



EDO BULLETIN

May 2011

In this issue:

CSG Case	2
Right to Information.....	2
Mining and Coal Seam Gas—urgent reforms needed...	3
Ministerial Call in Powers.....	4
Update on Strategic Cropping Land Policy.....	6
Law Reform and Policy	7
Opportunities to Comment	8
New EDO Qld Staff.....	9
Wild Law Conference	9

Wandoan Coal in Court

Xstrata & Ors vs Friends of the Earth - Brisbane Co-Op Ltd and Ors

This case involves objections being heard in the Land Court in Brisbane against an environmental authority and various mining leases approved for an open-cut coal mine, 'Wandoan Coal Project', proposed by Xstrata Coal Queensland Pty Ltd and its joint venturers.

The proposal involves mining thermal coal for a period of 30 years, in an area in the Surat Basin, approximately 350 km northwest of Brisbane and 60 km south of Taroom, Queensland. The total coal deposits for the mine are estimated to be in excess of 1.2 billion tonnes and are located within three mining lease applications covering approximately 32,000 hectares.

The environmental impact statement prepared for the application for the mining authorities state that the mining and

use of the coal would produce up to 49.9 million tonnes of carbon dioxide equivalents per year (0.17% of annual global emissions) and a total of 1.3 billion tonnes of carbon dioxide equivalents over the life of the mine.

EDO Qld is acting for Friends of the Earth – Brisbane Co-Op Ltd in their objection grounded on the contribution its emissions will make to climate change and ocean acidification, with a particular focus on the devastating effects climate change and ocean acidification will have on the Great Barrier Reef. Other objectors are farmers based in the area of the proposed mine.

The objections will be heard in a two week trial in the Land Court from 22 August 2011 – 2 September 2011.



Australia's Great Barrier Reef - what the Friends of the Earth believe is at stake if Queensland continues to approve coal mines such as Wandoan Coal Project.
(Source: <http://running4reefs.com> and www.sustainabilitymagazine.com.au)

Coal Seam Gas case: *Clapham & Ors v DERM, Arrow & Ors*

This case involves an originating application brought by a group of farmers to appeal a decision to approve an authority to prospect (ATP) for coal seam gas granted over land between and west of Dalby and Millmerran, Queensland.

The farmers and residents, who have interests within or directly in the vicinity of the area of the ATP, have brought this application on the grounds that the activities authorized by the ATP could risk harming groundwater systems, good quality agricultural land and cause unreasonable noise and other contaminants. The area includes prime agricultural land for wheat, sorghum, barley, beef and cotton.

The case allows important issues to be raised about the potential impact coal seam gas activities may pose to groundwater systems, an area with much uncertainty surrounding it. In addition, the impact of those activities on good quality agricultural land can also be raised.

The matter is still in preliminary stages at present, with

the next hearing set down for 10 June 2011.

EDO Qld has been assisting the farmers in their appeal against the authority to prospect. As there are significant public interest issues at stake, EDO can provide advice and assistance in respect of coal seam gas issues.



Farmer Ruth Armstrong, EDO principal solicitor Jo Bragg and farmer Graham Clapham (from left to right)

Right to Information Requests:

Waiver of fees through “Financial Hardship Status”

Under the *Right to Information Act 2009* ('the Act') non-profit organisations may make an application to the Information Commissioner for 'financial hardship status'. This status, if granted, allows the organisation to make requests for information under the Act free of charge, including the waiver of any processing charge or access charge. This is a significant benefit, as requests for information can involve considerable cost. The status has effect for one year, pending any improvements to the financial circumstances of the applicant, which must be declared by the organisation to the Information Commissioner, who may then withdraw the status from the organisation.

Individuals who have a valid concession card (an Australian health care card or pensioner concession card) are entitled to a waiver of the charges as well. Individuals must request, in writing, the waiver of any processing charge or access charge at the time of making their application for information under the Act and provide a copy of their concession card with the

application.

For organisations, an application must be made PRIOR to lodging a request for information, by simply writing a letter of application to the Information Commissioner providing:

- (a) evidence that the organisation is a non-profit organisation e.g. a copy of your organisation's constitution or rules of incorporation, containing clauses demonstrating the non-profit character of the organisation; and
- (b) evidence that the organisation is suffering financial hardship e.g. a certified copy of the annual audited accounts of the organisation, a Statement of Assets and Liabilities and Statement of Revenue/Earnings for the current and previous financial year, a tax exempt certificate, documents showing the nature and size of the organisations funding base, or any other relevant information pertaining to the organisation's financial status.

(Continued on page 3)

(Continued from page 2)

There is no set rule as to what is considered 'financial hardship', however the nature and size of an organisation's funding base is a significant factor in the Commissioner's decision. See the [guide provided by the Office of the Information Commissioner](#) for more information as to what the Commissioner considers in the assessment of an application.

There is no timeframe by which the Commissioner must decide the application, in which case the application must be decided 'as soon as possible'.

The application may be lodged by:

Email: administration@oic.qld.gov.au

Fax: 07 3005 7150

Mail: Information Commissioner
PO Box 10143
Adelaide Street
BRISBANE QLD 4000

Mining and Coal Seam Gas:

Access to information, fair process and the Land Court

Jo Bragg, Principal Solicitor, EDO Qld

When the State government response to the Solomon Review about freedom of information laws was introduced in August 2008, Premier Bligh stated:

“For members of the public access to information will be easier and quicker. It will break down bureaucratic barriers and make us the most open and accountable Government in Australia.”

As a non-profit community legal centre, working on environmental law matters of public interest for individuals and communities, we have hundreds of clients, both city-based and rural-based who are suffering from a lack of fairness, accountability and transparency in Queensland judicial and administrative processes for assessment of proposed coal mines and coal seam gas ('CSG') projects.

This lack of fairness, transparency and access to information and restrictions on appeal rights is of the gravest importance to our clients and the general public. This is due to the vast disparity of resources, given that the mining and gas industries can afford huge networks of paid lawyers and communication staff to promote approval of their projects, - whereas individuals and communities affected by those projects can rarely afford a single paid lawyer. It is also due to the major impacts these projects have on communities and the natural environment.

And by way of comparison, we find it extraordinary that in many ways the community has less rights to access information on “mega mines” and CSG Projects than on minor developments like housing renovations or small townhouse developments under the *Sustainable Planning Act 2009*

There are at least 22 major coal mines, plus coal seam gas projects, under application in Queensland right now. Mines and coal seam gas can have huge impacts on air, water, soil, human health, vegetation and most importantly of all, our climate.

All need environmental authorities under the *Environmental Protection Act 1994*.

From our experience assisting clients from rural areas and city areas, a number of legislative reforms to *processes* relating to CSG, and mining environmental authorities under the *Environmental Protection Act 1994* are needed urgently to make Queensland open and accountable:

Public submission rights

- Introduce public submission and appeal rights for all applications for all environmental authorities relating to coal seam gas. Currently those rights only apply for some.
- Introduce public notification of applications for mining and coal seam gas environmental authorities online at a central government website. Currently people often miss out on their chance to lodge a submission on a proposed environmental authority and thus miss out on the chance to later go to the Land Court. Put the application and supporting information online too- Brisbane City Council does it for local developments. Why is the State government lagging behind?
- Increase minimum legislative time frames for public

(Continued on page 4)

(Continued from page 3)

notification from 8 to 20 business days for coal seam gas environmental authorities and ideally from the current minimum of 20 business days to 30 business days for objecting to environmental authorities for mining leases. Currently the minimum time is too short to gather expert assistance and prepare submissions. Yet the approvals, once given, last for decades.

Coordinator General and Land Court powers

- Remove decision-making powers of the Coordinator General on conditions of environmental authorities for mines and coal seam gas that are "significant projects" so that the Department of Environment and Resource Management makes the decision. Currently the Coordinator General has a conflict of interest under legislation - both promoting development and assessing environmental impacts.
- Ensure the Land Court on appeal can consider and address all relevant issues and is not constrained by any decision-making powers of the Coordinator General on conditions.
- Introduce Land Court powers to make a decision, rather than a recommendation to government on

proposed environmental authorities for mining leases. Courts, not governments have the final say on coal seam gas environmental authorities and planning applications - why should mining be special?

Costs and Resources

- Change the costs rules in the Land Court to each party pays own costs, subject to exceptions. Currently people are cautious of costs orders and this discourages participation.
- Provide additional funding to Environmental Defenders Offices, so that we can help community clients scrutinise these projects. Currently we are grossly understaffed to provide advice.
- Provide legal aid for public interest environmental cases, such as scrutinising coal mines and gas. Currently Queensland provides no legal aid for any environmental cases. How can ordinary community groups get a fair go if they don't have funds for experts and are up against multinational coal mines?

A letter from EDO Qld and EDO Northern Qld will be sent shortly to the Premier, Deputy Premier and Minister for Environment and Resource Management, alerting them to these important issues. A copy of that letter will be available on the EDO Qld website.

See page 8 for current opportunities to comment

Ministerial Call In Powers

An alternative way to challenge development

Patrick Pearlman, Principal Solicitor, EDO Northern Qld

Development opponents are often unaware that they as well as developers, can request Queensland's Minister for Local Government and Planning to "call in" - *i.e.*, decide - a development rather than the local council. By "calling in" a development, the Minister essentially takes the local council out of the equation and decides

the merits of the development directly. If the Minister is on your side, requesting a ministerial "call in" may be a cost effective, viable alternative to litigating the matter in the Queensland Planning and Environment Court and is certainly a better alternative than meekly submitting to "the inevitable". As with most matters

involving Queensland's local planning and development laws, there are a number of considerations for development opponents to effectively use this option.

Ministerial call in power generally

Ministerial call-ins of proposed development are dealt with in sections 424-433 of the *Sustainable Planning Act 2009* ("SPA") (formerly sections 3.6.4-3.6.9 of the *Integrated Planning Act 1997*). Under SPA, the Minister may call in a development application either *before* or *after* the local council has acted on the application.

When the Minister calls in a development application *before* the local council has acted, the Minister can be said to "decide" the development; when the Minister calls in a development application *after* the council has acted on it, the Minister may be said to "override" the council's action.

Prerequisites to the Minister's exercise of call in powers.

There are several important items to note with respect to ministerial call-in powers under SPA ss 424-433. First, the Minister's decision whether to call in a development under SPA is *discretionary* (the Minister "may" call in rather than "shall"). Second, there are both substantive and procedural limits on the exercise of the Minister's call-in powers including that the development must involve a "State interest" [a substantive limit].

Is a "State interest" involved?

Putting aside whether a request for the exercise of ministerial call-in powers is timely, the key question is whether the development involves a "state interest". Generally speaking, if there is a State Planning Policy ("SPP") or regional plan involved by the proposed development, then a "State interest" will be involved for purposes of satisfying the first prong of SPA s 424 authorising the Minister to call in a development.

Time for Minister's exercise of call-in power is short

Section 425 of SPA requires the Minister to give written notice of any decision to call in a development, including the reasons for calling in the development, to: (1) the assessment manager (*i.e.*, usually the council); (b) the applicant; (c) any concurrence agency; and (d) any submitter. The Supreme Court of Queensland recently ruled that "natural justice" requires the Minister to give prior notice of "the intention to exercise the

power" to any person whose "rights, interests or legitimate expectations" might be "destroy[ed], defeat [ed] or prejudice[d]" by that exercise. See *Landel v Hinchcliffe* [2009] QSC 408.

Other aspects of Ministerial call ins

If the Minister calls in a development, the Minister may limit his or her decision to only the State interests involved. In that case, then the "deemed approved" provisions of SPA (s 331) do not apply, nor do the ordinary assessment and decision provisions set forth in SPA. If the Minister calls in a development before the council makes its decision, then the Minister may direct the council to assess the application and to refer the application to the Minister for decision - in that case, the council acts as the Minister's agent and recommends a decision but does not make the decision itself. In all events, the assessment manager (*i.e.*, council) is obligated to give the Minister all reasonable assistance in deciding the development application. SPA also includes a provision for the exercise of call in powers by the regional planning Minister for a designated region (SPA s 430). However, to date no regional planning Minister has been designated.

Limited appeal rights

Only limited appeal rights apply to the exercise of Ministerial call in powers. Even if the Minister does not limit his or her decision to only the State interests involved (and thus the ordinary assessment and decision provisions of SPA apply), there is no appeal against the Minister's decision under SPA. However, if the assessment provisions of the legislation apply, then declaratory proceedings could be taken in the Queensland Supreme Court to challenge the Minister's decision.

The key risk for anyone wanting to encourage the Minister to exercise their call in powers to decide a development is that the Minister will use these powers to approve the development, contrary to any indications State agencies have made to concerned community members. A more detailed fact sheet and information on how ministerial call ins may be used as an alternative way to challenge development is available on the EDO NQ website –

http://www.edo.org.au/edonq/images/stories/factsheets/20110523_factsheet_-

Update on Strategic Cropping Land Policy

Revel Pointon, Solicitor, EDO Qld

On 31 May 2011 the Queensland Government released [trigger maps](#) broadly demonstrating areas that may be quarantined from activities such as mining and urban development under the Strategic Cropping Land Policy ('the Policy'), a new State Planning Policy being developed under the *Sustainable Planning Act 2009*. Transitional arrangements which began on 31 May 2011 for bringing in the Policy were also announced, which are intended to be introduced into Parliament later in 2011. Under the trigger maps provided, approximately 4.3% of the state land mass has been included in the two zones provided by the Policy, being 'Strategic Cropping Protection Area' or 'Strategic Cropping Management Area'.

Of the land generally shown to be within these two areas, on-ground assessment at a property level against the Strategic Cropping Land criteria must be undertaken to verify whether **land** is in fact protected. The criteria to be used by the government in the assessment of prime agricultural land includes slope, rockiness, soil depth, drainage, Gilgai micro-relief (wet weather induced small depressions in land), soil pH, salinity and soil water storage.

Only approximately 1% of the state qualifies as Strategic Cropping Protection Area, the highest level of protection on which no works which permanently alienate land will be allowed except in 'exceptional circumstances'. This 1% includes the 'Southern Protection Area' covering Darling Downs, Lockyer Valley, Granite Belt and South Burnett; and the 'Central Protection Area' covering the 'Golden Triangle' region of Central Queensland near Emerald and Rolleston.

The transitional arrangements require that certain projects currently being assessed and those applied for after 31 May 2011 will be subject to the full strategic cropping land protection and management arrangements unless they have reached certain milestones in their assessment by 31 May 2011. A project must simply avoid, minimise, mitigate and remediate their impact on strategic cropping land impact upon projects, where it had reached the following milestones as at 31 May 2011:

- an EIS is required or being undertaken voluntarily and the EIS Terms of Reference have not yet been finalised;
- an EIS is not being undertaken and the draft

environmental authority has not yet been granted; or

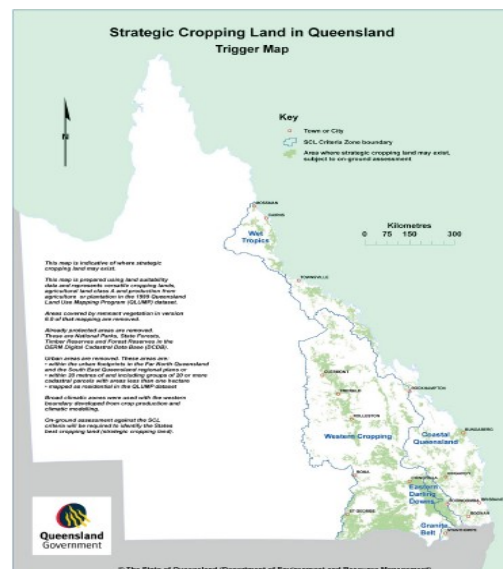
- for expansion projects under existing mines, an Exploration Permit or Mineral Development Licence was not held as at 23 August 2010 (when the SCL framework was released) and a mining lease application certificate under s252 of the *Mineral Resources Act 1989* is obtained by August 2012.

Most coal seam gas activities such as gas wells and pipelines are considered by the Queensland Government to have only a 'temporary' impact under the pretense that land can be adequately restored once the project has finished. However, water storage ponds and gas compression stations are considered likely to have a more permanent impact and thus they are not expected to be allowed on Strategic Cropping Protection Areas except in 'exceptional circumstances'.

Exceptional circumstances needing to be demonstrated are that a resource is only found on strategic cropping land; or that development under the Sustainable Planning Act cannot occur anywhere but on strategic cropping land; and that the development provides a significant community benefit to the State. The significant community benefit may include an economic benefit to the State, however economic benefit alone is not enough.

We are not able to say at present which, if any, of the mines currently under assessment in Queensland will be stopped by the transitional arrangements.

For more information, visit the DERM website at: <http://www.derm.qld.gov.au/land/planning/strategic-cropping/>



Law Reform and Policy

Patrick Vuleta, Solicitor,
EDO Northern Qld

Draft State Planning Policy for Wetlands in Great Barrier Reef Catchments

The Queensland Government invited comments on a draft State Planning Policy: "Protecting Wetlands of High Ecological Significance in Great Barrier Reef Catchments". The due date for comments closed on 28 April 2011.

The draft policy aims to protect important freshwater wetlands within the Great Barrier Reef ("GBR") Catchment from adverse effects of earthworks. These wetlands perform a vital role for the reef by filtering runoff before it can flow out to the reef. Such wetlands protect the reef from pollutants produced by agriculture, industry, residential development, etc.

A State planning policy acts to produce a consistent guideline for assessing developments under local planning schemes. Local planning schemes must comply with the State planning policy and, until a State planning policy is "appropriately reflected" in the local planning scheme, conflict with the State planning policy is an independent basis for challenging development. The GBR Wetlands draft policy will determine how local governments assess development applications proposing earthworks that affect freshwater wetlands within the GBR Catchment.

Fitzroy Basin Draft Water Resource Plan

On 4 April 2011 the Queensland EDOs made a submission on the draft *Water Resource (Fitzroy Basin) Plan 2010*. This plan will replace the existing Fitzroy Basin Draft Water Resource Plan, which has been in effect since 1999. The EDOs are supportive of the scientific basis of much of the new draft plan. However, the EDOs criticised the draft plan on grounds it does not adequately emphasise issues related to groundwater quality.

Groundwater quality will be a significant environmental issue for the Fitzroy Basin in coming years, as the area is experiencing a rapid increase in coal seam gas production. Coal seam gas production poses risks to groundwater quality that must be adequately addressed.

In particular, the Queensland EDOs noted that the cumulative effect of many coal seam gas production projects within the same basin have not been properly accounted for.

Queensland Biodiversity Strategy

On 4 April 2011 the Queensland EDOs made a submission in response to the draft Queensland Biodiversity Strategy. The draft Strategy aims to map out broad policy principles regarding conservation of biodiversity for the next ten years. This is an important issue as Queensland has a rich and diverse collection of species, many of which are native to Queensland and found nowhere else in Australia.

The loss of any species would have a significant impact on Australia's overall biodiversity. However, Queensland has one of the fastest growing populations in Australia, much of which is concentrated on the coast, and such population growth puts heavy pressure on biodiversity. Similarly, resource extraction associated with coal and other mineral production puts heavy pressure on biodiversity. The Queensland EDOs urged the State to be a leader in this area.

Productivity Commission Report on Business Regulation

The Australian Productivity Commission released a draft report on business regulation. The report, entitled *Performance Benchmarking of Australian Business Regulation: Planning, Zoning and Development Assessments*, looks at how planning and zoning systems across Australia impacted on business compliance costs, competition, and the overall efficient and effective functioning of cities.

On 1 April 2011 the Australian Network of Environmental Defenders Offices (ANEDO) - the national umbrella organisation for all EDOs - made a submission commenting on the environmental aspects of the report. ANEDO's main comment was that the effectiveness of planning systems should not be judged solely by processing timeframes or approval rates. Instead, ANEDO urged, planning systems should be measured against the criteria that focuses on whether the process incorporates comprehensive environmental impact assessment, genuine public consultation, and produces ecologically sustainable outcomes.

Opportunities to Comment: *how to have your opinion heard*

As highlighted in Jo Bragg's article in this bulletin, the submission periods for major coal seam gas projects and coal mining projects are poorly publicised – so many landholders miss out on the chance to make submissions on the Environmental Impact Statement ('EIS') draft terms of reference, draft EIS and applications for mining or petroleum leases and their relevant environmental authorities. If you do not make a submission/objection to the environmental authority application or mining lease application then, where applicable, you cannot appeal to the Land Court.

EDO Qld has been asking the Department of Environment and Resource Management ('DERM') to make submission periods available on their website. In the meantime, we'll keep phoning around to get the information for you!

Projects currently open for public submissions are listed here:

- The draft terms of reference for an Environmental Impact Statement for **Stanmore Coal's "The Range" Project** are open for comment to **Monday 20 June 2011**. The Range Project proposes to develop an open-cut coal mine located 25km south-east of Wandoan. The proponent has applied for a mining lease to extract thermal coal at a rate of up to 11.2 million tonnes per annum with 142 million tonnes extracted over a 25-year mine life. The public notification and draft terms of reference are available online at http://www.stanmorecoal.com.au/projects_the_range.aspx.
- The Environmental Impact Statement for **Aquila's Washpool Coal Mine Project** is open for public comment to **Monday 20 June 2011** and available online at <http://www.aquilaresources.com.au/go/projects/coal/washpool-hard-coking-coal-project>. Aquila have recently had problems with their website. If you cannot access the website online you can call Aquila and they can send you a CD copy of the EIS. The Project will produce up to 2.6 million tonnes per annum of product hard coking coal for export markets, and approximately 38 million tonnes of coal over the 15-20 year life of the project.
- **WestSide's Meridian Seamgas CSG** field has applied to renew its environmental authority for petroleum lease 94, which is located in the Moura-Theodore district of the Banana Shire. Properly made submissions must be received by DERM by

Friday 10 June 2011. The application environmental authority application, environmental management plan and public notice are available online at www.westsidecorporation.com.au.

Other opportunities to comment

- Councillor Debra Hendy of Redlands City Council is leading a petition to the State Government to cut the cap on infrastructure charges. For more information and to sign the petition you can access it online at the following address :
http://www.parliament.qld.gov.au/view/EPetitions_QLD/CurrentEPetition.aspx?PetNum=1669&Index=-1
- The Draft Mackay, Isaac and Whitsunday Regional Plan is currently open for public comment, along with the associated Draft Mackay, Isaac and Whitsunday State Planning Regulatory Provision 2011, until 5 pm on Friday 2 September 2011. Public information sessions will be held throughout June and July. To have your say and for more information on the draft plan visit www.dlqp.qld.gov.au/miw.

Information updates

- The Planning and Environment Court Registrar has published 'Useful practice hints' on the Queensland Courts website for people involved in matters in the Planning and Environment Court. Topics covered include the process for telephone appearances (for matters listed in Brisbane) and the process for adjournments 'on the papers'. <http://www.courts.qld.gov.au/5699.htm>
- An updated guideline about the public notice requirements and submissions about applications for environmental authorities for level 1 chapter 5A activities under the *Environmental Protection Act 1994 (Qld)* is now available on the Department of Environment and Resource Management's website at: <http://www.derm.qld.gov.au/register/p00580aa.pdf>. The guideline provides useful information to individuals and groups wishing to make submissions about applications for environmental authorities for petroleum activities, which can include gas fields, gas pipelines and LNG facilities

New Staff for EDO Qld

Ariane Wilkinson has joined the EDO Qld as our new Planning and Environment solicitor. Ariane holds a Bachelor of Laws (Honours) and a Bachelor of Science (Environment) from Griffith University and a Graduate Diploma (Legal Practice) from ANU. She served as an Associate to a Judge in the Planning and Environment Court in 2008 and 2009 and completed 18 months with the courts as the Associate to the President of the Queensland Civil and Administrative Tribunal. Ariane began practising law acting for traditional owners by negotiating future act

agreements. She most recently practised in environment and planning law at a top-tier firm and worked in the areas of planning and environment litigation, environmental compliance and project approvals. She also worked as a research clerk in environment and planning sections in private practice while undertaking her undergraduate studies. Ariane is excited to utilise her legal skills and experience as part of the EDO Qld team and support the objective of using the law to protect our environment.

Earth Jurisprudence: Building Theory and Practice

Australia's Third Wild Law Conference

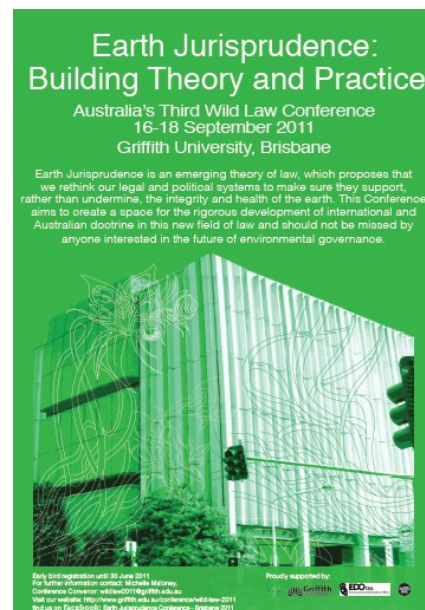
Griffith University, Brisbane, Australia - 16-18 September, 2011

Earth Jurisprudence is an emerging theory of law which proposes that we rethink our legal and political systems to make sure they support, rather than undermine, the integrity and health of the earth. This Conference aims to create a space for the rigorous development of international and Australian doctrine in this new field of law and should not be missed by anyone interested in the future of environmental governance.

More information and **registration details** can be found on our website: <http://www.griffith.edu.au/conference/wild-law-2011>

Find us on facebook: 'Earth Jurisprudence Conference - Brisbane 2011'

Contact us: wildlaw2011@griffith.edu.au



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