

## **Cross-border surrogacy agreements**

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### Published

2012

### Journal Title

Australian Journal of Family Law

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# Cross-border surrogacy agreements

Mary Keyes\*

*This article investigates the application of Australian law regulating surrogacy in international and intra-Australian contexts. Altruistic surrogacy is diversely regulated by the states and territories, raising the issue of the interaction of those laws in intranational cases. Commercial surrogacy is prohibited in Australia, but is permitted in other countries. An increasing number of Australians exploit this difference by entering into commercial surrogacy agreements overseas, raising the question of the effect of such agreements in Australia. This article suggests that the well-meaning regulation of altruistic surrogacy and criminalisation of commercial surrogacy within Australia is likely to be ineffective in cross-border situations. Accordingly, it suggests reforms to the Australian law and endorses multilateral cooperation to respond more effectively to the issues that arise in cross-border surrogacy arrangements.*

## Introduction

In Australia, surrogacy is directly regulated<sup>1</sup> at the state and territory level.<sup>2</sup> In all Australian jurisdictions but the Northern Territory, commercial surrogacy is prohibited and criminalised. Following recent reforms, altruistic surrogacy is now permitted in most Australian jurisdictions, but it is diversely and extensively regulated. There is even greater diversity in the legal treatment of surrogacy internationally. Some countries do not permit any form of surrogacy; others allow commercial surrogacy subject to regulations; yet others do not regulate it at all.<sup>3</sup>

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1 The legal treatment of surrogacy involves many areas of law other than the legislation which directly regulates surrogacy, including child welfare law, the law of adoption and parental responsibility; the law regulating reproductive technology generally; the law of personal status including citizenship; criminal law; and immigration law. This article is mainly concerned with the legislation directly regulating surrogacy, although it refers also in some detail to the Family Court's jurisdiction to make parenting orders: see below at text accompanying nn 89–95.

2 Surrogacy refers to an agreement under which a woman (the birth mother) agrees to bear a child or children for a person or a couple (the intended parent or parents) who are unable or unwilling to conceive and bear children, with the mutual intention that the intended parents will have the responsibility of parenting the child or children born as a result of the arrangement, and that the birth mother and her partner will not have that responsibility. The intended parents usually specifically agree to compensate the birth mother, either to ensure that her expenses are covered (altruistic surrogacy), or to provide a payment in excess of reimbursement for reasonable expenses (commercial surrogacy). The child is sometimes conceived with the assistance of artificial reproductive treatment, but this is not always the case. The birth mother is sometimes called the surrogate mother. Intended parents are sometimes called intending, commissioning or substitute parents. All Australian jurisdictions except the Northern Territory have specific legislation directly addressing surrogacy.

3 Hague Conference Permanent Bureau, *Private International Law Issues Surrounding the*

Cross-border surrogacy refers to surrogacy which has an intra-Australian or international element. This is most likely to occur if the intended parents attempt to avail themselves of a more permissive regime outside their home jurisdiction, for example, by entering into a commercial surrogacy agreement in another country. It can also occur if the parties relocate from one jurisdiction which permits surrogacy to another which prohibits it or regulates it differently, or if the intended parents and the birth mother are from different jurisdictions. Cross-border surrogacy is increasingly common in Australia and in other countries.<sup>4</sup> This is a combined result of the extensive regulation of surrogacy in most Australian jurisdictions, the great diversity in the regulation of surrogacy within Australia and internationally, the ready availability of information about surrogacy in other countries and the affordability of travel. This article considers how the Australian regulation of surrogacy should be applied in intra-Australian and in international cases. It is presented in four parts. Part I describes the law of the Australian states and territories relevant to altruistic surrogacy agreements, particularly addressing how it should be applied in intra-Australian cases. Part II addresses commercial surrogacy, which is prohibited in most Australian jurisdictions. It particularly considers the effect of commercial surrogacy agreements which are entered into and performed outside Australia in applications for parenting orders in the Family Court. Part III suggests that the parties should be permitted expressly to choose the law to determine aspects of international and inter-Australian surrogacy agreements, by use of concepts from private international law. Part IV concludes with a call for reform to the Australian law so that it more effectively responds to international and intra-Australian surrogacy situations and endorses multilateral efforts to address the issue of international surrogacy.

## I Intra-Australian altruistic surrogacy agreements

There is significant diversity in the regulation of altruistic surrogacy within Australia. In this part, I describe that diversity and then explain how an altruistic surrogacy arrangement that has intra-Australian aspects should be resolved. Most Australian jurisdictions now specifically allow altruistic surrogacy subject to regulations; the Northern Territory and Tasmania are the exceptions. Surrogacy is not directly regulated by legislation in the Northern Territory.<sup>5</sup> In Tasmania, at the time of writing in November 2011, altruistic

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*Status of Children, Including Issues Arising from International Surrogacy Agreements*, Preliminary Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, p 7.

<sup>4</sup> *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) at [26], Hedley J noting that:

As babies become less available for adoption and given the withdrawal of donor confidentiality . . . , more and more couples are likely to be tempted to follow the applicants' path to commercial surrogacy in those places where it is lawful, of which there may be many.

As discussed below, there has been a dramatic increase in the number of cases litigated in the Family Court of Australia in the last 2 years, involving international commercial surrogacy: below at text accompanying nn 89–115.

<sup>5</sup> Medical practitioners who provide reproductive services are subject to the National Health and Medical Research Council's *Ethical guidelines on the use of Assisted Reproductive*

surrogacy agreements are 'void and unenforceable'.<sup>6</sup> A bill which proposes to regulate altruistic surrogacy is currently before the upper house of the Tasmanian Parliament, having passed the lower house in April 2011.<sup>7</sup> The scheme in the Tasmanian bill, as passed by the lower house, is similar to the scheme in force in the mainland states and the Australian Capital Territory discussed in detail below.<sup>8</sup>

There has been a great deal of legislative activity in Australia over the last 11 years concerning the direct regulation of surrogacy. The legislative regimes in the Australian Capital Territory and the mainland states are broadly similar, in that they give some effect to altruistic surrogacy agreements, and render commercial surrogacy criminal. However, there are significant differences in the regulation of altruistic surrogacy, giving rise to the possibility of a conflict in the application of the law of two different Australian jurisdictions. In the jurisdictions that permit altruistic surrogacy, the agreements have two main effects.<sup>9</sup> The first is that they are the basis of the courts' jurisdiction to make parentage orders which transfer parental status from the birth mother and her partner to the intended parents. The second effect is that they may be unilaterally enforced by the birth mother in seeking reimbursement for reasonable expenses she has incurred in connection with the pregnancy and birth. These two effects are addressed differently in the surrogacy legislation, and therefore are discussed separately, in turn, so far as they may be applied in intra-Australian cases.

### Parentage orders

In 2000, the Australian Capital Territory introduced legislation which allowed the transfer of parentage from the birth mother to the intended parents.<sup>10</sup> The

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*Technology in clinical practice and research 2007*, at <[http://www.nhmrc.gov.au/\\_files\\_nhmrc/publications/attachments/e78.pdf](http://www.nhmrc.gov.au/_files_nhmrc/publications/attachments/e78.pdf)> (accessed 8 August 2011). Those guidelines state that 'Clinics must not undertake or facilitate commercial surrogacy arrangements' (p 53). They note that altruistic surrogacy is controversial, but impose relatively minimal requirements on the provision of medical services in altruistic surrogacy situations (ibid, p 53).

<sup>6</sup> Surrogacy Contracts Act 1993 (Tas) s 7.

<sup>7</sup> Surrogacy Bill 2011 (Tas).

<sup>8</sup> As at 15 November 2011, the bill was still before the upper house of the Tasmanian Parliament. Because the Tasmanian bill may be modified or not passed by the upper house of parliament, no further comment is made on it. The provisions of the bill, as passed by the Tasmanian lower house of parliament, are referred to by Jenni Millbank, 'The New Surrogacy Parentage Laws in Australia: Cautious Regulation or "25 Brick Walls"?' (2011) 35 *MULR* 165 at 181–4.

<sup>9</sup> Although the NSW and Queensland provisions state that altruistic surrogacy agreements are unenforceable, this is not strictly accurate in either jurisdiction: Surrogacy Act 2010 (NSW) s 6(1); Surrogacy Act 2010 (Qld) s 15(1). The ACT and WA provisions are better drafted. They state that a surrogacy agreement is unenforceable except as provided in the legislation: Parentage Act 2004 (ACT) s 31; Surrogacy Act 2008 (WA) s 7(1).

<sup>10</sup> Transfer of legal parentage in surrogacy arrangements by means of parentage orders was first permitted under the Artificial Conception Act 1985 (ACT) Pt 3. These provisions were introduced by the Artificial Conception (Amendment) Act 2000 (ACT). This legislation was repealed and replaced by the Parentage Act 2004 (ACT). The relevant provisions of the Parentage Act, referred to below, are essentially the same as those in the Artificial Conception Act. The Artificial Conception Act was based on UK legislation, and was in turn used as the model for the legislation relating to parentage orders in the Australian states.

mainland states have since enacted legislation which resembles the ACT model. The surrogacy agreement is the source of the courts' jurisdiction to make parentage orders,<sup>11</sup> which legally recognise the parental status of the intended parents.<sup>12</sup> The agreement is not binding per se, because the courts must ensure compliance with many requirements, especially that the birth mother consents to the application,<sup>13</sup> and that the order is in the best interests of the child.<sup>14</sup> The agreement is most likely to be effective in Western Australia where the legislation creates a presumption that effectively upholding the agreement is in the child's best interests.<sup>15</sup>

### Requirements for making a parentage order

Further requirements apply in relation to a wide range of matters,<sup>16</sup> which differ in many respects between the jurisdictions. For the purposes of the analysis in this article, the requirements can be divided into those which are independent of any nexus between the surrogacy arrangement and the legal system in which the application for a parentage order is made, and direct and indirect nexus requirements.<sup>17</sup>

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There remain significant differences between the Australian statutes, and between the Australian regimes and the current English law: see Millbank, above n 8, at 178–80.

- 11 Parentage Act 2004 (ACT) s 24(c); Surrogacy Act 2010 (NSW) s 34(1); Surrogacy Act 2010 (Qld) s 20; Family Relationships Act 1975 (SA) s 10HB(2)(a); Status of Children Act 1974 (Vic) s 20(1)(a); Surrogacy Act 2008 (WA) s 12.
- 12 A parentage order is effective to establish parental status for the purposes of the Family Law Act: s 60HB(1).
- 13 Parentage Act 2004 (ACT) s 26(1)(b); Surrogacy Act 2010 (NSW) s 31(1); Surrogacy Act 2010 (Qld) s 22(2)(h); Family Relationships Act 1975 (SA) s 10HB(7); Status of Children Act 1974 (Vic) s 22(1)(e); Surrogacy Act 2008 (WA) s 21(2)(d). The court is able to dispense with the requirement of the birth mother's consent, but only if she is deceased, incapacitated, or unable to be contacted: Parentage Act 2004 (ACT) s 26(2); Surrogacy Act 2010 (NSW) s 31(2); Surrogacy Act 2010 (Qld) s 23(3); Family Relationships Act 1975 (SA) s 10HB(8); Status of Children Act 1974 (Vic) s 24(1). In Western Australia, the court can dispense with the requirement of the birth mother's consent in the same situations as the other jurisdictions, and also in the situation that the birth mother is not genetically related to the child, but one of the intended parents is genetically related to the child: Surrogacy Act 2008 (WA) s 21(3)–(4).
- 14 Parentage Act 2004 (ACT) s 26(1)(a); Surrogacy Act 2010 (NSW) s 22(1); Surrogacy Act 2010 (Qld) s 22(2)(a); Family Relationships Act 1975 (SA) s 10HB(6); Status of Children Act 1974 (Vic) s 22(1)(a); Surrogacy Act 2008 (WA) ss 13(1), 21(2)(g).
- 15 Surrogacy Act 2008 (WA) s 13(2).
- 16 In some jurisdictions, the requirements are not strictly mandatory, in that the court or a statutory authority may relax some or all of the requirements in exceptional circumstances: Surrogacy Act 2010 (NSW) s 18(2); Status of Children Act 1974 (Vic) s 24 (allowing the court to relax the requirement of the birth mother's and her partner's consent); Assisted Reproductive Treatment Act 2008 (Vic) s 41 (permitting the Patient Review Panel to approve a surrogacy arrangement that does not comply with the statutory requirements in exceptional cases). For detailed discussion of the requirements which must be satisfied as a precondition to parentage orders being made in the different Australian jurisdictions, see Millbank, above n 8, at 181–4.
- 17 Direct nexus requirements refer to requirements of particular connections between aspects of the arrangement and the state or territory. For example, applicants for parentage orders under the NSW legislation must be resident in that state at the time the application is heard: Surrogacy Act 2010 (NSW) s 32. Indirect nexus requirements refer to provisions which indirectly impose a requirement of connection, for example, by requiring that the parties to the arrangement receive counselling from members of a local association: eg, Surrogacy Act

*Requirements which are independent of connection*

In each jurisdiction, many non-nexus requirements must be satisfied before a parentage order can be made. These vary between the different jurisdictions on matters including the minimum age of the birth mother,<sup>18</sup> her partner,<sup>19</sup> and the intended parents.<sup>20</sup> A minority of jurisdictions impose more onerous requirements than other jurisdictions on a range of factors, such as:

- that the birth mother has previously given birth to a live child;<sup>21</sup>
- that the birth mother is not genetically related to the child,<sup>22</sup> or that one of the intending parents is genetically related to the child,<sup>23</sup> or both;<sup>24</sup>
- that only couples can be intended parents;<sup>25</sup>
- that a male cannot be the sole intended parent;<sup>26</sup> and
- that same sex couples cannot be intended parents.<sup>27</sup>

These variations create the possibility of a conflict of laws between the legislation of different jurisdictions. A conflict may arise as a matter of design, in that some or all of the parties to a surrogacy arrangement might attempt to avail themselves of a more attractive regime within Australia; in this article, I refer to this as regime shopping.<sup>28</sup> For example, a same sex couple from South Australia might attempt to access altruistic surrogacy in another state or

2010 (Qld) s 19 (which requires that the parties have received counselling from a member of one of several Australian professional associations).

18 In New South Wales, Queensland, Victoria and Western Australia the birth mother must be 25 years old: Surrogacy Act 2010 (NSW) s 27(1); Surrogacy Act 2010 (Qld) s 22(2)(f); Assisted Reproductive Treatment Act 2008 (Vic) s 40(1)(b); Status of Children Act 1974 (Vic) s 23(2)(a); Surrogacy Act 2008 (WA) s 17(a)(i). In South Australia the birth mother must be at least 18 years old: Family Relationships Act 1975 (SA) s 10HA(2)(b)(ii). The ACT legislation does not stipulate any minimum age for the birth mother.

19 Most jurisdictions do not regulate the age of the birth mother's partner. In Queensland, if the birth mother has a partner, that person must be at least 25 years old: Surrogacy Act 2010 (Qld) s 22(2)(f). In South Australia, if the birth mother is married, her husband must be at least 18 years old: Family Relationships Act 1975 (SA) s 10HA(2)(b)(ii).

20 In the Australian Capital Territory the intended parents must be at least 18 years old, presumably but not clearly from the wording of the legislation, at the time of making the application for parentage orders: Parentage Act 2004 (ACT) s 26(3). See likewise Family Relationships Act 1975 (SA) s 10HA(2)(b)(ii). In New South Wales the intended parents must have been at least 18 years old at the time of entering the agreement, and there further requirements apply to intended parents under the age of 25: Surrogacy Act 2010 (NSW) ss 28(1), 29. In Queensland the intended parents must have been at least 25 at the time the agreement was made: Surrogacy Act 2010 (Qld) s 22(2)(g)(i). In Western Australia at least one of the intended parents must be at least 25 years old at the time the application for parentage orders is made: Surrogacy Act 2008 (WA) s 19(1)(a).

21 Assisted Reproductive Treatment Act 2008 (Vic) s 40(1)(ac); Surrogacy Act 2008 (WA) s 17(a)(ii).

22 Assisted Reproductive Treatment Act 2008 (Vic) s 40(1)(ab).

23 Family Relationships Act 1975 (SA) s 10HA(2)(b)(viii)(B) (although see s 10HA(5)).

24 Parentage Act 2004 (ACT) s 24(b), (c).

25 Parentage Act 2004 (ACT) s 24(c); Family Relationships Act 1975 (SA) s 10HA(2)(b)(ii).

26 Surrogacy Act 2008 (WA) ss 19(1)(b)(ii), 19(2) (definition of 'eligible person').

27 Family Relationships Act 1975 (SA) s 10HA(2)(b)(iii); Surrogacy Act 2008 (WA) s 19(2).

28 In this article, the intended parents' attempt to select a legal regime for surrogacy is referred to as 'regime shopping'. In the context of cross-border surrogacy, this is sometimes referred to as 'forum shopping', but that term has a particular meaning in private international law, in which it refers to the choice of venue for litigation. Both terms are pejorative, impugning the parties' intentions in their selection of regime or venue as being improper.

in the Australian Capital Territory, where same sex partners may become intended parents. A conflict of laws might also arise incidentally as a consequence of population mobility,<sup>29</sup> or just because the parties are from different states.<sup>30</sup> Where a conflict of laws occurs as a matter of design, it may raise the charge that the parties have acted evasively. This possibility attracted some attention in recent reports leading to the current legislative regimes.<sup>31</sup> The consequence of population mobility for regulating altruistic surrogacy does not appear to have been considered at all in the design of the Australian legislation.

#### *Direct nexus requirements*

All jurisdictions require that there be a substantial personal connection between the intended parents and the jurisdiction in which the application for parentage orders is made.<sup>32</sup> This requirement is not strictly mandatory in New South Wales and Queensland, where it can be relaxed in exceptional circumstances.<sup>33</sup> Some jurisdictions impose additional direct nexus requirements. In the Australian Capital Territory, South Australia and Victoria, it is a requirement that the child was conceived as a result of a procedure carried out within the jurisdiction.<sup>34</sup> In South Australia, the surrogacy agreement must state that the parties intended that the fertilisation procedure would be carried out in the state.<sup>35</sup>

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29 A similar issue occurred in *W: Re Adoption*, in which the child was born under a surrogacy agreement in California. The following year, the child and the intended parents moved to New South Wales, and the intended parents applied for an order for adoption. Windeyer J granted the order, noting that ‘the agreement was not entered into deliberately for the purposes of circumventing the law of New South Wales. The agreement was entered into in accordance with the laws of the place in which [the intended parents] were resident at the time’: (1998) 23 Fam LR 538 at 542–3.

30 This occurred in *Lowe & Barry*, in which the intended parents were resident in Tasmania and the birth mother and her partner were resident in New South Wales: [2011] FamCA 625.

31 In the many parliamentary reports leading to the recent changes to Australian legislation, there is limited discussion of this issue. See further, below at text accompanying nn 56–60.

32 In South Australia the requirement is of domicile: Family Relationships Act 1975 (SA) s 10HA(2)(b)(iv). In the other jurisdictions, the requirement is of residence: Parentage Act 2004 (ACT) s 24(e); Surrogacy Act 2010 (NSW) s 32; Surrogacy Act 2010 (Qld) s 22(2)(g)(ii); Status of Children Act 1974 (Vic) s 20(1)(b); Surrogacy Act 2008 (WA) s 19(1)(a). It is possible that the requirement of the intended parents’ local residence might be constitutionally impermissible under the Commonwealth Constitution s 117. See *Street v Bar Association of Queensland* (1989) 168 CLR 461; 88 ALR 321; [1989] HCA 54; BC8902696.

33 Surrogacy Act 2010 (NSW) ss 18(2), 32; Surrogacy Act 2010 (Qld) ss 22(2)(g)(ii), 23(2). The Queensland legislation gives an example of such exceptional circumstances relevant to the requirement of residence, namely, that: ‘One of the joint applicants is temporarily residing outside Queensland because of work commitments but is still in a spousal relationship with the other joint applicant who is resident in Queensland.’

34 Parentage Act 2004 (ACT) s 24(a); Family Relationships Act 1975 (SA) s 10HB(2)(c); Status of Children Act 1974 (Vic) s 20(1)(a).

35 Family Relationships Act 1975 (SA) s 10HA(2)(b)(viii)(A).

*Indirect nexus requirements*

Most jurisdictions also impose requirements of indirect nexus. These include specific requirements of counselling<sup>36</sup> and legal advice,<sup>37</sup> and in one state, a requirement that the surrogacy agreement record the parties' intention that an application for parentage orders would be made under local legislation.<sup>38</sup> In Western Australia, parentage orders can only be made in respect of agreements that have been approved by a statutory authority.<sup>39</sup>

**Parentage orders in cross-border altruistic surrogacy**

The overall effect of the surrogacy legislation permitting the court to make parentage orders is that it appears to be intended only to give effect to altruistic surrogacy agreements which are entirely local to the relevant state or territory.<sup>40</sup> The variety in the regulation of altruistic surrogacy creates the conditions for regime shopping. The incidence of regime shopping within Australia is well-documented and was noted in the reports which led to the current legislation.<sup>41</sup> In the four jurisdictions with the most extensive regulations, parentage orders would simply not be available in cross-border surrogacy situations. For example, in Western Australia, it is a requirement that the Western Australian Reproductive Technology Council has approved the surrogacy agreement.<sup>42</sup> The ACT, SA and Victorian schemes impose so many requirements, including multiple nexus requirements, that it is unlikely

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36 Surrogacy Act 2010 (Qld) s 19, defining 'appropriately qualified' counsellor to give requisite advice under s 22(2)(e)(ii) as a member of one of four Australian professional associations. See similarly Family Relationships Act 1975 (SA) ss 10HA(2)(vi), 10HA(2)(vii), 10HA(3) 10HA(4); Status of Children Act 1974 (Vic) s 23(3).

37 Surrogacy Act 2010 (NSW) s 36(1) (requiring that all 'affected parties must have received legal advice from an Australian legal practitioner'); Surrogacy Act 2010 (Qld) s 30(1) (stating that the lawyer who gave advice as required under s 22(2)(e)(i) must in their affidavit state that they gave advice concerning the effect of the Surrogacy Act 2010 (Qld) and other Australian legislation); Family Relationships Act 1975 (SA) s 10HA(1) (defining 'lawyer' to mean someone admitted to practise in South Australia).

38 Family Relationships Act 1975 (SA) s 10HA(2)(b)(x).

39 Surrogacy Act 2008 (WA) s 16(1). One of the pathways which intended parents may take under the Victorian legislation also requires that a Victorian statutory authority approved the surrogacy agreement: Status of Children Act 1974 (Vic) s 22(1)(b). This is not compulsory — the legislation provides another pathway to parentage orders which is available if the arrangement was commissioned without the assistance of a registered assisted reproductive treatment provider and the birth mother became pregnant as a result of artificial insemination: Status of Children Act 1974 (Vic) s 23.

40 This is the consequence of the direct and indirect nexus requirements. The only indication that the legislature contemplated the availability of parentage orders in some cross-border surrogacy agreements is found in the NSW legislation, in relation to the requirement that the child's birth be registered as a precondition to making a parentage order. The legislation specifically provides for the situation that the child was born, and its birth registered, outside Australia: Surrogacy Act 2010 (NSW) s 38(2).

41 See NSW Legislative Council, Standing Committee on Law and Justice, *Legislation on altruistic surrogacy in NSW*, Report No 38 (May 2009), p 68; Queensland Parliament, Investigation into Altruistic Surrogacy Committee, *Report* (October 2008), p 11; Parliament of South Australia, *Inquiry into Gestational Surrogacy, 26th Report of the Social Development Committee* (2007), pp 27–8, 31, 63; Parliament of Tasmania, Legislative Council Select Committee, *Report on Surrogacy* (No 21, 2008), pp 21–2; Western Australia Legislative Assembly Select Committee on the Human Reproductive Technology Act 1991, *Report* (Parliament of Western Australia, 1999), pp 243, 255.

42 Surrogacy Act 2008 (WA) s 16(1).



that a cross-border altruistic surrogacy could be given effect by the grant of parentage orders. The requirements in these jurisdictions are clearly mandatory and the court has no discretion to relax the requirements.

The NSW and Queensland schemes are the least regulated. In those jurisdictions, the direct and indirect nexus requirements are not strictly mandatory in that the court can dispense with them in exceptional cases, if that is consistent with the child's best interests.<sup>43</sup> It is conceivable that in these jurisdictions, the requirements might be satisfied or relaxed in a cross-border case. The court then would almost certainly apply the local legislation in determining whether to make parentage orders. This might occur, for example, if the child was born in another jurisdiction. There is no Australian authority on this point. In *Re X and Y (Foreign Surrogacy)*,<sup>44</sup> commissioning parents domiciled in England entered into a surrogacy agreement with a woman in the Ukraine, as a consequence of which twins were born in the Ukraine. The English commissioning parents subsequently sought a parental order under UK legislation.<sup>45</sup> Hedley J noted that the UK legislation was 'the law applicable to all aspects of this case', because the application for a parental order was made under the Act.<sup>46</sup> One of the issues was whether the provision of that legislation that the birth mother's husband was the father of the child according to English law was applicable.<sup>47</sup> The relevant section was stated to be applicable 'whether the woman [the birth mother] was in the United Kingdom or elsewhere at the time of the placing in her of . . . the embryo'.<sup>48</sup> Relying particularly on that provision, Hedley J held that the legislation had an extraterritorial effect.<sup>49</sup>

The extensive regulation of altruistic surrogacy raises the very real question as to the effect of a cross-border altruistic agreement if the requirements for making a parentage order are not satisfied. This issue has not been addressed in Australian litigation,<sup>50</sup> but it arose in *Re G (Surrogacy: Foreign Domicile)*. In this case a couple from Turkey entered into an altruistic surrogacy agreement with an Englishwoman, and sought to take the child from England to Turkey. McFarlane J found that the nexus requirement for intended parents in the UK legislation<sup>51</sup> was mandatory, and that as neither intended parent was

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43 NSW legislation gives the court the discretion to relax the direct nexus requirement of residence and the indirect nexus requirement of legal advice and counselling in exceptional cases: Surrogacy Act 2010 (NSW) ss 18, 32, 36(1); in Queensland the court can dispense in exceptional cases with both the direct nexus requirement of residence and the indirect nexus requirement of counselling: Surrogacy Act 2010 (Qld) s 23(2).

44 [2008] EWHC 3030 (Fam).

45 Human Fertilisation and Embryology Act 1990 (UK) s 30. This legislation has now been repealed and replaced by the Human Fertilisation and Embryology Act 2008 (UK).

46 [2008] EWHC 3030 (Fam) at [15].

47 Human Fertilisation and Embryology Act 1990 (UK) s 28(2).

48 Human Fertilisation and Embryology Act 1990 (UK) s 28(8).

49 [2008] EWHC 3030 (Fam) at [16].

50 *McQuinn & Shure* is a recent decision of the Family Court involving an international altruistic surrogacy: [2011] FamCA 139. At the time the agreement was entered into, all forms of surrogacy were criminalised in Queensland, so this case is referred to below in the context of the discussion of commercial surrogacy, the relevant issue in that discussion being the way Australian courts deal with international surrogacy arrangements which are criminal according to Australian law: below at text accompanying nn 89–94.

51 Human Fertilisation and Embryology Act 1990 (UK) s 30(3)(b).

domiciled in the United Kingdom, it was ‘not legally possible for them to achieve the status of M’s parents by means of a parental order’.<sup>52</sup> Instead, he made an order giving parental responsibility to the intended parents under UK adoption legislation.<sup>53</sup> The Australian courts would find that they had no jurisdiction to make a parentage order unless the requirements were satisfied.<sup>54</sup> In New South Wales and Queensland, the discretion which permits the courts to relax some requirements, including the requirements of nexus, would give the courts some leeway to recognise a cross-border arrangement by making parentage orders. Although the legislation refers to ‘exceptional circumstances’ justifying such relaxation, the further requirement that the court consider the best interests of the child in deciding whether to relax the requirements is likely to lead to such relaxation, by parity of reasoning to the manner in which the Family Court deals with the best interests calculus in international commercial surrogacy cases.<sup>55</sup>

In short, the provisions permitting the court to make parentage orders impose so many requirements that they are unlikely to allow the courts to grant parentage orders in cross-border cases. The issue of cross-border surrogacy appears to have been given very limited attention in the design of this legislation. Where it is mentioned in the reports leading to the enactment of the legislation, it is usually in the context of regime shopping within Australia. Most of these references to regime shopping are highly sympathetic to the situation of intended parents who have considered or engaged in it, and usually uncritical of the practice.<sup>56</sup> The reports which preceded the legislation do not refer to other requirements of nexus; nor do they consider the possibility that a conflict of laws may arise quite innocently — that is, where the parties had no intention of regime shopping. Given the expressions of sympathy which are commonly made in the reports, it is surprising to find, where there is any discussion of it,<sup>57</sup> that the requirement of the intended parents’ residence appears to be directed at the prevention of regime

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52 *Re G (Surrogacy: Foreign Domicile)* [2007] EWHC 2814 (Fam) at [3].

53 *Ibid.*, at [50], applying Adoption and Children Act 2002 (UK) s 84(2) which permits the court to make an order awarding parental responsibility of a child to persons who intend to adopt a child under the law of a foreign country.

54 The intended parents could still apply to the Family Court for parenting orders, and if the birth mother consented to those orders, the court would almost certainly grant them: eg, *Lowe & Barry* [2011] FamCA 625.

55 See below, at text accompanying nn 89–95.

56 Above n 41. For example, the Tasmanian Legislative Council Select Committee in its *Report on Surrogacy* was sanguine about cross-border surrogacy. The only concerns it reported were that this ‘is both unwieldy (in that there is a lack of uniformity across the nation) and pernicious (in that it is economically discriminatory of poorer potential commissioning parents on the one hand, and tends to commodify children at the centre of a surrogacy agreement on the other hand)’: Parliament of Tasmania, Legislative Council Select Committee, *Report on Surrogacy* (No 21, 2008), p 22. The Victorian Law Reform Commission noted the diversity in the regulation of surrogacy in its report but made no further comment on this: *Assisted Reproductive Technology and Adoption: Final Report*, 2007, p 168.

57 In most jurisdictions, there was no specific explanation given as to the intention of the requirement and no further discussion of it in parliamentary debates: eg, Mr McGinty, *Surrogacy Bill 2007, Second Reading*, Western Australian Legislative Assembly, *Hansard*, 1 March 2007, p 194 (noting the requirement of residence without further explanation);

shopping.<sup>58</sup> The requirement of the intended parents' residence was first established in the Australian Capital Territory in 2000,<sup>59</sup> where it was intended to prevent regime shopping by Australians from outside the territory, at which time parentage orders were unavailable in any other Australian jurisdiction.<sup>60</sup> That concern is patently no longer alive. The other jurisdictions seem to have followed the ACT's residency requirement without detailed consideration of this issue.<sup>61</sup> It is questionable whether this requirement is necessary; it is certainly incompatible with the sympathy with regime shopping expressed in the reports.

As will be seen below, the evasive behaviour of Australians in contracting for commercial surrogacy abroad has not yet prevented the Family Court making parenting orders in such cases.<sup>62</sup> This is because the courts are presented with a *fait accompli* in which the parties have performed their obligations under the agreement. In accordance with the agreement, the birth mother has relinquished her responsibility for parenting the child and the intended parents have assumed responsibility for the child and established a home for the child in which the child is settled. It would be a rare case in which a court could safely conclude that the best interests of the child would be served by returning that child to a birth mother who has declared that she does not wish to parent the child, and this is even less likely when the birth mother is outside the jurisdiction. An analogous problem would arise in the case of applications for parentage orders, where the parties had fully performed the altruistic surrogacy agreement, but where one of the prerequisites to making a parentage order was not satisfied. The courts would probably then be inclined to find a way to legitimise the result of the surrogacy agreement. This is an onerous responsibility to cast onto courts without any direction from the legislature. It would be consistent with the policy underlying the surrogacy legislation to allow the courts some discretion in deciding whether to make parentage orders in cross-border cases which do not fully comply with the current requirements, if not to reconsider whether all the

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Mr Hulls, Artificial Reproductive Treatment Bill 2008, Second Reading, Victorian Legislative Assembly, *Hansard*, 10 September 2008, p 3457 (referring to the requirement of residence, without explanation).

58 Surrogacy Bill 2009 (Qld) Explanatory Notes, p 13, stating that 'A residency requirement will ensure that intended parents do not forum shop in order to avail themselves of the most suitable forum in which to apply to a court for a parentage order'.

59 Artificial Conception Act 1985 (ACT) s 9(2) (inserted by the Artificial Conception (Amendment) Act 2000).

60 The requirement of the intended parents' residence within the Australian Capital Territory was proposed by Mr Stanhope, then leader of the opposition: Artificial Conception Amendment Bill 2000, ACT Legislative Assembly, *Hansard*, 31 August 2000, p 2793: 'I do not believe it is appropriate that the ACT should at this time be legislating for the possibility of people from interstate using the ACT as a base of convenience for surrogacy arrangements'. See also *ibid*, p 2794.

61 The Standing Committee of Attorneys-General, Australian Health Ministers' Conference, Community and Disability Services Ministers' Conference Joint Working Group confidently assumed that the inclusion of residency requirements would 'prevent exploitation' of forum shopping in Australia: *A Proposal for a National Model to Harmonise Regulation of Surrogacy*, January 2009, p 14 (emphasis added) (referred to below as Joint Working Group, *Proposal for a National Model*).

62 See below at text accompanying nn 96–98, 112–113.

current requirements are strictly necessary to achieve the objectives of the legislation.

### The birth mother's entitlement to reimbursement

The second effect of altruistic surrogacy agreements is that they may be relied on by the birth mother in claiming reimbursement for expenses incurred in the pregnancy and birth. In three states, surrogacy legislation expressly recognises the intended parents' obligation to reimburse the birth mother for reasonable expenses associated with pregnancy and birth.<sup>63</sup> These provisions are generally worded. They do not include any nexus requirements, raising the question as to how they should be applied in cross-border cases. There are two possible responses.<sup>64</sup> The first is that the provisions should be applied if they form part of the governing law for the relevant issue, which in this case should be the proper law of the contract.<sup>65</sup> The second is that they should be applied consistently with parliament's intention, presuming that forum legislation is applicable. It is notoriously difficult to determine parliament's intention as to the scope of legislation, when none has been expressed. *Dicey, Morris & Collins* describes this method therefore as 'artificial . . . , and perhaps a dangerous one'.<sup>66</sup> It is especially difficult to determine the significance of parliament's failure to state its intention as to the scope of application of a provision in legislation, other parts of which include express nexus requirements. That might be taken to indicate either that parliament did not intend the nexus requirements in the other parts of the legislation to apply, or that it intended that they might be taken into account in determining the scope of application of generally worded provisions in the same statute. The former is more logical.<sup>67</sup> In that case, it would be difficult to ascertain parliament's intention with any certainty. This suggests the superiority of the first solution referred to above — application of the legislation only if it is part of the proper law of the contract. In most Australian jurisdictions, there are no policy reasons for denying the contractual status of the birth mother's right to reimbursement of expenses.

In the Australian Capital Territory, South Australia and Victoria, the legislation does not directly provide for enforcement of the birth mother's entitlement to reimbursement of her expenses.<sup>68</sup> If the birth mother performs

63 Surrogacy Act 2010 (NSW) s 6(2); Surrogacy Act 2010 (Qld) s 15(2); Surrogacy Act 2008 (WA) s 7(3).

64 M Keyes, 'Statutes, Choice of Law and the Role of Forum Choice' (2008) 4 *Jnl of Private International Law* 1 at 10–25.

65 The proper law of a contract is the law the parties expressly or impliedly intended to apply to determine the effect of their agreement. If there is no enforceable agreement as to choice of law, then it is the legal system with which the contract has its closest and most real connection: *Akai Pty Ltd v The People's Insurance Co Ltd* (1996) 188 CLR 418 at 440–2; 141 ALR 374; [1996] HCA 39; BC9606281.

66 L Collins (Gen Ed), *Dicey, Morris & Collins on the Conflict of Laws*, 14th ed, Sweet & Maxwell, London, 2006, p 17.

67 This is because the parliament actually considered the scope of application of at least part of the legislation and specifically limited the nexus provisions to that part of the legislation dealing with parentage orders. If parliament had intended the same nexus provisions to apply to other parts of the legislation, it would have been simple for it to do so.

68 The ACT legislation refers to the existence of an agreement for the reimbursement of

her obligations under a local altruistic surrogacy agreement, the intended parents' obligation should be enforceable under local Australian contract law, depending on the construction of the agreement.<sup>69</sup> If the birth mother does not perform her obligations, especially the obligation to relinquish the child, she would probably not be entitled to reimbursement, depending on the construction of the contract.<sup>70</sup> In an intra-Australian or international agreement, it should not be assumed that the contract law of the forum applies. Rather, the governing law for the birth mother's entitlement to enforce the intended parents' obligation to reimburse her for reasonable expenses should be determined according to the contract choice of law rule.<sup>71</sup>

In the Northern Territory, the birth mother *may* be entitled to claim reimbursement for her reasonable expenses according to the agreement. It is not clear whether the common law policy against enforcing surrogacy agreements would remain an impediment to the enforcement of this promise as a contract, there being no clear abolition of that policy in NT legislation. In Tasmania, the current legislation would certainly prevent the birth mother from succeeding in a claim for reimbursement in reliance on the agreement, whether in reliance on domestic Tasmanian law, or by reference to a choice of foreign law.<sup>72</sup>

The birth mother cannot be compelled to perform her agreement to relinquish the child or to consent to the making of parentage orders in any Australian jurisdiction.<sup>73</sup> The intended parents would almost certainly not be entitled to recover contractual damages for breach of the birth mother's promise to relinquish the child or to consent to the application for parentage orders.

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expenses as one factor relevant to the court's decision whether to make a parentage order, but contains no specific provision relating to enforceability of the agreement to reimburse expenses: Parentage Act 2004 (ACT) s 26(3)(d). The SA legislation recognises surrogacy agreements in which the costs associated with the pregnancy and birth might be payable: Family Relationships Act 1975 (SA) s 10HA(2)(ix). Victorian legislation provides that the offence of receipt of material benefit or advantage by the birth mother 'does not prevent a surrogate mother being reimbursed for the prescribed costs actually incurred by the surrogate mother as a direct consequence of entering into the surrogacy arrangement', without actually creating an entitlement to the recovery of such costs: Assisted Reproductive Treatment Act 2008 (Vic) s 44(2).

69 At common law, surrogacy agreements were unenforceable as being contrary to public policy: *A v C* [1985] Fam LR 445. The effect of the legislation which recognises the effect of altruistic surrogacy in the Australian Capital Territory, South Australia and Victoria is to make it clear that there is no public policy against altruistic surrogacy for the purposes of denying enforceability of the promise to reimburse the birth mother's reasonable expenses.

70 The courts would probably refuse to enforce such a promise, unless it was clearly worded to establish an obligation that was independent of the promise to relinquish the child on birth.

71 This argument is further developed below, in Part III.

72 Surrogacy Contracts Act 1993 (Tas) s 7 renders surrogacy contracts 'void and unenforceable, wherever the contract is made and whatever law may be the proper law of the agreement'.

73 In Queensland the enforceability of the intended parents' agreement to pay the birth mother's expenses is conditional on her doing so: Surrogacy Act 2010 (Qld) s 15(2) (stating that the agreement to reimburse is not enforceable if the mother does not relinquish the child, or does not consent to the making of the parentage orders). In New South Wales and Western Australia, there is no such explicit requirement.

## II Commercial surrogacy agreements in international cases

The current Australian state and territory legislation is strongly opposed to commercial surrogacy, which is explicitly prohibited in most jurisdictions. Some Australian intended parents who wish to pursue commercial surrogacy have responded to this prohibition by entering into agreements abroad and then returning to Australia with the children of such agreements. Some later apply to the Family Court seeking parenting orders. In this part, I consider how such applications are dealt with in the Family Court and how this undermines the prohibition of commercial surrogacy under state and territory legislation. Legislation in all Australian jurisdictions except South Australia and the Northern Territory criminalises the parents' involvement in commercial surrogacy agreements, which are agreements under which payment in excess of reasonable expenses related to pregnancy and birth is promised or made to the birth mother or received in connection with a surrogacy arrangement.<sup>74</sup> The legislation creates other offences, including the advertisement of commercial surrogacy services,<sup>75</sup> procuring commercial surrogacy agreements,<sup>76</sup> and the provision of professional and technical assistance in commercial surrogacy cases,<sup>77</sup> all of which demonstrate a strong policy against commercial surrogacy arrangements.<sup>78</sup> By reference to the public policy which underpins the legislation in other Australian jurisdictions, it is likely that a court in the Northern Territory would refuse to enforce a commercial surrogacy agreement, as being contrary to public policy.

### International commercial surrogacy

The prohibition of commercial surrogacy in Australia creates the conditions for international regime shopping, which is increasingly common. As noted above, many references to regime shopping in the reports leading to the legislation are sympathetic to the situation of intended parents who engage in

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<sup>74</sup> The offences relating to the parties to a surrogacy agreement are found in Parentage Act 2004 (ACT) ss 41, 45(2); Surrogacy Act 2010 (NSW) ss 8, 11(2); Surrogacy Act 2010 (Qld) ss 56–57; Surrogacy Contracts Act 1993 (Tas) s 4(4); Surrogacy Act 2008 (WA) s 8. In each case, the offence is entry into the surrogacy contract. In Victoria, the relevant offence is not entry into the agreement but receipt by the birth mother of 'any material benefit or advantage as a result of a surrogacy arrangement': Assisted Reproductive Treatment Act 2008 (Vic) s 44(1). This means that Victorian intended parents who engage in international commercial surrogacy are not liable to prosecution in Victoria. In the other jurisdictions, the actions of the intended parents are also criminalised.

<sup>75</sup> Parentage Act 2004 (ACT) s 43(1); Surrogacy Act 2010 (NSW) s 10(1); Surrogacy Act 2010 (Qld) s 55(1); Family Relationships Act 1975 (SA) s 10H(c); Surrogacy Contracts Act 1993 (Tas) s 6; Assisted Reproductive Treatment Act 2008 (Vic) s 45(1); Surrogacy Act 2008 (WA) s 10.

<sup>76</sup> Parentage Act 2004 (ACT) s 42(1); Family Relationships Act 1975 (SA) s 10H(b); Surrogacy Contracts Act 1993 (Tas) s 6(1), (2), (3); Surrogacy Act 2008 (WA) s 9(1) (in Western Australia, the offence applies also to procuring altruistic surrogacy agreements: s 9(2)).

<sup>77</sup> Parentage Act 2004 (ACT) s 44; Surrogacy Act 2010 (Qld) s 58; Surrogacy Contracts Act 1993 (Tas) s 5; Surrogacy Act 2010 (WA) s 11.

<sup>78</sup> This article is specifically concerned with the agreement between the birth mother and the intended parents, so these offences are not further discussed.

regime shopping.<sup>79</sup> Notwithstanding these expressions of sympathy, the criminal offences are at least in a minority of jurisdictions certainly intended to apply to international conduct. In three jurisdictions, the legislation includes direct nexus requirements relating to the offences created by the Acts.<sup>80</sup> In the jurisdictions that have nexus provisions, the offences apply to those who have some personal connection to the jurisdiction at the time the offence was committed, such as ordinary residence or domicile.<sup>81</sup> The intention of those provisions is to prevent evasion and to protect potential birth mothers in developing countries from exploitation.<sup>82</sup> In Queensland, the prohibition is expressly stated also to apply to those who act within Queensland, irrespective of any personal connections to the state.<sup>83</sup>

In two jurisdictions, the surrogacy legislation refers also to the nexus provisions of general application in criminal law.<sup>84</sup> The general nexus provisions in criminal legislation usually refer to acts done outside the jurisdiction which are elements of the offence, or which have effects within the jurisdiction.<sup>85</sup> Effects jurisdiction is not clearly suitable to the surrogacy offences because of the nature of those offences, which in most jurisdictions is the entry into a surrogacy agreement.<sup>86</sup> In the recent cases of *Hubert & Juntasa* and *Johnson & Chompunut*, Watts J considered whether entry into a commercial surrogacy in Thailand was a criminal offence in New South Wales.<sup>87</sup> His Honour concluded that: 'It is not clear that it could be said that the offence has an effect in the state of New South Wales.'<sup>88</sup>

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<sup>79</sup> See references above at n 41.

<sup>80</sup> In four states, the legislation does not contain nexus provisions (South Australia, Tasmania, Victoria and Western Australia). In South Australia, the general criminal legislation contains nexus provisions, providing that the criminal law applies if an element of the crime occurred in the jurisdiction, or if an act committed outside the jurisdiction caused harm within the jurisdiction: Criminal Law Consolidation Act 1935 (SA) s 5G(2)(a), (b), (c)(ii).

<sup>81</sup> Parentage Act 2004 (ACT) s 45(1) (ordinary residence at the time the offence was entered into); Surrogacy Act 2010 (NSW) s 11(2) (ordinary residence and domicile); Surrogacy Act 2010 (Qld) s 54(b) (ordinary residence).

<sup>82</sup> Ms Burney, Surrogacy Bill 2010, NSW Legislative Assembly, *Hansard*, 10 November 2010, p 27,583.

<sup>83</sup> Surrogacy Act 2010 (Qld) s 54(a).

<sup>84</sup> Parentage Act 2004 (ACT) s 24(2) (referring to the Criminal Code 2002 (ACT) s 64(2)), Surrogacy Act 2010 (NSW) s 11(1) (referring to the Crimes Act 1900 (NSW) Pt 1A). In the jurisdictions which lack nexus provisions in the surrogacy legislation, the courts would apply general nexus provisions in the criminal law in order to determine the scope of operation of the commercial surrogacy offences: eg, Criminal Law Consolidation Act 1935 (SA) s 5G.

<sup>85</sup> Criminal Code 2001 (ACT) s 64(2)(b); Crimes Act 1900 (NSW) s 10C; Criminal Code (Qld) s 12(2), (3).

<sup>86</sup> The relevant crime in Victoria is the receipt by the birth mother of benefits under the agreement: Assisted Reproductive Treatment Act 2008 (Vic) s 44(1).

<sup>87</sup> As noted above, in the Surrogacy Act 2010 (NSW), the offence of entering into a surrogacy contract is stated to be applicable to ordinary residents, but the legislation was not in effect at the time the contracts were entered into in these cases. In both cases, his Honour was considering the effect of the Assisted Reproductive Technology Act 2007 (NSW) s 43, which criminalised commercial surrogacy but contained no nexus provisions. It was therefore necessary to refer to the nexus provisions in the Crimes Act 1900 (NSW) Pt 1A.

<sup>88</sup> *Hubert & Juntasa* [2011] FamCA 504 at [13]; *Johnson & Chompunut* [2011] FamCA 505 at [12].

### International surrogacy cases in the Family Court

It seems to be increasingly common that Australian intended parents enter into surrogacy agreements outside Australia with foreign birth mothers,<sup>89</sup> and return with the children to Australia. Some intended parents then apply for parenting orders by consent under the Family Law Act.<sup>90</sup> Cases of this kind emphasise the tension between two significant policy goals: the child's best interests, which must dominate the court's determination as to whether to grant parenting orders,<sup>91</sup> and the prohibition of commercial surrogacy. The former, naturally, prevails. In every published case, the Family Court relied on the evidence tendered by the intended parents indicating the foreign birth mother's consent to the applications,<sup>92</sup> even where some of that evidence was quite concerning,<sup>93</sup> the birth mother's lack of interest in parenting the child;<sup>94</sup>

89 At the time of writing, in August 2011, there were 12 published cases of international commercial surrogacy and one of international altruistic surrogacy in Australia. Although the numbers are in absolute terms small, given that the intended parents in at least some cases had technically committed serious crimes, this seems the tip of what appears to be not an insignificant iceberg. Of those 13 cases, only two were decided before 2010, and seven were decided in 2011 (to August 2011). This is a remarkable increase. The international commercial cases are *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162; *Cadet & Scribe* [2007] FamCA 1498; *Wilkie & Mirkja* [2010] FamCA 667; *Collins v Tangtoi* [2010] FamCA 878; BC201050981; *O'Connor & Kasemsarn* [2010] FamCA 987; *McGee & Duchampes* [2010] FamCA 1230; *Dennis & Pradchaphet* [2011] FamCA 123; *Ronalds & Victor* [2011] FamCA 389; *Dudley & Chedi* [2011] FamCA 502; *Findlay & Punyawong* [2011] FamCA 503; *Hubert & Juntasa* [2011] FamCA 504; *Johnson & Chompunut* [2011] FamCA 505. The international altruistic surrogacy case is *McQuinn & Shure* [2011] FamCA 139 which is included in this discussion because at the time the agreement was entered into, altruistic surrogacy was criminal in Queensland, where the intended parents were resident, and the crime of entry into a surrogacy agreement at the time was stated to be applicable to Queensland ordinary residents: Surrogacy Contracts Act 1988 (Qld) ss 2 (definition of prescribed contract), 3(1)(c), 3(2)(b). Murphy J did not refer to the criminality of the intended parents' actions in his judgment.

The birth mothers were from Canada (*McQuinn & Shure* [2011] FamCA 139); India (*Wilkie & Mirkja* [2010] FamCA 667; *Ronalds & Victor* [2011] FamCA 389); South Africa (*McGee & Duchampes* [2010] FamCA 1230); Thailand (*Collins v Tangtoi* [2010] FamCA 878; *O'Connor & Kasemsarn* [2010] FamCA 987; *Dennis & Pradchaphet* [2011] FamCA 123; *Dudley & Chedi* [2011] FamCA 502; *Findlay & Punyawong* [2011] FamCA 503; *Hubert & Juntasa* [2011] FamCA 504; *Johnson & Chompunut* [2011] FamCA 505); and the United States (*Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162, involving California; *Cadet & Scribe* [2007] FamCA 1498 involving Ohio).

90 In some cases the issue of parental status was also raised, eg, *O'Connor & Kasemsarn* [2010] FamCA 987.

91 Family Law Act 1975 (Cth) ss 60CA, 65AA.

92 *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162 at [20]; *Cadet & Scribe* [2007] FamCA 1498 at [1], [6]; *O'Connor & Kasemsarn* [2010] FamCA 987 at [9]; *Dennis & Pradchaphet* [2011] FamCA 123 at [14]; *McQuinn & Shure* [2011] FamCA 139 at [13]; *Dudley & Chedi* [2011] FamCA 502 at [5], [35]; *Findlay & Punyawong* [2011] FamCA 503 at [22]; *Hubert & Juntasa* [2011] FamCA 504 at [2], [20]; *Johnson & Chompunut* [2011] FamCA 505 at [2], [20]. In *Wilkie & Mirkja*, the birth mother could not be found, and so her consent was not given. The court made critical remarks about her apparent lack of interest in the children, because she had not made contact with them since relinquishing them into the care of the intending parents, even though Cronin J also noted that her behaviour was consistent with the surrogacy agreement: [2010] FamCA 667 at [3], [16].

93 For example, in *Dennis & Pradchaphet*, Stevenson J noted that: 'In her affidavit the Thai interpreter deposed that she translated to [the birth mother] *her own affidavit* . . . [the birth



and the satisfactory nature of the parenting arrangements achieved under the agreement,<sup>95</sup> in concluding that the best interests of the child were served by making the parenting orders. By granting the parenting orders, it might be argued that the court de facto endorsed the results intended by the surrogacy agreement. In most cases, the court did not record that the intended parents' behaviour was criminal, or at least evasive of the Australian policy against commercial surrogacy. Rarely, the judge noted that the arrangements may have breached Australian criminal law;<sup>96</sup> where they did so, they usually stated that this was irrelevant to their determination.<sup>97</sup> In two recent cases, Justice Watts emphasised that the behaviour of the intended parents was criminal according to Queensland law, and directed the Registrar to convey a copy of the reasons for judgment to the Queensland Director of Public Prosecutions.<sup>98</sup>

The earliest published international surrogacy case is *Re Mark (an application relating to parental responsibilities)*. The facts are fairly typical. A couple from Victoria entered into a surrogacy contract under which a woman in California agreed to bear a child for them; the ovum was supplied by an anonymous woman, and one of the applicants provided the sperm. The contract was valid and enforceable in California, where it was made and performed, but illegal in Victoria, where the intended parents were resident. The intended parents applied for parenting orders by consent in the Family Court. The birth mother and her husband were served with notice of the Australian proceedings and chose not to participate, a factor which was clearly significant in the decision.<sup>99</sup> Brown J noted that if the birth mother and her husband had participated in the proceedings, this 'may have exposed them to legal proceedings for breach of the surrogacy agreement but that is not a matter to which this court can have regard'.<sup>100</sup> Consequently, Brown J noted

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mother] then swore and signed her affidavit' [2011] FamCA 123 at [10] (emphasis added). In all cases, of course the evidence as to the birth mothers' intentions, and as to the suitability of the arrangements for the child, was tendered by the intended parents with very little critical assessment by the court.

- 94 *Wilkie & Mirkja* [2010] FamCA 667 at [3], [16]; *Collins v Tangtoi* [2010] FamCA 878 at [7], [17]; *Dennis & Pradchaphet* [2011] FamCA 123 at [20]; *McQuinn & Shure* [2011] FamCA 139 at [10]; *Findlay & Punyawong* [2011] FamCA 503 at [22], [27]; *Hubert & Juntas* [2011] FamCA 504 at [20], [22], [23]; *Johnson & Chompunut* [2011] FamCA 505 at [20], [22], [23].
- 95 *Cadet & Scribe* [2007] FamCA 1498 at [7]; *Wilkie & Mirkja* [2010] FamCA 667 at [4], [17], [21]; *O'Connor & Kasemsarn* [2010] FamCA 987 at [16]; *Dennis & Pradchaphet* [2011] FamCA 123 at [22]–[24]; *Ronalds & Victor* [2011] FamCA 389 at [10]; *Dudley & Chedi* [2011] FamCA 502 at [42]; *Findlay & Punyawong* [2011] FamCA 503 at [28]–[30]; *Hubert & Juntas* [2011] FamCA 504 at [26]; *Johnson & Chompunut* [2011] FamCA 505 at [24].
- 96 *Dudley & Chedi* [2011] FamCA 502 at [7]; *Johnson & Chompunut* [2011] FamCA 505 at [9].
- 97 *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162 at [94].
- 98 *Dudley & Chedi* [2011] FamCA 502; *Findlay & Punyawong* [2011] FamCA 503.
- 99 Brown J referred to it repeatedly: *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162 at [18], [94], [102]; see likewise *Ronalds & Victor* [2011] FamCA 389 at [6].
- 100 *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162 at [18] (emphasis added). See similarly *Cadet & Scribe* [2007] FamCA 1498 at [6] and *Ronalds & Victor* [2011] FamCA 389 at [6].

that the parenting orders sought were by consent of the parties.<sup>101</sup>

The effect of the surrogacy agreement is fascinating. Brown J insisted that '[i]t is the Family Law Act that governs this case, not the provisions of the surrogate agreement'. But the significant factor of the birth mother's lack of objection to the application was consistent with her obligations under the agreement. The result of the litigation was consistent with the outcome which the parties attempted to secure by their agreement. The effect on the state's criminal prohibition of commercial surrogacy was regarded as irrelevant, even though Brown J noted that a dominant explanation for the intending parents' decision to enter into a surrogacy agreement in California was that 'such an agreement would be illegal in Victoria'.<sup>102</sup> Without explanation, her Honour held that the illegality of the agreement was not a relevant consideration.<sup>103</sup>

There is now a significant number of recent cases which are similar to *Re Mark*, although from these cases it appears that Thailand has become a popular destination for Australian intended parents.<sup>104</sup> Rather than sympathising with the situation of birth mothers, judges sometimes harshly criticise their behaviour. For example, in *Wilkie & Mirkja*, a case in which the Indian birth mother could not be found because her address given in the surrogacy agreement was false, Cronin J noted that:

Unfortunately, or otherwise, in these children's lives, they are not going to have any benefit of having a mother because she has, pursuant to the surrogacy agreement, excluded herself from their lives as well as having had nothing to do with them since they have been born.<sup>105</sup>

The prohibition of commercial surrogacy in the state and territory legislation is justified on policy grounds which are fairly uncontroversial. These include recognition of the vulnerability of birth mothers and of the children born of such arrangements; a concern with the complicated consequences for children in terms of their rights to know their parents and their genetic background;<sup>106</sup> and a deep discomfort with the commodification of children, women and reproductive services.<sup>107</sup> Yet as these cases vividly demonstrate, criminalisation does not prevent these problems. It pushes the issues of protecting vulnerable women, and concerns with the

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101 *Re Mark (an application relating to parental responsibilities)* (2003) 31 Fam LR 162 at [20].

102 *Ibid.*, at [94].

103 *Ibid.*, at [94].

104 The Australian embassy in Thailand provides on its website specific information about surrogacy which is clearly directed at Australian intended parents: 'Children born through a surrogacy agreement', at <[http://www.thailand.embassy.gov.au/bkok/DIAC\\_Children\\_surrogacy.html](http://www.thailand.embassy.gov.au/bkok/DIAC_Children_surrogacy.html)> (accessed 4 August 2011). Millbank reports very different destinations in her study of Australian surrogacy, in which her data is derived from Australian media reports: above n 8, at 192–3 (of 35 international surrogacy arrangements, 20 involved the United States, 12 involved India, two involved New Zealand and one involved Indonesia).

105 *Wilkie & Mirkja* [2010] FamCA 667 at [16]; see similarly at [18]: 'Again, because Ms Mirkja [the birth mother] has decided to do what she has done, the children cannot have the benefit of her involvement in their lives and having regard to what I have heard about [the intending parents], that may not be a major problem'. See likewise *Ronalds & Victor* [2011] FamCA 389 at [6]–[7].

106 Joint Working Group, *A Proposal for a National Model*, above n 61, p 20.

107 *Ibid.*, pp 4–5; Assisted Reproductive Treatment Act 2008 (Vic) s 5; *Dudley & Chedi* [2011] FamCA 502 at [14].

commodification of women and reproductive services, offshore, sometimes to countries with lax or no regulations where the policy concerns that animate the Australian legislation are far more serious.<sup>108</sup> This effect of criminalising commercial surrogacy should have been anticipated and addressed directly in the design of that legislation.<sup>109</sup> Most especially is this so, because as the above cases show, the consequence is likely to be that international surrogacy agreements will be effective, usually without even noting that this undermines and frustrates state and territory policy. This should have been foreseen; the leading case, *Re Mark*,<sup>110</sup> pre-dates the enactment of the recent surrogacy legislation in all jurisdictions but the Australian Capital Territory. There is obviously a need for greater cooperation between the states and territories on the one hand and the Commonwealth on the other to ensure that the law operates in a way that is not quite so inconsistent and potentially confusing for the parties. The priority of the child's best interests suggests that the prohibition of commercial surrogacy is futile.

In a recent English case involving a foreign surrogacy agreement, Hedley J noted that 'the full rigour' of the local proscription of commercial surrogacy 'will bear on one wholly unequipped to comprehend it let alone deal with its consequences (ie, the child concerned)'. He observed that the court would almost inevitably have to make an order de facto enforcing the agreement, because 'it is almost impossible to imagine a set of circumstances in which by the time the case comes to court, the welfare of any child (particularly a foreign child) would not be gravely compromised (at the very least) by a refusal to make an order'.<sup>111</sup> One might note that their welfare would be further gravely affected if the intended parents were prosecuted, convicted and sentenced under the surrogacy legislation.

This observation raises the very real concern that *any* regulation of

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108 There are several reports of very disturbing practices in clinics in Thailand, involving human trafficking: see Hague Conference Permanent Bureau, *Private International Law Issues Surrounding the Status of Children, Including Issues Arising from International Surrogacy Agreements*, Preliminary Document No 11 of March 2011 for the attention of the Council of April 2011 on General Affairs and Policy of the Conference, pp 18–20; ABC Radio Australia, 'Thai police bust Asian surrogacy ring', 28 February 2011, at <<http://www.radioaustralia.net.au/connectasia/stories/201102/s3150620.htm>> (accessed 18 August 2011).

109 Very little attention was given to this issue in the parliamentary reports which led to the new Australian surrogacy regimes. The Joint Working Group assumed that 'the counselling requirement, together with the rule against commercial surrogacy, will preclude exploitative arrangements with third-world surrogates': *A Proposal for a National Model*, above n 61, p 14. Likewise, Ms Burney, who moved the amendment which introduced the nexus requirement for the offences in the NSW legislation clearly believed that the criminalisation of commercial surrogacy would effectively prevent it: Surrogacy Bill 2010, Legislative Assembly, *Hansard*, 10 November 2010, p 27,583.

110 (2003) 31 Fam LR 162.

111 *Re X and Y (Foreign Surrogacy)* [2008] EWHC 3030 (Fam) at [24]. See similarly, *Re L (A Minor)* [2010] EWHC 3146 (Fam). It has been noted that, in cases of immigration difficulties following international surrogacy agreements, '[i]n a number of states ad hoc, ex post facto remedies have been found with a view to reducing the harmful impact of this legal limbo for children. These remedies are ways of trying to cope with situations which are, in effect, a fait accompli: the child is already born and usually the surrogate mother does not wish to care for the child and the intending parents do': Hague Conference Permanent Bureau, above n 108, p 11.

surrogacy — altruistic as well as commercial — may be trumped by the fait accompli: if the birth mother consents to the intended parents taking responsibility for the child and indicates her unwillingness to do so herself and if the child is settled with the intended parents, the Family Court is unable to do anything other than approve the arrangement by making parenting orders in favour of the intended parents. A similar problem is likely to arise in international and intra-Australian altruistic surrogacy cases in which the requirements for parentage orders are not satisfied; in such cases, the courts will be called on to devise solutions because the surrogacy legislation supplies none.

In four separate decisions handed down in June 2011, Watts J noted the concerns that motivate the Australian criminalisation of commercial surrogacy.<sup>112</sup> In two cases, his Honour noted that the intended parents' act in entering into a commercial surrogacy agreement in Thailand was certainly illegal under Queensland law at the time the agreement was made, and referred the matter to the Queensland Director of Prosecutions. These cases give the most explicit attention to the issue of illegality in any of the reported decisions of the Australian courts. Notwithstanding this, Watts J's conclusion was the same as in the other cases: relying on the evidence that the birth mother had relinquished her responsibility and consented to the parenting orders, the outcome was consistent with the surrogacy agreements.<sup>113</sup>

In some cases, the issue has arisen as to the parental status of one of the applicants for Australian parenting orders. The Family Law Act permits persons interested in the welfare of the child to apply for parenting orders,<sup>114</sup> so in these cases it is not necessary for the courts to determine whether the genetic parents of the child born through a surrogacy agreement should be declared to be the parents of the child, and in most recent cases involving international surrogacy, the courts have not made such determinations. Watts J declined to do so in two recent cases 'because of the public policy concerns behind how current surrogacy laws have been framed in New South Wales and consistently with other places in Australia'.<sup>115</sup>

### III Choice of law in cross-border surrogacy

As we have seen, the current law is not entirely consistent in the effect given to the parties' expressed agreements in surrogacy cases. The surrogacy legislation is generally supportive of the parties' altruistic agreements, subject to controls. On the other hand, in most jurisdictions, entry into commercial agreements is criminalised. That prohibition may effectively be subverted by the parties' agreement, if the parties fully perform it. Altogether, the law and practice of the courts tend to favour party agreements relating to surrogacy. In

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112 *Dudley & Chedi* [2011] FamCA 502 at [14]; *Findlay & Punyawong* [2011] FamCA 503 at [15]–[16]; *Hubert & Juntasa* [2011] FamCA 504 at [11]; *Johnson & Chompunut* [2011] FamCA 505 at [11].

113 *Dudley & Chedi* [2011] FamCA 502; *Findlay & Punyawong* [2011] FamCA 503.

114 Family Law Act 1975 (Cth) s 65C(c).

115 *Hubert & Juntasa* [2011] FamCA 504 at [18]; *Johnson & Chompunut* [2011] FamCA 505 at [18].

this part, I briefly consider whether this apparent preference for party autonomy might be extended by allowing the parties to choose the law that applies to their surrogacy agreement.

This is a rapidly developing area; limited attention has been given to the suitability of contractual choice of law in the context of either intra-Australian or international surrogacy. It has been suggested that the parties should be permitted expressly to choose the legal regime to govern their surrogacy arrangement, subject to controls.<sup>116</sup> That would not be directly possible in the current Australian legislation relating to commercial surrogacy, which is intended to apply with mandatory effect. However, the analysis above shows that the parties' agreement inevitably has a significant indirect effect so far as the current practice of the Family Court is concerned in applications for parenting orders following international commercial surrogacy arrangements. The parties, especially intended parents, currently have the ability indirectly to choose the governing law for at least some aspects of the agreement by travelling and by physically relocating to a foreign legal system in which they can access commercial surrogacy.<sup>117</sup> The possibility of an indirect choice of the applicable law in this way suggests that the parties' direct agreement should be given greater recognition in both intra-national and international cases. The following discussion relates to whether the parties should be permitted expressly to choose the law to determine aspects of their surrogacy agreement.<sup>118</sup>

The parties already have some ability expressly to choose the governing law for some issues in international family law,<sup>119</sup> and it has recently been suggested that the parties' express choices of law should be recognised more broadly in international family law.<sup>120</sup> Enforcing express choices of law is suggested to be relatively superior to other methods of determining the applicable law: it is said to promote certainty and predictability; to be relatively simpler to apply; to uphold the parties' reasonable expectations; to reduce cost and complexity for the parties and the courts; and to prevent opportunistic forum shopping by one party.<sup>121</sup> Permitting expressed choice in the context of surrogacy is somewhat controversial but it warrants further detailed consideration. If expressed choice of law were to be permitted in cross-border surrogacy cases, it would be essential to consider what

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116 E A O'Hara and L E Ribstein, *The Law Market*, Oxford University Press, New York, 2009, p 178.

117 This raises questions of economic discrimination against less wealthy parents: Parliament of Tasmania, Legislative Council Select Committee, *Report on Surrogacy*, (No 21), 2008, pp 22–3 (arguing in favour of a uniform scheme in Australia).

118 Interestingly, this may be an area where *dépeçage* (splitting of the contract for the purposes of determining the governing law) is likely. This refers to the situation where the parties intend that different laws govern different parts of the contract. The parties may wish the law of the place where the birth mother lives to govern some aspects of the agreement, and the law of the place where the intended parents live to govern other aspects.

119 Eg, the parties can choose the law to determine their entitlement to property: *In the Marriage of Hannema* (1981) 7 Fam LR 542.

120 E Jayme, 'Party Autonomy in International Family and Succession Law: New Tendencies' (2009) 11 *Yearbook of Private International Law* 1.

121 See M Keyes, 'Financial agreements in international family litigation' (2011) 25 *AJFL* 167 at 176–177.

protections should be included for the sake of birth mothers and children. These might be developed by analogy to other kinds of contracts where there are significant protective concerns, such as consumer and employment contracts.<sup>122</sup>

Under the state and territory surrogacy legislation, the parties cannot directly choose the law to determine the legal consequences of the surrogacy agreement, and in particular, whether a parentage order can be made. It would be controversial to permit this, but there are good reasons to consider doing so, including the child's best interests, improving certainty and predictability, and giving effect to the parties' reasonable expectations. If the parties' express choice were to be permitted, then it would be necessary to determine minimal requirements which should be met in all cases, taking into account the objectives of regulating access to surrogacy.<sup>123</sup>

I suggested above that the parties should be permitted to choose the law to determine the birth mother's entitlement to reimbursement in cross-border surrogacy agreements, and that the current law arguably already allows this. The birth mother is likely to be in a situation of relative economic disadvantage to the intended parents and if an express choice of law were to be permitted it would also be necessary to consider what specific protections are required to protect the birth mother. As in the current domestic law, the birth mother's agreement to relinquish the child or to consent to the arrangement after the child has been born should not be enforceable in Australia, whatever the proper law of the contract.

Struycken has argued that enforcing express choices of law in the context of surrogacy contracts is inappropriate, because surrogacy agreements differ in material respects from commercial contracts,<sup>124</sup> and because permitting

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122 In Europe, the parties' express choices of law are ineffective to exclude the application of protective mandatory rules of the consumer or employee's country of residence: Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (the Rome I Regulation), Arts 6 and 8. This Regulation also specifically stipulates that overriding mandatory provisions of forum law cannot be excluded: Art 9(2). This relates to 'provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation' (Art 9(1)). These kinds of interests may well be relevant in international surrogacy cases. When express choice of law is permitted in international family law, the parties' choice is usually restricted to one of several nominated countries to which at least one of the parties has a personal connection: EU Council Regulation No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation, art 3(1); Hague Convention on the Law Applicable to Matrimonial Property Regimes 1978, Art 3.

123 For example, in the Report of the Investigation into Altruistic Surrogacy conducted by the Queensland Parliament in 2008, the committee recommended that a requirement of *Australian* residency for *at least one* of the intended parents should be applied: above n 41, p 77. That recommendation was not adopted. Instead the Queensland legislation requires that both intended parents are Queensland residents, which seems to be designed to prevent forum shopping, but the requirement of one parent being an Australian resident may be sufficient.

124 A (Teun) V M Struycken, 'Surrogacy, a New Way to Become a Mother? A New Private International Law Issue' in K Boele-Woelki, T Einhorn, D Girsberger and S Symeonides (Eds), *Convergence and Divergence in Private International Law — Liber Amoricum Kurt*

express choice would allow suspect choices of more liberal regimes.<sup>125</sup> Struycken proposed instead that the applicable law for most issues should be the law of the birth mother's habitual residence, subject to the law of the intended mother's habitual residence.<sup>126</sup> The birth mother typically remains in her home jurisdiction throughout the surrogacy arrangement, so the result is likely to be similar for some issues at least, whether an express choice of law is permitted or not. The intended parents are likely to prefer the law of the birth mother's home, indirectly by choosing the location of the birth mother or directly by an express choice of law. Existing restrictions on express choice of law in the contract choice of law rules, supplemented by specific protections that could be developed as relevant to the surrogacy context, are probably capable of addressing these concerns. Consideration should be given to including specific provisions in the surrogacy legislation setting out whether the parties are able to choose the governing law of their agreement and stipulating specific limitations to such choices.<sup>127</sup>

#### IV Conclusion

This article shows that admirable and wholly justified policy objectives can be undermined, frustrated and avoided in cross-border surrogacy situations. The current Australian law regulating surrogacy agreements requires improvement to take into account the specific and unusual features of surrogacy agreements in intra-Australian and international contexts. The above discussion suggested that altruistic surrogacy may be too heavily regulated and that, at the least, the state and territory surrogacy legislation should clearly allow the courts some discretion to make parentage orders in exceptional cases, including some in which the nexus requirements are not satisfied. It must be accepted that the prohibition of commercial surrogacy has signally failed to prevent this practice. The anomalous situation has developed that Australian courts effectively uphold the results of agreements which are prohibited by state and territory legislation and are required to do so for the sake of the best interests of the child. Careful consideration should be therefore be given to decriminalising commercial surrogacy which would allow regulation of the practice in order to provide better protection for birth mothers and children,<sup>128</sup> and to considering more carefully how international commercial surrogacy should be dealt with in Australian litigation. Better cooperation between the Commonwealth on the one hand and the states and territories on the other is

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*Siehr*, Schulthess/Eleven International Publishing, Zürich/The Hague, 2010, p 368 (denying the direct relevance of commercial choice of law rules, while still accepting that those rules 'may be a source of inspiration').

125 Ibid, p 369.

126 Ibid, pp 369–71.

127 Currently, only the Tasmanian legislation specifically indicates what effect should be given to the parties' express choices: Surrogacy Contracts Act 1993 (Tas) s 7. This provision makes it clear that the legislation applies with mandatory effect irrespective of the proper law of the contract.

128 It would permit the regulation of commercial surrogacy within Australia, along similar lines to the regulation of altruistic surrogacy. This might include requirements of counselling for the parties, which would provide more protection for parents and children, and record-keeping so that children are able to access information about their genetic background.

essential in order to reduce the incoherence of the legal response to international commercial surrogacy and the confusion this creates. As part of a general reconsideration of surrogacy, the possibility of allowing the parties expressly to choose the governing law of their agreement should be contemplated.

International commercial surrogacy is increasing at a dramatic rate. An international problem of this highly unusual type, raising serious questions of protection of vulnerable children and women, can never be satisfactorily resolved unilaterally. Australia should therefore support and actively participate in the continuing work of the Hague Conference on Private International Law on this important and pressing issue.<sup>129</sup>

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<sup>129</sup> Hague Conference on Private International Law, Council on General Affairs and Policy of the Conference, Conclusions and Recommendations adopted by the Council, 5–7 April 2011, pp 3–4, at <[http://www.hcch.net/upload/wop/genaff\\_concl2011e.pdf](http://www.hcch.net/upload/wop/genaff_concl2011e.pdf)> (accessed 18 August 2011).