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# WILD LAW – IN PRACTICE

**Edited by Michelle Maloney and Peter Burdon**

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# Wild Law – In Practice

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*Edited by*  
Michelle Maloney and  
Peter Burdon

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# Wild Law – In Practice

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*Wild Law – In Practice* aims to facilitate the transition of Earth Jurisprudence from theory into practice. Earth Jurisprudence is an emerging philosophy of law, coined by cultural historian and geologist, Thomas Berry. It seeks to provide the foundation for a radical shift in law and governance from an exclusive focus on human beings to recognition of human interconnectedness with the comprehensive Earth community.

This volume addresses a range of topics including the effectiveness of environmental law, developments in domestic law recognising the rights of nature, the role of civil society in legal change, the regulation of sustainability and limits to growth. *Wild Law – In Practice* is the first book to focus specifically on the practical legal implications of Earth Jurisprudence.

**Michelle Maloney** is based at Griffith Law School; **Peter Burdon** teaches at the University of Adelaide.

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## Law, Justice and Ecology

Series editor: Anna Grear, Cardiff Law School,  
Cardiff University, UK

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In an age of climate change, scarcity of resources, and the deployment of new technologies that put into question the very idea of the 'natural', this book series offers a cross-disciplinary, novel engagement with the connections between law and ecology. The fundamental challenge taken up by the series concerns the pressing need to interrogate and to re-imagine prevailing conceptions of legal responsibility, legal community and legal subjectivity, by embracing the wider recognition that human existence is materially embedded in living systems and shared with multiple networks of non-humans.

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*Edited by Michelle Maloney and Peter Burdon*

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Private property and the environment

*Peter Burdon*

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## Notes on contributors

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### **Samuel Alexander**

Dr Samuel Alexander is a Lecturer with the Office for Environmental Programs, University of Melbourne, where he teaches an interdisciplinary course called 'Consumerism and the Growth Paradigm'. He is also co-director of the Simplicity Institute ([www.simplicityinstitute.org](http://www.simplicityinstitute.org)) and founder of the Simplicity Collective ([www.simplicitycollective.com](http://www.simplicitycollective.com)). His research focuses on voluntary simplicity, degrowth economics, and the implications of peak oil and energy descent. He is active in his local 'transition initiative', Transition Coburg, and is currently writing a book on the economics of sufficiency.

### **Peter D Burdon**

Peter Burdon is a Senior Lecturer at the Adelaide Law School. His PhD was in the field of ecological law. It won the Bonython Prize and a University of Adelaide Research Medal for best original thesis. Since 2005 he has worked with Friends of the Earth Adelaide in the Clean Futures Collective. He also sits on the Ethics Specialist Group of the International Union for the Conservation of Nature, the executive committee of the Australian Earth Laws Alliance and on the management committee of the Environmental Defender's Office (SA). He lives in the Adelaide plains with his beautiful wife, dancing daughter and baby boy.

### **Felicity Deane**

Felicity Deane recently completed her PhD in Law at the Queensland University of Technology, on the topic of Australia's Clean Energy Package and the World Trade Organisation. She holds a Bachelor of Law and a Bachelor of Commerce from the University of Queensland (1999) and a Post Graduate Diploma in Legal Practice from Monash University (2004). She has held positions as a financial accountant and legal consultant in Australia and as a managerial accountant in the USA. Prior to this she worked as a Senior Policy Officer for the Queensland Police Service and assisted in the



establishment of the state-based Domestic and Family Violence Unit in the Office of the Commissioner.

### **D E Fisher**

Douglas Fisher joined the Queensland University of Technology as Professor of Law in 1991. Prior to this he held appointments at the University of Edinburgh, the University of Queensland, the Australian National University and the University of Dundee, before being appointed as Professor of Law at Victoria University (Wellington, New Zealand) in 1982, where he was Dean during 1988, 1989 and 1990. He also practised law in the public sector with the United Kingdom government and was for some 10 years a consultant with Phillips Fox in Brisbane. His principal teaching and research interests are currently in the areas of environmental law and natural resources law.

### **Brendan Grigg**

Brendan Grigg is a Lecturer at Flinders University Law School, Australia. Before joining the Flinders Law School in 2010 he worked in the South Australian Crown Solicitor's Office where he practised in native title law and in environmental law. This included a role as in-house solicitor to the South Australian Environment Protection Authority. He has also practised at a specialist planning and development law firm in Adelaide.

### **Erin Fitz-Henry**

Dr Erin Fitz-Henry joined the School of Social and Political Sciences at the University of Melbourne in 2011. She completed an MDiv at Harvard University and a PhD in anthropology at Princeton University, where she previously served as a lecturer. She has long-standing interests in social movement organising, and is currently finalising a book manuscript based on her dissertation research on and around a US military base in Manta, Ecuador. Her second major project looks at the Rights of Nature movement in Ecuador and Bolivia, the first two countries in the world to grant ecosystems the same legal rights accorded citizens. She is particularly interested in the ways in which these environmental rights are being differently implemented and challenged by states, local citizen groups, and industry personnel in the oil and mineral sectors.

### **Ian Lowe**

Professor Ian Lowe (BSc, NSW; DPhil, York (UK)) is an Emeritus Professor in the School of Science at Griffith University, an Adjunct Professor at two Australian universities and is the President of the Australian Conservation Foundation. His principal research interests are in policy decisions influencing the use of energy, science and technology; energy use in industrialised countries; large-scale environmental issues and sustainable development. Professor Lowe has been appointed to the Australian National Commission

for UNESCO and is a consultant to the CSIRO Division of Sustainable Ecosystems. In 1988 he was Director of the Commission for the Future, and was named Australian Humanist of the Year.

### **M Maloney**

Michelle Maloney is an environmental lawyer and activist. She is co-founder and National Convenor of the Australian Earth Laws Alliance ([www.earthlaws.org.au](http://www.earthlaws.org.au)), Executive Committee Member of the Global Alliance for the Rights of Nature and Chairperson of the Environmental Defender's Office Queensland. Michelle is currently completing her PhD at Griffith University and her thesis uses an Earth jurisprudence framework to examine the role of law and regulation in reducing unsustainable consumption.

### **Mari Margil**

Mari Margil is the Associate Director of the Community Environmental Legal Defense Fund where she leads the organisation's international Rights of Nature work. In 2008, she assisted Ecuador's Constitutional Assembly to draft Rights of Nature constitutional provisions. Mari received her Master's degree in Public Policy and Urban Planning from Harvard University's John F. Kennedy School of Government. She is a co-author of *The Public Health or the Bottom Line* published by Oxford University Press in 2010, and *Exploring Wild Law: The Philosophy of Earth Jurisprudence* published by Wakefield Press in 2011.

### **Karen Morrow**

Karen Morrow graduated from the Law Faculty of the Queen's University of Belfast in 1991 and obtained a Master's degree at King's College London in 1992. She has held posts in law at the University of Buckingham, the Queen's University of Belfast, the University of Durham and Leeds University and has, since January 2007 been a Chair at Swansea University where she is co-director of the Centre for Environmental and Energy Law (CEELP). Her research specialism is in UK, EU and international environmental law, focusing primarily on rights-based questions and public participation in these areas.

### **Alessandro Pelizzon**

Alessandro Pelizzon completed his LLB/LLM in Law in Italy, specialising in comparative law and legal anthropology. He has been involved in indigenous rights for over 15 years, firstly by supporting the drafting of the UN Declaration on the Rights of Indigenous Peoples in Geneva and then completing his PhD thesis at the University of Wollongong on native title and legal pluralism in the Illawarra. He is one of the founding members of the Global Alliance for the Rights of Nature, the Australian Earth Laws Alliance and the Earth Laws Network at Southern Cross University. His main areas of research are legal anthropology, comparative law, legal theory, indigenous rights and ecological jurisprudence.



## **Justice Preston**

Justice Brian Preston is the Chief Judge of the Land and Environment Court in New South Wales. Prior to being appointed in 2005, he was a senior counsel practising primarily in New South Wales in environmental, planning, administrative and property law. He is an Adjunct Professor at Sydney Law School and has lectured in postgraduate environmental law for over 20 years, both in Australia and overseas. He is the author of Australia's first book on environmental litigation (in 1989) and 76 articles, book chapters and reviews on environmental, administrative and criminal law.

## **Nicole Rogers**

Dr Nicole Rogers is a Senior Lecturer in the School of Law and Justice, Southern Cross University, Lismore. She has published in the areas of climate change litigation, Wild Law, environmental activism, and the interdisciplinary area of performance studies theory and the law. Her doctorate was on the playfulness of law. She has a background in environmental activism.

## **Linda Sheehan**

As Executive Director of Earth Law Center, Linda Sheehan develops new laws and governance models that acknowledge the natural world's rights to exist, thrive and evolve. For her prior NGO work 'fight[ing] pollution of the Pacific and the streams and rivers that flow into it', she was recognised as a 'California Coastal Hero'. She is also Summer Session Faculty at Vermont Law School, where she teaches 'Earth Law', and was a Visiting Research Fellow at the University of Victoria, BC. She is a contributing author to *Exploring Wild Law: The Philosophy of Earth Jurisprudence*, and a member of the IUCN's Commission on Environmental Law. She holds a BS in chemical engineering from the Massachusetts Institute of Technology; an MPP from the University of California, Berkeley's Goldman School of Public Policy; and a JD from the University of California, Berkeley's Boalt Hall School of Law.

## **Brendan Sydes**

Brendan Sydes is Principal Solicitor with the Environment Defender's Office Victoria, a community legal centre specialising in environmental law. His work at the EDO involves providing legal advice and representation to community groups and environmental NGOs working to protect and enhance the environment, policy and law reform work and overseeing the EDO's community legal education activities. Brendan has volunteered as a legal adviser and committee member at community legal centres in Victoria and NSW and is presently Chair of the Committee of Management of the Federation of Community Legal Centres, Victoria.

**Steven White**

Steven White is a Lecturer at Griffith University Law School, specialising in animal law. He is also a member of Griffith University's Key Centre for Ethics, Law, Justice and Governance and the Socio-Legal Research Centre. Steven has written extensively on animal law issues and he created and continues to teach one of the first undergraduate courses on animal law ever offered in Australia. His doctorate examined the regulation of companion and farmed animals in Australia.

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# Wild Law

## Series editor's preface

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The series *Law, Justice and Ecology* seeks to publish diverse engagements with the complex and challenging factors involved in the profound human and ecological crises characterizing the early twenty-first century.

*Wild Law* presents a fresh attempt to address important challenges presented to mainstream environmental law and governance structures by Earth Jurisprudence and Wild Law. The book is organized as a response to one central question: how can the theory and practice of Wild Law be developed in meaningful, practical and transformative ways? Drawing from papers initially presented at a multidisciplinary conference in Brisbane, Australia in September 2011, *Wild Law* centrally engages with Thomas Berry's challenge to humankind to embrace the 'Great Work' of finding a way to make 'the transition from a period of human devastation of the Earth to a period when humans would be present to the planet in a mutually beneficial manner'.

This edited collection aims to bring important ground-level perspectives to bear on key contemporary challenges and issues concerning the application of Wild Law, while also offering some invigorating theoretical engagements with its central theme. The contributions are refreshingly varied. Some are written on the basis of long experience in the courts or in litigation-facing legal-environmental initiatives; others reflect engagement with indigenous peoples' groups and initiatives; others are based on scholarly engagements with a range of themes and concerns. The result is a collection drawing together scholarship, policy considerations, practice and activism that, in various ways and from various angles, challenges – in practical ways – the ecocidal status quo in which neoliberal structures (including law and legal systems) are complicit.

For anyone concerned to reflect upon the practical implementation of Wild Law in the company of a committed, passionate group of commentators and experts, this book provides a valuable introduction to some potential responses and strategies aimed at unfolding the 'great work' that Thomas Berry urged humanity to embrace.

Anna Gear

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## Editors' introduction

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For those of us who care deeply about the state of the world and find the apparently endless downward spiral of environmental indicators a cause for great despair, the writings of Thomas Berry are a greatly needed source of guidance, inspiration and optimism. His intellectual legacy is immense and includes: a new narrative or Universe Story to provide the context for a viable human presence on the Earth; a soulful critique of modern industrial society and of the complicity of social institutions such as law, religion, the university and the economy in perpetuating environmental harm; and his challenge to develop more intimate relationships with the non-human world and with local bioregions.

But it is Thomas Berry's gifts to us as lawyers and as people interested in the meta-structures and minutiae of modern governance – the rules, systems, institutions and decision making processes that underpin our societies – that provide the starting point for this book. The chapters that follow were selected from presentations given at a multidisciplinary conference held in Brisbane, Australia, in September 2011. The conference brought together more than 150 people, including legal academics, lawyers, scientists, politicians, activists, philosophers, priests and interested members of the public. Each participant was committed to the single question that informs this book – how can we work collaboratively to build the theory and practice of Wild Law?

### **Why a book about Wild Law in practice?**

Wild Law is an emerging theory of earth-centred law and governance that is stimulating a burgeoning field of academic literature and grassroots activism. While it draws broadly on the insights of environmental philosophy, Wild Law also has something new to offer. Its proponents have inspired a growing international movement of activists, researchers and advocates who are implementing ecological law in domestic legal systems. Individual organisations involved in this work include the Center for Earth Jurisprudence, USA;

the Community Environment Legal Defence Fund, USA; the Center for Earth Law, USA; Wild Law United Kingdom; the Pachamama Alliance, Ecuador; Navdanya, India; the Australian Earth Laws Alliance; and the Earth Law Alliance New Zealand. The international umbrella network that brings many of these groups together is the Global Alliance for the Rights of Nature which represents more than 60 organisations around the world.

The aim of this book is to capture some of the stories about the progress, success and challenges faced by the practical implementation of Wild Law. Unlike most books of this kind, many of the chapters offer insights into the daily practice of activists engaged with articulating and advocating for Earth centred law and governance. Other chapters offer new frameworks and theoretical insights for thinking about the practical implementation of Wild Law.

### ***Introduction***

Ian Lowe sets the tone for the volume, arguing that environmental laws and regulations have not fundamentally changed the rate of environmental destruction. He reminds us that despite 50 years of awareness of environmental issues and 35 years of environmental law, all of the important indicators are worsening. At best, he argues, environmental laws are merely slowing down the rate of degradation of natural systems. Following this critique, Lowe maps out a range of reforms that would be required to move legal systems towards an improved capacity to protect the natural world. He also highlights the importance of Wild Law and other strands of utopian thinking for progressing humankind toward a sustainable future.

### ***Part I Agency and implementation***

We then move to four chapters that focus on the methods through which Wild Law can be introduced into our existing, anthropocentric and pro-growth legal systems. Peter Burdon and Samuel Alexander both consider how Wild Law can be introduced into the present legal and political systems of western industrialised nations. Burdon argues that the power structures that presently prevent our transformation to a healthy Earth Community can be countered by projects such as 'The Project for Earth Democracy'. He argues that attempts to fuse ecocentric ethics with deeper forms of democracy and public participation can help 'shift the power structure that dominates contemporary decision making from private interests, to the collective'. Alexander suggests a radical rethink of how we create the transition to an Earth-centred governance system and suggests the building of a grassroots movement that can force change throughout society, and eventually also lead to 'top down' change. Karen Morrow examines the growing role of civil society in challenging existing nation-state structures and in offering up increasingly sophisticated, well-organised agendas for action and change.

Brendan Sydes reflects on how Wild Law can be implemented within the only network of public environmental law organisations in Australia, called the Environmental Defender's Offices. He suggests that while there are significant barriers to introducing Wild Law into the 'administrative rationalist' framework that has shaped Australian environmental law and the work of the EDOs, Wild Law may offer a new paradigm for supporting the intrinsic values of the natural world.

### ***Part II Jurisprudential challenges***

Two chapters from leading Australian jurists then explore how Earth-centred principles and practice can be implemented in our judicial and legislative systems. Justice Preston, Chief Judge of the New South Wales Land and Environment Court, raises a number of critical issues relating to access to justice and statutory approaches to regulating human impact on the environment, that need to be addressed if principles of Wild Law are to be integrated into western legal systems. Douglas Fisher examines the jurisprudential foundations of environmental law, including the structure of selected international and national instruments, and suggests that an ecocentric basis for environmental law is emerging. Following these chapters, Nicole Rogers examines the challenges of integrating Wild Law into western constitutions in general, and the Australian Constitution in particular, and highlights the potential for radically retelling important High Court cases from a Wild Law perspective. In so doing, she highlights the potential for alternative narratives to inform the process of adjudication.

### ***Part III The rights of nature***

Four chapters then explore different aspects of how one of the most prominent elements of Wild Law, Rights of Nature legislation, is being interpreted and implemented in various jurisdictions. Erin Fitz-Henry examines the barriers currently being addressed by Rights of Nature advocates in Ecuador and reminds us that the struggle for environmental protection continues even after progressive legislation has been enacted. Mari Margil provides an overview of the Rights of Nature movement around the world and sets it within the broader context of how social movements form and prevail in the face of initial attitudinal and structural barriers. Linda Sheehan examines current governance structures for managing water and criticises the dualistic approach which treats water as human property. She argues for new water governance methodologies grounded in the collective, shared rights of people and the natural world. Alessandro Pelizzon's chapter examines Rights of Nature and legal pluralism, and offers insights into how the Wild Law movement can both learn from and create spaces to engage with indigenous knowledge.

***Part IV A Wild Law perspective on environmental stewardship***

The final section provides an Earth jurisprudence perspective of current practice in areas as diverse as biodiversity offset schemes and carbon pricing. Michelle Maloney applies a Wild Law framework to examine the debate about, and offer a practical framework for progressing, the idea of living within our ecological limits. Brendan Grigg uses a Wild Law lens to examine biodiversity offset schemes and the property rights they create and argues that such schemes must be severely limited in scope and operation if our legal and economic systems are to respect the natural world. Felicity Deane creates an Earth jurisprudence framework to examine the emissions-trading schemes of the European Union, New Zealand and Australia and argues that the current schemes, though a positive step forward in curbing humanity's atmospheric pollution, merely perpetuate the status quo and do not protect the atmospheric commons. Finally, Steven White writes a valuable piece that examines the commonalities and differences between Wild Law and animal law and lays the groundwork for a dialogue between these two fields of work.

Individually, each of these chapters offers an important contribution to the development of specific aspects of Wild Law and environmental governance. Collectively the chapters provide fascinating insights into the current state of Wild Law in practice. It is our hope that this volume inspires others to focus on the nexus between theoretical development and practical implementation.

Michelle Maloney and Peter Burdon  
July 2013



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