Submission: Clean Air for All Victorians
Douglas Crosher, Victoria Australia.

Thank you for hearing my submission.

1. The approach being taken will not achieve the goal of clean air for all Victorians because it is compromised by principles that balance the action that the government takes in abating pollution against: the desires of people to engage in polluting activities whether reasonable or not; and claimed public good economic considerations. These principles appear contrary to common law nuisance and the rights of victims of pollution.

2. The challenges that people face in achieving justice need to be explored and articulated and then addressed to achieve the goal of clean air for all Victorians. Some of these challenges appear to be: obtaining evidence; and taking legal action. The proposals address neither of these, and I welcome an opportunity to work with the government on this process.

3. The PHAW Act nuisance provisions are in addition to all other laws, including the EP Act, and do not appear to be compromised by the same principles as the EP Act, not compromised by considerations of the wants of irrational people, or compromised by claimed public good economic considerations. These PHAW Act nuisance provisions appear to be a far better match to justice for pollution victims, but in practice it is not adequate either. The investigative powers under the Public Health and Well being Act (PHAW Act) could be improved, or the barriers to individuals using these statutory provisions lowered, or the barriers to to taking common law complains to court lower. The process should be expanded to include private nuisance air pollution victims too, but under terms compatible with private nuisance.

4. We have had a review of the EPA, submissions were made pointing out the problems, but the problem for private nuisance air pollution victims does not appear to be addressed. Making the EPA more credible but still constrained by principles hostile to victims of private nuisance does not help those victims and might even work against them where other authorities might direct complaints to the EPA. The EPA can not be Victoria's environment 'policy force' when it comes to the disproportionate exposure of sub classes of people to pollution because the laws and policies it operates under are hostile to these victims and not compatible with private nuisance determinations. I raised many of these issue with the EPA in a recent submission on a WMP variation, and they claimed to have given the matter a lot of consideration and to not be surprised by the issues, yet they had not yet engaged to help clear up some of these issue for this submission so I repeat many of the issues here as they affect air quality, and I look forward to working with Victoria to better understand the issues.

5. Experience seeking help from council health officers for wood smoke complaints suggests a very poor level of experience and enthusiasm for helping the victims in many cases. There are reports of occasions when officers acted quickly to stop burning, for example when there were reports of people burning old train track sleepers. There are reports of some councils that will stop use of wood heaters using local laws. There appears to be little to compel officers to investigate to a standard adequate to support taking action, even thought the PHAW Act has provision to hold councils liable if they fail to investigate are there any practical precedents? Councils appear to be able to avoid liability by simply claiming they do not have the resources or will not not allocate the resources to investigate to the standard required to support taking action. There appears nothing to compel innovation or efficiency in investigations and officers appear able to simply choose resource intensive methods and then claim they do not have the resources. It would appear that officers even

take sides with the polluter in some cases, taking the opinion that the polluter is the victim of the complaint. There might be a claimed public good for the use producing the pollution and the officers may well be compromised by that either as beneficiaries of that good or via their career reward structure. This approach is not tenable, there is no competition, no drive to improve, no reward for doing a good job for the victims of the pollution.

6. A separate body working in the interests of the victims needs to engage with them and help them achieve justice. That body needs to be unconstrained by considerations hostile and incompatible with the legal rights of the victims, including the wants of unreasonable people, and claimed public good considerations. There needs to be a reward path related to victims achieving justice.

7. Alternatively the government should provide aid to victims to investigate and take legal action.

8. The Environment Protection Act has as one principle 'Part I 1B (2) This requires effective integration of economic, social and environmental considerations in decision making ...'. There are many principles, and while some that might support the victims, in practice they can be ignored in the name of other principles. For example The Waste Management Policy for Solid Fuel Heaters (WMP) casts solid fuel heating as being 'important to the community ... for its cultural value.' and appears to claim this is a 'social' consideration. Choosing to heat by burning wood for cultural reasons is most often an emotional choice which is an irrational reason as it is based on emotions and not on a reasonable choice for heating.

9. The Environment Protection Act has as one principle 'Part I 1K (a) better protecting the environment and its economic and social uses'. The WMP appears to claim that 'solid fuel heating ... for its cultural value' is a 'social' consideration, this appears to cast the Act as a defender of people 'solid fuel heating' which would make the WMP hostile to a claimant in private nuisance.

10. In Bank of New Zealand v Greenwood 1984 1 NZLR 525 appears to be a good review of common law private nuisance and has this to say:

> “Transposed to the antipodes, the test is simply whether a reasonable person, living or working in the particular area, would regard the interference as unacceptable. The reasonable person, much loved of lawyers, is as was pointed out in the 17th edition of Salmond on the Law of Torts at p 56, not necessarily the same as the average person. The expression ‘connotes a person whose notions and standards of behaviour and responsibility correspond with those generally obtained among ordinary people in our society at the present time, who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equable’ : probably not an accurate description of the average citizen.”

11. There appears to be a potential conflict between the WMP reliance on the claimed cultural value of heating by burning wood and this apparent common law test. Someone choosing to heat by burning wood might not be someone "who seldom allows his emotions to overbear his reason and whose habits are moderate and whose disposition is equable", and given how extremely polluting this choice of heating is might that not be a "moderate" habit, and might someone exposing a neighbour to the concentrated toxic emission not be someone "whose disposition is equable". Even if not an explicit conflict with this law, the WMP does appear to be normalizing certain actions and measures that are grossly ineffective for abating the exposure that close neighbours might experience, and that might indirectly bias such determinations.

12. This conflict appears to cut across our society, otherwise well educated and economically privileged people can be stubborn wood burners. It is not unheard of to find victims of wood burning emissions interacting with officers who enjoy burning wood. Someone burning wood could not expect better of their neighbours, so their only complaint might be that their neighbours emissions are excessive, very different to the reasonableness that a non wood burning could expect. Smoking is unfortunately common, that might affect the smokers sensitivity to smells and make them an unreliable witness, and possible also bias their views about what is reasonable in terms of air quality. The suggestion to these people that their actions might not be those of reasonable people might not be something that they can accept and their involvement might not be appropriate.

13. Recently the EPA CEO Nial Finegan Tweeted a reply to someone complaining about wood smoke that included a photo with a perspective that suggested it was very close, and the CEO referred them to their council. Unfortunately the EPA knows or should know that many council refuse to stop people using wood heaters, and that this is often the only measure that can help. When this was put to the CEO the response was that 'wood heaters are not illegal'. I hear this same opinion from other people in positions of discretion. This would appear to be an error of law, and it would appear that there is no law in Victoria making the use of a wood heater legal irrespective of the circumstances in which it is used.

14. I was shocked to see the EPA CEO Nial Finegan Tweeting a photo and message of him being ‘cozy’ in front of what appeared to be an open fireplace at home, and to do so recently after I made a submission explaining the impact that wood heaters can have on neighbours and raised this ‘reasonableness’ issue. People might look at that image and see it associated with someone well educated, well informed on the environmental impact, well informed on the laws (Nial was a former Executive at the Department of Justice), an otherwise reasonable person, here enjoying a ‘cozy’ open fireplace and view that as reasonable too, and perhaps even view that as something to aspire to encouraging this choice. There are victims, their health is being degraded, and their rights to the quiet enjoyment of their properties is being taken, and they are not receiving justice – something very wrong in happening in our society.

15. Bank of New Zealand v Greenwood 1984 1 NZLR 525 appears to note that public good is not to be considered in private nuisance, see:

> "... the circumstances that the wrong-doer is in some sense a public benefactor ... has not ever been considered a sufficient reason for refusing to protect by injunction an individual whose rights are being persistently infringed."

16. The nuisances provisions in the Public Health and Welling Act 2008 (PHAW Act) appear to be a statement of common law private nuisance with some limitations.

> "Part 6, 58, (3) For the purpose of determining whether a nuisance arising from or constituted by any matter or thing referred to in subsection (2) is, or is liable to be, dangerous to health or offensive— (a) regard must not be had to the number of persons affected or that may be affected; …"

This requirement when determining this statutory private nuisance appears to shows that a claimed public good should not be considered and thus that the WMP and the EP Act is in conflict with this statutory nuisance and likely common law private nuisance.

17. In Gary Bowling and Mable Bowling, Appellants-Plaintiffs, v. Christopher Nicholson and Shelley Nicholson, Appellees - Defendants. February 25, 2016, Court of Appeals of Indiana, the matter of public good appears to have been considered and this might be of some help. This appears to be a statutory nuisance so might only be relevant to the extent that the laws are similar to those in Australia. The decision appears to also make it clear that the circumstances can not be ignored, in this case in granting an injunction to stop use of a wood burning appliance. The WMP ignores the circumstances in which a solid fuel heater is used and so appears to be incompatible with common law private nuisance.

> “[17] Finally, the Bowlings assert that the trial court applied the wrong standard with respect to the public interest element of a preliminary injunction. The trial court concluded:
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> > ‘The Court is hard pressed to find how granting an injunction based upon the facts as presented serves the greater public. If a home owner follows the law and regulations and despite constant contact with governing bodies no error is found, an injunction under those circumstances would cause a negative effect on the public's right to quiet enjoyment of their own property.’
>
> Id. at 14. Whether the public interest is disserved is a question of law for the court to determine from all the circumstances. Robert's Hair Designers, Inc., v. Pearson, 780 N .E.2d 858, 868–69 (Ind.Ct.App.2002).
>
> [18] Here, there are competing interests – the Bowlings’ right to quietly enjoy their own property and the Nicholsons’ right to operate their OWB on their property. The competing interests identified give rise to a private nuisance claim, which arises when it has been demonstrated that one party has used his property to the detriment of the use and enjoyment of another’s property. ... Contrary to the trial court’s conclusion, however, the fact that the Nicholsons’ operation of their OWB does not violate the law or regulations is not dispositive of whether a preliminary injunction would disserve the public interest. To hold such would

> bar injunctive relief in all cases of nuisance per accidens, i.e., where an otherwise lawful use may become a nuisance by virtue of the circumstances surrounding the use."

18. In Bank of New Zealand v Greenwood 1984 1 NZLR 525 an intermittent light pollution that occurred only some periods of the year and only at some times or the day was found to be a nuisance, and it does appear that those characteristics were a factor in that decision.

> "The problem of course is not a continuous one. It occurs only when the sun's rays strike the verandah, which is for approximately the six month period from early October to later March, and only in the later part of the morning and the early the afternoon... It does appear however that the glare is still troublesome, although less so, in conditions of haze or high cloud.'
>
> ... Moreover the level of inconvenience is not to be measured solely by the length of time over which it is experienced. It is not time that is important so much as effect. Other relevant facts in that respect are the intensity of the glare; the direction from which is comes; and the fact that there is no escape from it, for the plaintiffs cannot simply close down when the problem arises, or even alleviate its effects by closing down sometimes. ... Another most significant feature, which I consider increases rather than diminishes the inconvenience, is the intermittent nature of the problem, not only its arrival and departure as the direction of the reflection changes, but also as the sun is obscured by cloud and then clears. This must all be very trying to those concerned, and is awkward for them to deal with, without proper curtains or blonds, drawn for considerably longer than may actually be necessary. For these reasons I conclude that despite the relatively short time overall in which the problem occurs, it amounts to a substantial and unacceptable imposition."

19. The nuisances provisions in the PHAW Act also appear to suggest that the concentration and character of the exposure would be appropriate considerations in private nuisance, see

> "Part 6, 58, (3) For the purpose of determining whether a nuisance arising from or constituted by any matter or thing referred to in subsection (2) is, or is liable to be, dangerous to health or offensive— ... (b) regard may be had to the degree of offensiveness."

20. The apparent consideration of the character of the exposure in private nuisance appears to conflict with the failure of the WMP to address the degree of the exposure, a degree that varies widely in concentration and rate of variation and perhaps in other ways too based on the distance and perhaps other circumstances.

21. The WMP defines no measure of exposure to the emissions. The WMP implementation is substantially in terms of indirect approaches to minimize the quantity of the emissions such as design standards that loosely relate to real world emissions and education to minimize emissions which is now known to be ineffective.

22. The exposure of a claimant to the emissions appears to be a key consideration in an private nuisance claim, not the level of the emissions where they are emitted. Using a rough approximation, the inverse square law, the concentration at 5 meters is 100 times that at 50 meters, and 10000 times that at 500 meters. It is just common sense that the measures in the WMP can not possible approximate decisions in private nuisance claims over such a wide range of distances. Even if the measures in the WMP could reduce the emissions by 20%, and that appears to be very generous to

them, then using the inverse square law approximation that is equivalent to the reduction achieved by increasing the separation distance from 5.0 meters to just 5.5 meters.

23. The Tasmania EPA has mapped the concentration around some affected homes and made these public, for example BLANkET Brief Report 21, see the example blow. These are consistent with my own attempts to map the concentration around homes.

Document: “BLANkET Brief Report 21 A brief study of wood heater smoke from a neighbouring property, using measurements made with a hand–held particle counter and GPS Air Section, EPA Division, 14 May 2014”. It shows a mapping of the smoke concentration around a property neighbouring a wood heater flue and at a distance of around 35 meters, and shows how localized the concentration can be.

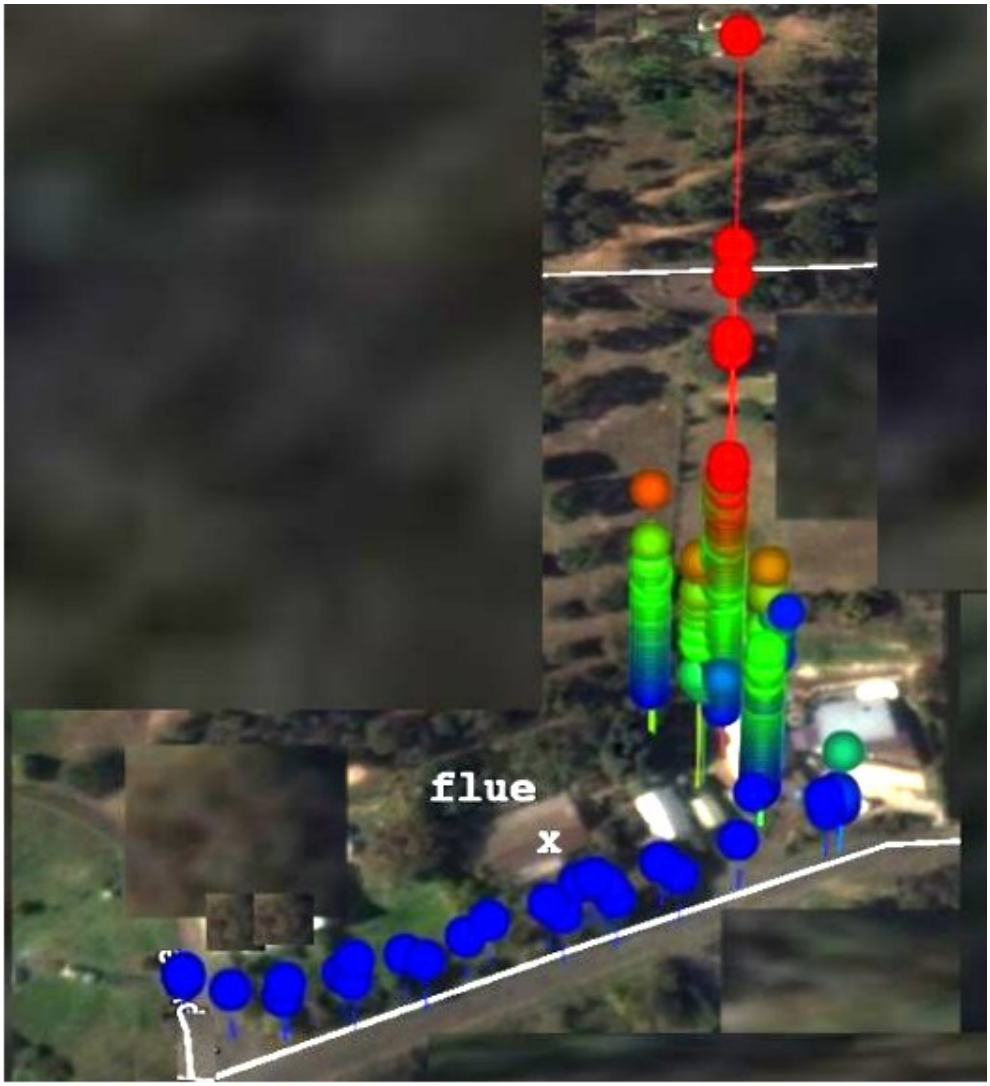


Figure 7: Spatial representation in oblique view of the 1st May survey data. Indicative $PM_{2.5}$ level is represented by symbol height above local ground and colour – red: 50 μg m^{-3} or over; mid–green: $\sim$25 μg m^{-3}; dark blue: $\sim$5 μg m^{-3} or below.

24. The WMP defines no measure of the characteristics of the exposure to the emissions, and gives these characteristic no consideration.

25. The characteristics of exposure to wood heater emissions from a close source may likely be of an unpredictable widely varying concentration with extreme peaks. The exposure might have a very fast rate of increase that could quickly fill a home with high concentrations of toxic emissions. My own data supports this and so do the public reports by the Tasmanian EPA, and if the EPA were in doubt then this seems a matter that they could independently test themselves.

26. The emissions from a wood heater are unpredictable. They are not only significant for 10 minutes when started as sometimes incorrectly claimed. There are a range of toxic compounds and gasses in the emissions and some can be emitted in high concentration while others at low concentration. The dispersal of those emissions is also highly unpredictable. When close to the emission point the emissions have not had space to disperse well and can be very concentrated. This is all just common sense.

27. The Tasmania EPA has also measured the time varying character of the exposure, for example in “BLANkET Technical Report 28” see the below example. These are consistent with my own results of continuous measurement. When you absorb the obviousness of the fact it seem just common sense.

28. The Tasmania EPA has also assisted local government in the investigation of nuisance investigations, and appears to report on a case in which results from continuous monitoring gave the local government the evidence it needed to stop the use of a wood heater, see “Over the fence, down the street, and across the town: Wood heater smoke in Tasmania. EPA Tasmania, Tasmanian Government. 2017”.

29. With such best practice in investigating nuisance complaints, how many of the solid fuel heaters in use in Victoria would likely be properly stopped from use, and how many should have properly been stopped from use? This may well be a significant percentage in urban areas. The WMP does not have anywhere near a similar level of protection to the vulnerable claimants.

Document: “BLANkET Technical Report 28 PM2.5 levels at a residence in Invermay, Launceston, Tasmania – July 2014: The signature of individual smoke plumes Air Section, EPA Division, March 2015”. This shows the characteristics of the emission concentration experienced from close plumes, and note the high peaks in the concentration and the unpredictability of that concentration, and that the peaks are far above the characteristic background concentration.

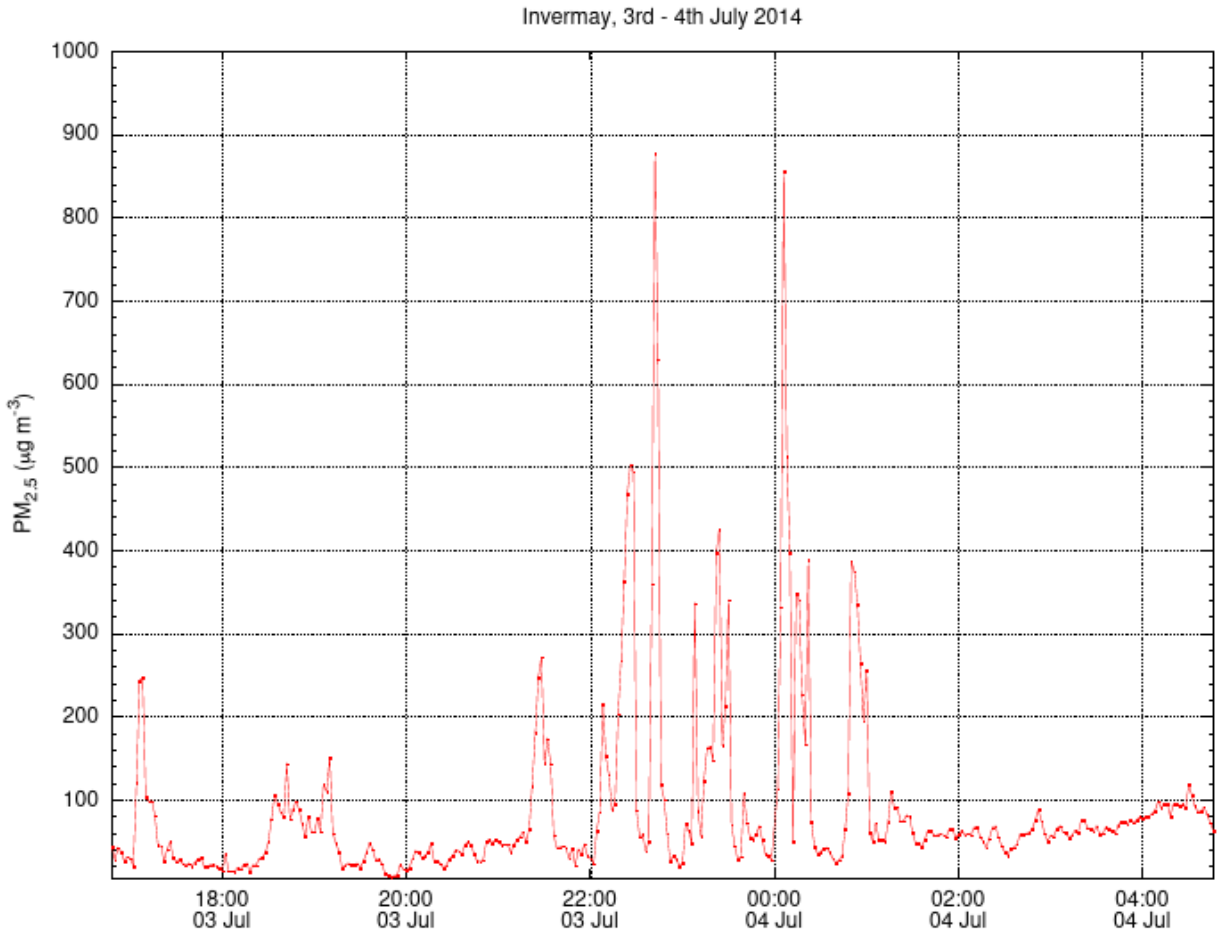
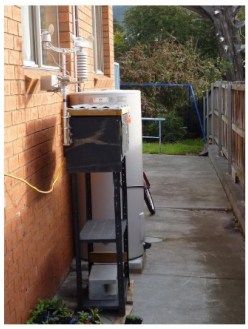


Figure 7: 2–minute indicative $PM_{2.5}$ data from Invermay, detail for the interval 3rd to 4th of July 2014.

Document: “Over the fence, down the street, and across the town: Wood heater smoke in Tasmania. EPA Tasmania, Tasmanian Government. 2017” A case of a Tasmanian local government stopping the use of a wood heater that was around 15 meters distance to a neighbouring property and on lower ground, and in which continuous monitoring appears to have provided them with the evidence needed. There are photos of the layout and the high PM2.5 experienced from the smoke emissions and a comparison with the street measurements at 35m which are much lower. The added Google Maps side view illustrates the layout.

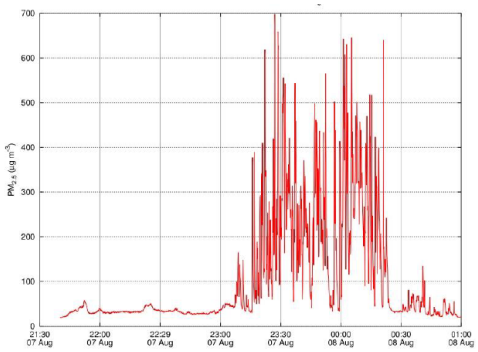
Claremont – August 2016 - II

The babyBLANkET monitoring station was placed in the backyard of the complainant's house, approximately 15 metres from the identified flue, in late July 2016. (Neighbouring house is lower than affected residence.)



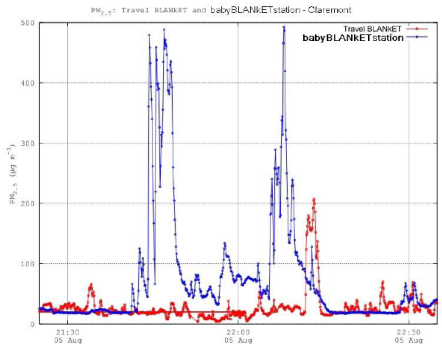
Claremont – August 2016 - III

Almost immediately we saw episodes of very-high, short-duration, elevated PM2.5. (Not seen at Glenorchy station.)



Claremont – August 2016 - VI

The babyBLANkET station (~15 m from flue) recorded higher PM2.5 than measured by Travel BLANkET (in street, ~35 m from flue)



Claremont – August 2016 – VIII

- The measurements, photographs, and an analysis were provided to council.
- Council issued an EPN– woodheater can not be used (the house has a heat pump).
- Council met with the household producing the smoke.
- Result: flue was capped, woodheater stopped being used.

These monitoring data have been extremely informative to the EPA as data on emissions from a single woodheater, and in helping to define what understanding will be needed for population exposure determination.

30. Bank of New Zealand v Greenwood 1984 1 NZLR 525 appears to make it clear that the burden to abate a nuisance is the polluters burden.

> '... If one creates an actionable nuisance, he must eliminate it, whatever the cost. The fact that it will be expensive does not affect his liability. ... To take account of relative costs where an actionable nuisance has been prima facie established would in my view again be to impose the impermissible requirement that the plaintiffs carry the burden of the defendant's tort.'

31. The measures in the WMP are grossly inadequate, and casting them as reasonable measures to abate the exposure appears in conflict with common law private nuisance were the polluter must abate the nuisance "whatever the cost", and not just minimize the nuisance by making some claimed reasonable attempt to abate the nuisance. It would not appear to be sufficient under private nuisance to simply claim to cleaning the flue or using dry wood have abated the nuisance, and the cost to show that these do actually abate the nuisance would appear to be a cost the polluter must pay too. People appear able to use wood heater without any need for expert advice on it’s safety, but if found to have to abate that nuisance then they would appear to properly face that burden. In practice a different form of heating may needs to be chosen.

32. The WMP appears to misleadingly cast the measures to minimize emissions as in some way reasonable, as if following the policy somehow makes a use of a wood heater legal, however it fails to consider the circumstances in which the wood heater is used. It is an absurd position to take that pollution can be emitted irrespective of the circumstances, that a private nuisance claim should not take into account the exposure. The precedents in common law private nuisance appear to consider the circumstances, and the failure of the WMP to account for the circumstances appears to make it incompatible with private nuisance.

33. There might be some defence argument that the defendant has taken all reasonable measures to minimize the emissions, and thus to minimize the exposure, but in the vast majority of cases it is a choice by the defendant to choose to heat by burning wood, such as appears the case for the EPA CEO Nial Finegan as surely he is paid well enough to be able to afford cleaner methods of heating. The WMP largely casts that choice as untouchable, as if burning wood to heat is the activity in dispute, but there appears to be a good argument that that is a choice too and may well be an unreasonable one. There are cases in which people have gas heating or reverse cycle heating available but choose to burn wood for heating. The WMP notes 'In some regions of Victoria, where alternative forms of heating are limited, it is the only feasible form of heating' and if that were the case then that might be a consideration of how reasonable it is to heat with wood, but in these regions the separation distances might be much larger too. It is unlikely that burning wood is the only option in an urban area. The community has built electrical and gas infrastructure to improve the community, and where available that would appear to be a reasonable choice.

34. The Environment Protection Act appears to have no provisions overriding rights in private nuisance.

35. The Environment Protection Act appears to have no provisions for compensation for a loss of a right to claim private nuisance created by the principles of the Act. The State does not appear to be offering to compensate affected people for the interference and trespass to their land for a State purpose of dispersing the toxic emissions generated when people indulge a State supported cultural activity of burning wood or for the State claimed public good of that use of their land.

36. Contrasting the WMP with statutory noise regulations in many States such as WA, these noise regulations define reasonable levels of noise based on exposure, and not on levels of emission. They define exposure to be measured where it impacts the claimant, at a boundary or an affected room. The method of measurement of exposure has a scientific (objectively reproducible) basis. It does not attempt to limit the manufacture or supply of speakers to a certain wattage to achieve a reasonable exposure, or to limit authorities to using educational material to minimize the noise emissions, or to claim a cultural value to playing extremely loud music.

37. In Cohen -v- City of Perth 2000 WASC 306 the court does appear to take into account a breach of statutory noise regulations:

> '159 Although breach of the prescribed standards does not of itself establish a private nuisance it is relevant evidence of which account can be taken, and I so do.'

38. The legal precedents appear to be clear that non compliance with statutory noise regulations is a matter that a court might consider in a claim, that this might support the claimant. But compliance with the noise regulations appears to be of limited use to a defendant in private nuisance, if it can be considered at all, see Coventry v Lawrence [2014] UKSC 13. The WMP appears to project a conflicting view, that it defines legal uses of solid fuel heaters, and that appears to mislead private nuisance.

39. Contrasting the WMP with statutory noise regulations, the noise regulations define characteristics of a noise that relate to the offensiveness of that noise, including having tonality, and modularity, and it takes these factors into account. The noise regulations do not attempt to dismiss the characteristics as if they are just part of the wider ambient noise the community experiences.

40. The character of the exposure close to the emission point can lead to psychological harm. Claimants can learn to associate some smell of wood smoke with the significant impact when the exposure is high, an impact that may take time to build. When they smell some wood smoke they expect extreme concentrations of wood smoke and they learn to react quickly to protect themselves, so by necessity they make quick decisions with the limited information available to them and thus might be expected to make mistakes too. The sense of smell appears to be rather limited as an absolute measure of concentration, and a cheap particle counter does a far better job at generating a plume concentration map in my experience. Thus wood burning emissions have an impact beyond being offensive to the senses and can lead to a psychological reaction that does not appear normal if the history is not considered. This damaged state may well appear to cast the claimant as over sensitive and common law private nuisance appears to be determined objectively so can not take into account over sensitive claimants. If the characteristics of the emissions is not considers then the history of the exposure might not be properly considered. Mistakes can also cast the claimant as not credible, and courts appear to be fall back to using credibility to decide cases, to weigh the credibility of claims by the claimant about their exposure. Such a denial of justice may seem very unfair to the claimant, having been damaged by their exposure and then having that damaged state used against them as a defence, and this injustice may well exasperate the psychological harm.

41. The WMP opens with "In Victoria, all sources of air pollution are managed according to the State Environment Protection Policy (Air Quality Management), which aims to protect the beneficial uses of the air environment ..." This would tend to mislead people into believing that this was a policy applicable even to a private nuisance claim. I have contacted a Health Minister for help over a wood smoke nuisance and been referred to the Environment Minister, but the Public Health and Welling Act does have nuisance provisions and those appear to be largely a statement of

common law private nuisance. This appears to be a funnelling of a private nuisance complaint to an inappropriate path incompatible with private nuisance.

42. The EPA has information on its website pertaining to tips for operating a wood heater correctly. It also has advice about what to do if a neighbour's wood heater is unduly impacting on the community. The website directs people to their local council. Again the EPA should know that this will likely not resolve the problem. In practice the only hope neighbours have is if the polluter has a change of heart and reduces or stops use of their wood heater. There are some circumstances in which councils have been reported to take action quickly, for example when someone was burning sleepers, but that would fall under a 'minimization' policy. For a close neighbour reduction is not sufficient, and directing people on a path that is known to be ineffective appears misleading.

43. Here are some examples exhibits of council responses from a Victorian council in an urban area, with names an places redacted. I witnessed the emissions from this solid fuel heater and it’s proximity to neighbouring properties. The complainant was a few lots away. I plotted the plume concentration at ground level and made that available to the council, but on that occasion the wind was blowing away from the complainant. At the local law review that is referred to, the position of the council was that it had no responsibility to consider the health dangers from the wood burning emissions. Recently this council amended local laws to remove any doubt that burning wood for heating or cooking was a violation of local laws – I presume they are still responsible under the PHAW Act to investigate, yet they claim how they investigate is entirely their discretion. I have heard from other residents where their council is reported to have claimed that there is nothing they can do to stop a wood heater, and did nothing. It would appear untenable for the EPA to refer complainants to this council to resolve a nuisance complaint.

“Dear *******

Thank you for your recent emails to Councillors ..., ... and ... . I am responding on behalf of these Councillors.

Council has conducted a full and thorough investigation into this matter since you lodged your concerns with Council in June 2014 and I will take this opportunity to provide to you some further detail on our investigation into this matter.

Last week (on Tuesday 9 June), **** *****, Coordinator Public Health visited **** ****, Clayton. During the visit it was evident that the flue at the wood heater had been changed to a smaller flue and appeared to be contributing to smoke not being dispersed as efficiently as the flue that was installed as part of Council’s prohibition notice issued to the property owners in September 2014. Mr **** spoke to the occupants of the property and instructed that the former flue be reinstated by the end of the week.

Another visit to the property by Mr **** on Friday 12 June confirmed the flue had been reinstated.

Mr **** also conducted a further visit to the property on Monday 15 June and discussed the operation of the wood heater with the occupants. The wood heater was in use during the visit and Mr **** confirmed that the wood being burned appears well seasoned and dry. The operation of the wood heater appeared to be satisfactory during this time.

I am also informed that Mr. **** visited your property on 15 June 2015 immediately after visiting your neighbour to further discuss your concerns with you. Mr **** noted that after entering your backyard to observe the wood heater, you stated that the wood heater was not being operated at this time, when it was actually in use.

I hope that this continues to mean that Council’s intervention has led to an improvement.

I am aware that the levels of smoke and smells from the wood heater may be more apparent in certain circumstances, such as differing wind conditions, however the wood heater is operating how we would expect it to be.

Contact has been made with a number of other Councils (being the ones you stated you had contacted) to discuss processes and actions taken when investigating wood heater complaints. Whilst Councils would require a detailed investigation and officers to witness evidence first-hand to be able to provide an accurate response to this matter, it was evident that Monash Council processes are consistent for these types of matters. Our contact with Councils did reveal that there was one other Council who has issued a prohibition notice to a property to stop its use until works had been achieved, similar to the action Council took in this matter initially. Our investigations reveal that we have a consistent approach in our conduct on these matters.

Council has considered documentation provided by your medical practitioner and the report provided by Dr **** **** from the **** University about the harmful effects of pollutants from wood fires. Council do not dispute any of the issues you raise as a consequence of the use of the wood heater, however the relevant legislation within the Public Health and Wellbeing Act 2008 only allows us to deal with this as nuisance.

Council does not have legislative responsibility to approve the use of wood heaters, only to ensure the installation meets the requirements of the Building Regulations and applicable standards. It is the responsibility of the owner/operator to ensure that their wood heater complies with the relevant standards and does not cause a nuisance to their neighbours. Wood heaters are a legal and legitimate form of heating within the community and Council is not in a position to be able to persuade a landowner to change their heating if it is being used in a compliant manner.

The issue of wood smoke was raised for consideration when Council recently reviewed its Community Law No. 3. However, when introducing or reviewing a Community Law, Council must ensure that the Community Law is not inconsistent with any other Act or regulation. As wood heaters are a legitimate form of heating, Council believes that it is far more appropriate for the State Government to regulate pollution concerns from the use of wood heaters.

Therefore, provided the wood heater at **** ****, Clayton continues to operate and function in the same manner as observed by ****, there is nothing more Council can do. Council has investigated this matter and concludes that a nuisance does not exist under the Public Health and Wellbeing Act 2008 at present and as such no further action will be taken.

If you have any queries or wish to discuss this matter further, please contact **** on ****.

Regards
CR ...
Mayor”

“Dear ******

I refer to your email of 30 June 2015, with attached correspondence from Dr *** *** and Prof. *** ***, regarding smoke from the wood heater located at *** . Cr ... has asked me to respond on his behalf.

Council’s position in relation to this matter has been substantially addressed in Mayor, Cr ...\'s email of which you refer to.

I wish to reiterate to you that Council has conducted a thorough investigation within the scope of Council’s role and jurisdiction and conclude that a nuisance does not exist under the Public Health and Wellbeing Act 2008 at present. Therefore, Council will be taking no further action.

An option available to you to seek resolution to this matter is to contact the Dispute Settlement Centre of Victoria which was established to help people settle their disputes through mediation. The centre is located at 4/456 Lonsdale Street Melbourne 3000 (telephone 1300 372 888). Alternatively, you may seek your own legal advice.

If you have any queries or wish to discuss this matter further, please contact ****, Coordinator Public Health on ****.

Regards **** ****
Director ******”

“31 July 2015

Dear ...

COMPLAINT REGARDING USE OF WOOD HEATER AT ... *****

I refer to previous correspondence in this matter and, specifically, to your email to Cr ... dated 12 July 2015, in regards to smoke emanating from the wood heater at the property located at ..., Clayton.

As advised, Council has undertaken a considered and thorough investigation of your complaints pursuant to the 'Public health and Wellbeing Act 2008'. As you are aware officers have conducted a number of inspections between June 2014 and June 2015 to investigate your complaints.

Officers have attended your residence whilst the wood heater at ** ***** Street **** has been operating and have not able to detect the presence of smoke inside your residence. Furthermore, officers have on a number of occasions observed low levels of smoke, reflective of the normal operation of a wood heater, emanating from the premises when the wood heater was in operation. Finally, in September 2014 Council prohibited the use of the wood heater until certain actions were conducted by the owners of the premises to reduce the amount of smoke emanating. All such actions have been completed to the satisfaction of Council with the cooperation of the owners of the premises.

Council has considered all relevant matters and determined that there is 'not' a nuisance occurring and further that the matter does not require our further involvement.

This decision has resulted from a variety of factors, including buy not limited to:

1. Council's investigation and observations;

2. The lack of evidence in relation to the alleged nuisance; and

3. In accordance with the guidelines specified under the Act any decision made by Council should engage the most effective use of resources to promote and protect public health and wellbeing. That decisions made by Council should be based in evidence, and also that any actions taken by Council should be proportionate to the public health risk sought to be prevented or controlled.

Accordingly, Council has complied with its duties to investigate the alleged nuisance as required under the Act.

Please note the Act does not specify the requirements of a nuisance investigation. The Act therefore does not require Council to conduct scientific tests or obtain expert reports. Investigations in response to a complaint of nuisance along with the decision as to whether a nuisance exists, are entirely in the discretion of Council as determined by its officers.

For the sake of thoroughness, Council has sought independent legal advice that supports our position reached in this matter. We therefore, confirm that no further action will be taken by Council unless circumstances change so as to warrant further involvement. This will mean that Council will not engage in further correspondence in this matter, in light of having already substantially addressed this matter. Accordingly, Council considers this matter at an end.

Your sincerely
...
Director ...

cc: ..., ... Councillor”

44. The WMP implementation measures mention enforcement activities as investigating complaints relating to manufacturers or suppliers. There appears to be no discretion to investigate a nuisance complaint or to enforce a determination.

45. The EPA has advertised adding officers to assist councils, but the WMP would not appear to give them any authority to actually investigate a solid fuel heater nuisance complaint, or to do so only in as research.

46. The WMP includes a requirement "12. A solid fuel heater must be installed in accordance with Par 12 A of the Building Act 1993 (Vic.) and any Regulations made under that Act." The Build Code of Australia is an applicable regulation, and only refers to the installation of solid fuel heaters in "NCC Volume 2. P2.3.3 Heating appliances". The objective of this section "Part 2.3" is "Fire Safety", and while it mentions "or allow smoke to penetrate through nearby windows, ventilation inlets, or the like" that is qualified to "in the building containing the heating appliance". Part 3.7.3.0 states that "Performance Requirement P2.3.3 is satisfied for a heating appliance if it is install in accordance with one of the following manuals: ... (b) Domestic solid-fuel burning appliances are install in accordance with AS/NZS 2918.\', thus linking to a standard but this standard has been developed to ensure fire safety, the clearances in there are not designed to ensure that the emissions are safe for neighbouring properties. While this can offer some limited help to the operator, it offers no substantive help to a neighbour, it does not protect the environment in any substantive way.

47. The Build Code of Australia Part 2.4 "Health and amenity" does appear to have clause that appears relevant "P2.4.5 Ventilation (c) Contaminated air must be disposed of in a manner which does not unduly create a nuisance or hazard to people in the building or other property." however that appears to be excluded from consideration in the WMP by the narrowing of the to only consider the installation.

48. New Zealand appears to have a similar clause in their building codes, and there appears to have been a recent appeal on that basis in "Determination 2016/033 Regarding the code-compliance of a solid fuel fire appliance installed in a three year old house at 27 Mo Street, Cambourne, Porirua." That appeal failed, but I put this forward as an example of the very high barriers to justice that the claimants face. The claimants appeared to have a good reasons to complaint to me, but lacked evidence from continuous monitoring installed at a badly affected location and appear in general unprepared to make their case, in particular their own expert does not appear to have gathered any evidence. A lot of arguments are raised, and they might in of interest. The decision at 9.4.23 "... how the fire appliance is operated and the fuel used is not a factor that can be enforced by way of the Act and its regulations", so it would appear here that the claimant failed because they used the wrong appeal path, but is that a usable precedent or is this as flawed as many other points appear to be. I draw attention to the following comments by an expert for the claimant, commenting on the expert relied on in the defence, page 38 "The testing methodology undertaken by the expert in November 2015 was inadequate because the location of the testing was at ground level, some 36m away from the chimney and at a height of less than 1m, rather than at the height of the second level where the applicants experience the greatest smoke effect, which is approximately 10m from the chimney at a height of 4-5m", and that circumstance would appear to be very likely to result in very high concentrations of exposure in my experience, and that appears to be just common sense, and to prove that fact would require continuous monitoring to be installed at the most affected point to obtain evidence. Using the inverse square law the exposure at 10m would be expected to over 12 times higher than a 36m, and then there is the hight difference too. The reliance on the defence expert and Health Officers should be noted too, credibility appears to fill the gaps.

49. In a common law private nuisance claims it is hard to see how a defendant could properly rely on the solid fuel heater being correctly installed as demonstrating reasonableness when it is clearly understood that the the installation requirements have nothing to say about the exposure to neighbours.

50. If a common law private nuisance is found to exist then the claimant appears to generally have a right to an injunction to stop that nuisance and for damages for past losses.

51. The PHAW Act at Part 6, 59 is careful to protect against compliance this this limited statutory law being used as a defence in a common law private nuisance case. This would also appear to mean that a determination by a council that a use of a wood heater was not a nuisance is very limit and should not have been a defence or even imply that a use of a wood heater is not a common law private nuisance. See "(1) This Division does not render lawful any act, matter or thing which but for this Act would be a nuisance. (2) This Division is in addition to, and does not prejudice, abridge or otherwise affect any right, remedy or proceeding under any other provision of this Act, or under any other Act, or at common law." Such qualifications appear to be absent from the WMP.

52. Creating a separate WMP for a class of extremely polluting methods of heating, solid fuel heaters, appears to cast that choice as a distinct activity rather than being seen as a choice among a range of options to heat. Since a common law private nuisance would appear to consider reasonableness, a mind closed to considering the range of options might not properly hear a claim, and might consider only the reasonableness of actions taken to minimize the emissions from the solid fuel heater.

53. I have had a council responsible director claim that 'people have a right to choose their method of heating' as a defence to taking no effective action.

54. I have seen a court case in which the magistrate appeared to rely on the reasonableness of actions taken to minimize the emissions, and on following guidelines to take such actions, and these appeared to influence a determination of credibility.

55. I have seen polluters use this as a defence too, it increases their resolve, supports their belief that they are good reasonable people, and thus their negative opinion of people complaining.

56. I have been told of a council officer advising a complainant not to complain because she operates a wood heater and would not like someone complaining to her.

57. I have had someone complain that their home smells strongly of wood smoke and that breathing can be painful, but being hesitant to complain for not being believed.

58. I have heard from a family having to move homes to avoid solid fuel heater emissions, where they claimed smelling wood smoke in their children's hair and suffering medical problems claimed to be their exposure to the emissions. This state of affairs does not surprise me, is consistent with what I have witness and measured. Their council would not stop the use of the wood heater. They could not consider taking legal action, they just had to move and absorb the costs and the inconvenience.

59. I have observed a court case in which the magistrate appeared to rely on the council having investigated and taken no action, even where the statutory laws appear to disallow the council

determination being used as a defence. This cast the complainant as someone just unhappy with the council decision, and it appeared to affect credibility which appears to have been decisive. The council had written to the claimant noting that they were only responsible for handing out guidelines on the appropriate use of a wood heater. This court had no provision to appeal errors of law or fact.

60. I have observed a magistrate appear to place a burden on a claimant to prove that the measures that a defendant offered to abate an alleged nuisance from their wood heater, namely offering to raise the flue height, was not adequate. This appears to be an error of law, the nuisance determination needs to be made firstly and if an activity is found to be a nuisance then the defendant is liable for all the costs in abating that nuisance and that should include the cost of obtaining expert advise on how to do so and the cost of monitoring to ensure that was achieved and rectifying the abatement if necessary. The measures in the WMP might mislead people in positions of discretion that those measures were reasonable, that taking only claimed reasonable action to abate a nuisance is sufficient.

61. I have observed in multiple cases magistrates appearing to rely heavily on credibility in making decisions. In a common law private nuisance case over noise, the defendant was allowed to rely on the council determination, and was allowed to rely on a report that the council had obtain from a State department that they argued supported that decision. The magistrate appears to focus on the credibility of the authors of that report, their impressive titles, their impressive qualifications, and their impressive years of experience, and the substance of the report appears to be lost to the magistrate. The claimant appears very vulnerable, unable to afford good representation, unable to afford their own experts witness to refute this evidence. Where there is a vulnerability there may well exist a duty of care. The EPA retains staff with impressive qualifications and years of experience. The EPA appears to now have a chief scientist and to be quoting the chief scientist in comments related to wood heaters, and people expect a scientist to be objective and factual. The messages the EPA promote do not clearly qualify their intent, they do not clearly state that they are acting to shield wood burners, and do not disclose that they are hostile to complainants. The WMP may well limit their liability in these actions, being a policy to follow, and that appears to be the key reason for having this WMP.

62. In practice initial impressions create barriers. People often act with efficiency in mind, apply a principle of proportionality, and are not fully informed. There are not always opportunities to appeal decisions, some paths have limitations to appeal errors of law and fact, and limited time periods to appeal, and even where there are paths to appeal that takes time and more effort and raises the costs and risks. If claimants have to appeal to the Supreme Court or the High Court just to get a quality decision then that creates a huge barrier, and that is what appears to be the state of affairs. Misinformation can create barriers to justice. Legislation should be precise to avoid misleading, and should not be obfuscated by considerations of political appearance as the WMP appears to.

63. But for the WMP, could the EPA make the public comments that it does, with the bias that those appear to have? If the answer is 'no' then that might help understand the true intent of the WMP.

64. The impact of such an apparently hostile policy on the fabric of our community has not been disclosed to discuss. Such a hostile policy, one of sacrificing some people and their families just so that other people can get an emotional kick out of burning wood, casts our community in a very bad light.

65. Having a separate WMP for sold fuel heaters places this extremely polluting method on a separate and protected track where the progress of this technology is protect from competition from alternative and far less polluting technology. This might mislead people.

66. The Public Health and Wellbeing Act 2008 (PHAW Act) states "60 A Council has a duty to remedy as far as is reasonably possible all nuisances existing in its municipal district." and not that the person causing a nuisance must only take all reasonable steps to eliminate the nuisance. Also "61 (1) A person must not (a) cause a nuisance; or (b) knowingly allow or suffer a nuisance to exist on, or emanate from, any land owned or occupied by that person.", and there is no mention of the person having to only take only claimed reasonable steps. The WMP casts minimizing the emissions as the only steps to eliminate the nuisance, whereas the precedents in common law private nuisance appear to offer an injunction if a nuisance is found to exist, or for it to be abated to a level that it is not a nuisance, and there appears to be no consideration of how 'reasonable' those abatement steps are, and reasonableness appears to be a consideration only in determining if a nuisance exists. It would also be inconsistent with principle 1F (2) of the EP Act that a claimant be responsible for eliminating a nuisance pollution or that part that was not 'reasonable' for the defendant to eliminate.

67. The liability of public authorities appears to be limited by the Wrongs Act 1958, Part XII. Section '83 (a) the functions required to be exercised by the authority are limited by the financial and other resources that are reasonably available to the authority for the purpose of exercising those functions' and '(c) the authority may rely on evidence of its compliance with the general procedures and applicable standards for the exercise of its functions as evidence of the proper exercise of its functions in the matter to which the proceeding relates.'

68. It may well be that councils are relying on the WMP or 'general procedures' or 'applicable standards' tainted by the EP Act or WMP as a limitation of their liability.

69. The Local Government Act 1989, Part 5, 111, '(2) A local law must not be inconsistent with any Act or regulation. (3) A local law is inoperative to the extent that it is inconsistent with any Act or regulation.'. Councils have claimed that they have no authority to stop use of a wood heater, and might there be a reliance on these limitations, might they be claiming that to stop a wood heater would be inconsistent with the EP Act or the WMP?

70. One council did claim to use their local laws to stop the use of the wood heaters, but on following up refused to discuss the matter further. Might they have been concerned about appeals in the basis that this local law was not consistent the policy?

71. Councils may well need to pass local laws to efficient deal with nuisances, and if they are constrained by the WMP to not being able to pass local laws that stop the use of wood heaters in some circumstances and in circumstances where the WMP has been followed then that might be a significant barrier to councils being able to take action.

72. Recent practice in Tasmania, in which their EPA assisted a local government by installing continuous air quality monitoring at an affected home, does appear to have supplied the evidence needed for the local government to order the use of the wood heater to be stopped. This would appear to define best practice in Australia in these investigations. While the cost of air quality appears to be falling, it is still a significant cost to councils to investigate properly following this best practice, and to potentially have to litigate. It would be understandable that councils might wish to simply pass local laws limiting wood burning.

73. The PIA on page 13 notes the EPA have received complaints about inaction by local councils, it should not be a surprise to the EPA, and yet the EPA continues to direct people to local councils. If the WMP has limited the ability of councils to act on these very complaints, or shielded their liability included liability for making biased public comments on this matter, or assisted them by shielding them from liability, then that appears to raise some significant concerns that it mislead private nuisance.

Particulars within the call for comments itself

74. Page 1, "We also need to better address poor air quality hot spots ... or subject to excessive wood smoke."

Neighbours of wood heater operators are likely exposed to far higher concentrations of their emissions, as well as communities with high usage. The word 'excessive' is very loaded and does not appear compatible with peoples common law rights. For someone operating a wood heater their only complaint of their neighbour might be that their neighbours emissions are 'excessive'. For most communities the use of wood heaters is spares and the levels of exposure from an adjacent wood heater may well be unhealthy and unreasonable and a nuisance.

75. Page 2 "We have reduced residential emissions from incinerators, wood heaters and garden equipment, through tighter standards and the prohibition of some activities."

The reductions in wood heater emissions are trivial or nothing. There is no reduction in the emissions from open fire places, no reduction in existing installed solid fuel heaters. This is also not related to the level of exposure characteristic of an area without those wood heaters operating. The exposure depends very much on the separation distance, and an emission standard does not address exposure. This appears to be political propaganda.

76. Page 2 "Victoria has led the nation on standards for limiting larger particulate matter pollution, with our standard being consistent with World Health Organisation guidelines"

The PM standards are just one indicator of the offensiveness and health danger of the pollution. Wood heater emissions measuring under 10ug/m3 can be offensive, leaving a linger impact on your noise, and likely harmful to the health. Even recently in Melbourne we have had PM levels well over 25ug/m3 in the ambient air, yet that was not nearly as offensive to the senses. It is not realistic to compare PM levels without considering what they are a mass of. Further PM is a measure of the wider ambient air quality, measured away from point sources, and Victoria does not appear to have made any significant effort to define standards for measuring exposure close to point sources.

77. Page 3 "Locations subject to excessive wood smoke due to their topography (for example, towns in valleys such as Gisborne, Woodend and Healesville) can also have poorer seasonal air quality, potentially creating greater health risks for inhabitants". Also Page 6 "Air quality is generally good to very good in Australian urban areas."

There is an omission to recognise that neighbours of wood heater operators are likely disproportionately affected.

78. Page 7 "Victoria has legislation and control programs to maintain good air quality."

The EP Act the WMP and guidelines derived from these appear to be contrary to this claim and appear to be intended to limit the authorities taking action and mislead victims of wood smoke pollution.

79. Page 7 "Reforming the EPA to ensure it has modern, fit-for-purpose tools and systems to protect Victoria's environment (see page 8)."

The sole focus appears to be on the EPA, yet the EPA appears to be compromised by principles hostile to victims.

80. Page 8 "The EPA helps protect Victoria's air quality through implementing environmental laws, policies and regulations, and by working in partnership with Victorian communities and business."

The air quality of neighbours of wood heater operators is not protected. My experience has been that the EPA has been hostile to appeals to work through the issues with the class of people affected - it might properly do so as the principles and policies it operates under appear hostile to these victims.

81. Page 8 "Established a statutory objective for EPA to protect human health and the environment (through the Environment Protection Act 2017)." Also Page 8 "Commenced a pilot of EPA officers embedded within local government called `Officers for the Protection of the Local Environment', to improve local government responses to pollution complaints."

This appears to be an attempt to move investigations away from the principles of the PHAW Act that appear to be more favourable to the victims of pollution and towards the principles of the EP Act that appear hostile to the victims of pollution. It is not possible to protect peoples legal rights to healthy air while compromising these by the principles of the EP Act.

82. Page 10 "The Andrews Labor Government will work with communities, industries, local government and air quality experts during 2018 and into 2019 to develop a Victorian Air Quality Strategy -- a comprehensive approach to sustainably and cost-effectively improve air quality and continue to ensure all Victorians have clean air."

This appears to conflict with the goal of clean air for all Victorians. People with disproportionally polluted air need that nuisance abated, not some mere improvement compromised by public good considerations.

83. Page 10 "It will provide certainty for all Victorians on what will be required to maintain good air quality into the future. This will allow industry and government to invest in air quality management confident that such investments will be targeted and effective."

This appears to be considerations of claimed public good and economic good, both incompatible and hostile to a claimant in private nuisance.

84. Page 10 "Renewing and expanding our air quality monitoring network -- such as increasing the number of monitoring stations across Victoria, increasing the amount of mobile equipment to better assess air pollution from events such as industrial accidents, planned burns and bushfires, increasing monitoring of emissions at pollution hotspots such as major roads and industrial areas, and/or strengthening requirements for industries to monitor and report their emissions."

Continuous monitoring, at affected locations, is required to properly investigate air pollution nuisance, that is the best practice now clearly demonstrated by the Tasmanian EPA. The barriers needs to be lowered, and that requires lower cost sensors to be acceptable as evidence, and a wider variety of sensors rather than just PM. The sensors themselves are becoming smaller and the costs are reducing, but their quality and use as evidence needs attention.

85. Page 11 "Empowering communities. Improving protections for vulnerable Victorians in locations with poorer air quality, such as industrial areas like Brooklyn and Dandenong, and locations subject to excessive wood smoke, such as towns in valleys like Gisborne, Woodend and Healesville."

This again fails to recognise the impact on neighbours of wood heater operators.

86. Page 11 "Better partnering with communities to identify and address local air quality challenges that affect them, using innovative approaches to minimise pollution sources and emissions."

There a classes of affected people, not necessarily ‘communities’, that are victims and need help too, such as the class of neighbours of wood heater operators. The focus on ‘communities’ might leave acceptable there being classes disproportionally affected people within any community, and that would be contrary to the goals of clean air for all.

87. Page 11 "Reducing the occurrence of air pollution. Facilitating the uptake of cost-effective technology and practices to reduce air pollution. Strengthening Victorian equipment standards, such as for wood heater emissions."

Strengthening the emissions standards for wood heaters can not address the issue. That you would even suggest that casts this as having no real intention of neighbours having clean air.

88. Page 11 "We want benefits to clearly outweigh the costs to make the best use of air quality investments. Therefore, the government will assess the feasibility, cost, expected benefits and cost effectiveness of suggestions, before considering them for inclusion in the strategy."

This appears to be a statement of claimed public good and hostile to victims of air pollution.

89. Page 13 "The Andrews Labor Government intends to convene a Victorian Clean Air Summit in August 2018. ... * best practice monitoring, modelling and forecasting, and information provision"

The Tasmanian EPA have used continuous on site air quality monitoring to gather evidence that is reported to have stopped the use of a wood heater. There is best practice for you. I look forward working with you to ensure that complaints are properly investigated.