



# As the stork flies from India to Australia

## Intercountry commercial surrogacy arrangements

By Aneita Browning

The old story of the stork as 'bringer of the bundle of joy' is a fitting symbol for the surrogate mother as deliverer of a baby for prospective parent/s.

**H**owever, the trouble-free, stress-free delivery to the doorstep or down the chimney (as the story goes) is where the analogy ends. This article provides a snapshot of the current legal landscape of the fertility-tourism industry in India. A brief explanation of medico-tourism and surrogacy is followed by observations about the absence of an international law covering intercountry surrogacy, the lack of regulation for fertility clinics and services in India, the difficulties of reform, deficiencies with the draft legislation, and the possible illegality that may arise from intercountry arrangements. Case studies are included to shed light on the legal complexities and the implications that may arise for Australians hoping to start their family with the aid of an Indian surrogate.

### MEDICO-TOURISM

Simply put, medico-tourism is travel for medical treatment.<sup>1</sup> Over the past decade, India has become a 'favourable destination for foreign couples' accessing fertility-tourism, or looking for 'cost-effective' assisted reproductive technology (ART) treatments and services including commercial surrogacy.<sup>2</sup> A range of factors have been identified as contributing to the development of this fertility-tourism industry in India, including advances in medical technology, trends for outsourcing, globalisation, lower labour costs, and the absence of ART regulation in India.<sup>3</sup> Accessibility, availability and affordability have made it a popular destination with Australians for intercountry commercial surrogacy.<sup>4</sup>

**SURROGACY**

Surrogacy, or the delivery of a child on behalf of another person who is intended to be the parent/s,<sup>5</sup> is not a new phenomenon.<sup>6</sup> However, until the advent of ART, only traditional or genetic surrogacy was possible.<sup>7</sup> Through ART procedures, such as IVF, gestational or host surrogacy became possible. This means that there is no genetic link between 'surrogate' or 'host mother' and child.

**Australia**

Back in 1988, the Kirkman sisters made headlines with the first altruistic, gestational surrogacy in Australia.<sup>8</sup> Their story became a trigger for legislative reform in Australia. While each state approached altruistic surrogacy differently, none permitted commercial surrogacy.<sup>9</sup>

A more recent series of reforms has occurred in Australia, partly in an attempt to harmonise the laws nationally.<sup>10</sup> As a consequence of these reforms, it is illegal for most Australians to enter commercial surrogacy agreements overseas.<sup>11</sup> There is still no national uniformity to the laws.

**INTERNATIONAL LAW**

**Rights of the child**

Australia is a party to international laws that protect the rights of children.<sup>12</sup> However, no international treaty currently deals with protecting the rights of children born via intercountry surrogacy arrangements.

International law covers intercountry adoption through the *Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*. The Hague Convention lays out the 'international principles that govern intercountry adoption', and 'aims to protect children and their families against the risks of illegal, irregular, premature or ill-prepared adoptions abroad'.<sup>13</sup>

There are obvious parallels between intercountry adoption and intercountry surrogacy. However, the rights and interests of surrogate-born children are not protected by an equivalent treaty. This is an area of children's rights deserving of attention to ensure international adherence to the *United Nations Convention on the Rights of the Child (CROC)*.<sup>14</sup>

**Reproductive rights**

The rights of adults are protected by the *Universal Declaration of Human Rights*.<sup>15</sup> Article 16(1) provides that individuals 'have the right to marry and found a family'.<sup>16</sup> However, any right to reproduction that is asserted under Article 16 must be balanced against other, competing rights such as those arising under the CROC.

**REGULATION OF COMMERCIAL SURROGACY IN INDIA**

It has been said that 'surrogacy in India is legitimate because no Indian law prohibits' it.<sup>17</sup> Prior to 2005, there was no regulation at all of the Indian ART industry, including surrogacy arrangements.<sup>18</sup>

**ICMR Guidelines**

In an attempt to fill the legal and regulatory void, the Indian

Council for Medical Research (ICMR), together with the National Academy of Medical Sciences (NAMS), issued the *National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India* (2005) (the ICMR Guidelines).<sup>19</sup>

As noted by Mr Hota, Secretary of the Ministry of Health and Welfare in India, the ICMR Guidelines were deemed necessary because:<sup>20</sup>

'Many of these clinics do not have adequate trained manpower and infrastructure facilities to deliver these highly sophisticated technologies and even services provided by some of these clinics are highly questionable. In some cases, the infertile couple are being cheated by providing relatively simple procedure [sic] and charged for complicated and expensive procedures.'

The ICMR Guidelines aimed to 'ensure that ART clinics in India are accredited, regulated and supervised to assure the patients as well as the public that our ART clinics offer services that are at par with those available anywhere in the world'.<sup>21</sup> This includes donor clinics, embryo storage and surrogacy services.

Unfortunately, however, as the title suggests, these are merely industry guidelines and are not enforceable or justiciable.<sup>22</sup>

**TIME FOR LEGISLATIVE REFORM IN INDIA**

**Calls for industry reform**

The need for legislative reform of fertility-tourism in India was highlighted in 2008 by a couple of prominent case studies.<sup>23</sup>

**Baby Manji Yamada<sup>24</sup>**

In late 2007, a Japanese couple entered a gestational surrogacy agreement with a woman in Gujarat. The egg was from a donor and the sperm from the male parent-to-be. The couple divorced about one month prior to Manji's birth in July 2008. The entry requirements of Japan meant that either the intended mother needed to take custody of the baby, which she declined to do, or the father had to adopt her. Adoption was not possible because in India it was prohibited for a single man to adopt a girl child. The surrogacy contract vitiated the surrogate mother from parental responsibility. In effect, the baby was parentless and stateless. Two months after her birth, the Indian Supreme Court directed that an identity certificate and passport be issued. Finally, Manji entered Japan with her father in November 2008.

**Israeli couple<sup>25</sup>**

An agreement was entered into by male partners from Israel, Yonaton and Omer Gher, and a gestational surrogate in Mumbai. Yonaton provided the sperm and the egg was from a donor. Evyatar was born in October 2008 and was able to enter Israel with his fathers within a month. There was no legal action involved, but their story gained attention because it highlighted the potential for conflict of laws in these arrangements. At that time, homosexuality and surrogacy were both legal in Israel but surrogacy was not available to gay men, and in India homosexuality was a crime,<sup>26</sup> but men could lawfully enter a surrogacy agreement.

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### The first draft: the Bill and Rules (2008)

The cases highlighted a growing awareness that there was a lack of public information about the inner workings of the clinics and a lack of transparency and accountability.<sup>27</sup>

The ICMR prepared draft legislation which principally mirrored the earlier voluntary ICMR Guidelines. The *Assisted Reproductive Technology (Regulation) Bill (2008)* (the 'Bill (2008)') and the *Assisted Reproductive Technology (Regulation) Rules (2008)* (the 'Rules (2008)') were intended to 'provide a national framework for the regulation and supervision of assisted reproductive technology and matters connected therewith or incidental thereto'.<sup>28</sup>

This first attempt to legislate ART services and surrogacy in India attracted some criticism. In August 2009, the Law Commission of India released its report titled *The need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy*, which noted that the draft was 'full of lacunae' and 'incomplete'.<sup>29</sup>

The Law Commission of India concluded:

'Active legislative intervention is required to facilitate correct uses of the new technology ie ART and relinquish the cocooned approach to legalisation of surrogacy adopted hitherto. The need of the hour is to adopt a pragmatic approach by legalising altruistic surrogacy arrangements and prohibit commercial ones.'<sup>30</sup>

Other comments about the Bill (2008) and Rules (2008) included that it would be more appropriate to have separate legislation for ART management and surrogacy services, and that the legislation 'dwells on the infrastructure for clinics but underplays the side-effects of the procedure'.<sup>31</sup>

Despite the urgent need for laws covering ART and surrogacy, the Bill (2008) and Rules (2008) were not adopted by the Indian Parliament.

### THE 2010 BILL AND RULES

It is an understatement to say that finding an ART and surrogacy legal regime to satisfy all the competing interests is difficult. For example, balancing the Law Commission's call for altruistic surrogacy against the reluctance of the fertility-tourism industry to curtail profitable practices such as commercial surrogacy is no easy task.

Earlier this year, the *Assisted Reproductive Technology (Regulation) Bill (2010)* (the 'Bill (2010)') and the *Assisted Reproductive Technology (Regulation) Rules (2010)* (the 'Rules (2010)') were tabled, but have not been enacted.

The Bill (2010) and Rules (2010), like the 2008 versions, mirror the ICMR Guidelines, albeit with a few improvements. There is still further room for amendment to protect the rights and interests of all the parties affected by a surrogacy agreement, in particular the child and the surrogate.

Three areas of surrogacy arrangements that received some, but not sufficient, attention – the contract, insurance and citizenship – are briefly addressed here.

#### Surrogacy contract

A surrogacy contract is not a contract for an ordinary business purpose or transaction – it is a contract for the bringing about of the birth of a child. Invalidity of the contract or a breach by

a party could have ramifications not easily remedied. For this reason, caution is needed in drafting and executing a contract to effectively address the rights, duties and obligations of the parties involved, and to ensure that appropriate consequences and remedies are provided for.

#### Legality and enforceability

Commercial surrogacy contracts are legal and enforceable in India.<sup>32</sup> However, extra-territorial enforceability in Australia is questionable. For example, Tasmanian law currently provides that 'a surrogacy contract is void and unenforceable wherever the contract is made and whatever law may be the proper law of the contract'.<sup>33</sup> This prompts the question as to how a Tasmanian resident could be compelled to fulfil their contractual obligations in India.<sup>34</sup>

If adopted, the Bill (2010) will impose a new legal provision requiring documentary support for surrogacy. Pursuant to s34(19), Australian intending parent/s will need to provide documentation from the embassy or foreign ministry that Australia permits surrogacy and that the child will be permitted entry, irrespective of the biological relationship to the parent/s.

#### The contract

In the current, unregulated fertility-tourism industry, there is no standard agreement for commercial surrogacy. Clinics are free to regulate their own agreements without state interference.<sup>35</sup>

The ICMR Guidelines<sup>36</sup> contain pro-forma contracts, which are duplicated in the Rules (2010). However, the 'Agreement for Surrogacy'<sup>37</sup> and the 'Contract between the parties and the surrogate'<sup>38</sup> are far from sufficient for intercountry commercial surrogacy.

#### Conditions

The validity of some of the conditions in the Rules (2010) draft contracts is questionable. For example, the surrogate is to 'certify' that she will

- (i) 'avoid sexual intercourse during the pregnancy' and that
- (ii) 'I and my husband have had no extramarital relationship in the last six months'.<sup>39</sup>

What, if any, consequence would arise is not addressed.

#### Entering the contract

For intending parent/s, it probably goes without saying that investing in legal advice here and overseas is essential. Parents-to-be would also be well advised to inform themselves of their home-state surrogacy laws, the ICMR Guidelines and any developments in the Indian reforms.

The surrogate's contractual burden is extremely onerous. For example,<sup>40</sup> the surrogate foregoes her autonomy and the right to manage her health and pregnancy. She may be required to undergo drug therapies, foetal reduction, abortion and surgical delivery. Because of the associated risks for the surrogate, it is paramount that she has access to independent medical and legal advice to ensure her free and informed consent and to give effect to the contract.<sup>41</sup>

**Insurance**

The ART interventions involved with gestational surrogacy and the common practice of scheduled birthing<sup>42</sup> not only medicalise pregnancy and childbirth, but carry greater health risks beyond those normally associated with pregnancy.<sup>43</sup> Complications for surrogates can include unrelated medical conditions, infertility and death.

A positive amendment that can be found in the Bill (2010) is that the commissioning parent/s are to 'ensure that the surrogate mother and the child she deliver [sic] are appropriately insured until the time the child is handed over' and the surrogate 'is free of all health complications arising out of surrogacy'.<sup>44</sup> However, it is unclear whether the insurance is to include health, life and/or disability cover.

**UK surrogate**

In 2005, British surrogate Ms Natasha Catalbiano died from a ruptured aorta approximately 90 minutes after giving birth.<sup>45</sup> Following the surrogate's death, a dispute arose between her family and the commissioning parents around the payment of expenses and legal costs connected with her death.<sup>46</sup>

Ms Catalbiano's story, *inter alia*, highlights the risks for the surrogate and her family, and why comprehensive insurance is imperative.

**Citizenship and identity**

As seen in the Baby Yamada case, surrogacy can raise questions of statehood and citizenship. The Bill (2010) and the Rules (2010) seek to address this by providing that a child born as the result of gamete donation or surrogacy for a foreigner 'even though born in India, shall not be an Indian citizen'.<sup>47</sup> However, the inclusion of s34(19) provides that: 'if the foreign party seeking surrogacy fails to take delivery of the child born...the local guardian shall be legally obliged to take delivery of the child and be free to hand the child over to an adoption agency...In case of adoption or the legal guardian having to bring up the child, the child will be given Indian citizenship.'

This provision may be activated in a scenario like the Baby Yamada case,<sup>48</sup> where parent/s do not return or where the child is not related to the intended parent/s. Clearly the consequences for the parties, particularly the child, are extremely serious.

**Canadian twin cases**

Canadian immigration,<sup>49</sup> like Australia,<sup>50</sup> requires a genetic connection between the baby and at least one parent for eligibility for 'citizenship by descent'. These two cases, both involving the birth of twins, are exemplars of the risks associated with an unregulated ART industry.

Case 1:<sup>51</sup> In 2005, the DNA tests of the twins confirmed that there was a genetic connection between the daughter >>

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and the parents, but not between the son and the parents. The daughter was granted citizenship by descent, but it took approximately six years for the couple to gain an entry visa for their son.

Case 2:<sup>52</sup> Last year, intending parents engaged a surrogate to carry their embryos. After the delivery, they sought travel documents from the Canadian High Commission in New Delhi, but DNA tests revealed that there was no genetic relationship between the two babies and either the parents-to-be or the surrogate. The embryos that had been implanted were from an unknown couple. The children were therefore not eligible for citizenship by descent.<sup>53</sup>

Such cases are tragic for the intending parent/s, but raise issues about citizenship and identity for the child; and there are also implications for the person/s with a claim to the wrongly implanted embryo.

### AT HOME IN AUSTRALIA

#### Family Court matters

Increasingly, the Family Court hears parenting matters where the subject child was born via an 'illegal' intercountry surrogacy arrangement.<sup>54</sup> The tendency, until recently, has been for judges to deal with the matter 'in the best interests of the child' but not deal with the issue of the unlawfulness of the surrogacy, which is not within the Family Court's jurisdiction.<sup>55</sup>

#### Dudley/Dennis case

Earlier this year, the Family Court heard two cases relating to the same family<sup>56</sup> – *Dennis and Anor & Pradchaphet*<sup>57</sup> and *Dudley and Anor & Chedi*.<sup>58</sup> The commissioning parent's three sons were born in Thailand on the same day in August 2009 to two surrogates. Both commercial surrogacies were contrary to Queensland law.<sup>59</sup> *Dennis*, the case for the first boy, was heard in the Family Court by Stevenson J. The illegality was not an issue for Stevenson J, but it was a concern for Watts J in *Dudley* for the twin boys.<sup>60</sup> His Honour said:<sup>61</sup>

'There is a general policy question as to whether or not I should make the requested orders, which could be perceived in some sense to sanction acts which were illegal in Queensland at the relevant time and which were against public policy (such public policy now being recognised by way of legislation through virtually the whole of Australia in making those acts illegal, with possible severe penalties).

However, the paramount consideration for my decision about the orders sought is the best interests of the twins...' (footnotes omitted)

Watts J went further:<sup>62</sup>

'It appears that what the applicants have done in this case is illegal. I will direct the Registrar to send a copy of these reasons for judgment to the Office of the Director of Public Prosecutions, Queensland for consideration of whether a prosecution should be instituted against the applicants under s3 *Surrogate Parenthood Act* 1988 (Qld) and if requested, the Registrar is to supply any document on the court file to the Office of the Director of Public Prosecutions, Queensland.'

Another Queensland case also recently referred by Watts J to

the DPP is *Findlay and Anor & Punyawong*.<sup>63</sup> It remains to be seen how these cases unfold in the hands of the DPP.

### CONCLUSION

This article has provided only a brief glimpse into the legal landscape of intercountry commercial surrogacy arrangements. The case studies provide a reminder that there are no guarantees of a successful surrogacy and, when things go wrong the consequences for the commissioning parent/s, the surrogate and the child/ren can be dire. It is paramount that the rights and interests of those parties are protected ahead of the profit interests of the fertility-tourism industry. The priority really is for the prompt implementation of comprehensive ART and surrogacy laws in India.

While surrogacy may be an increasingly familiar birth story in Australia, anyone contemplating parenthood through an Indian surrogate should fully understand the good, the bad and the ugly of fertility-tourism and the scope of the legal issues. Intercountry commercial surrogacy may (like the stork) deliver a bundle or bundles of joy, but it is certainly no easy path to parenthood and may deliver a bundle of problems too. ■

**Notes:** **1** See J Pogson, 'More and more Australians are heading overseas for medical care, but what are the potential pitfalls?', 28 July 2011, ABC, last accessed 4 October 2011, <http://www.abc.net.au/health/features/stories/2011/07/28/3277842.htm>. **2** Government of India, Law Commission of India, 'Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy', August 2009, last accessed 4 October 2011, Part I: Introduction at 1.7, <http://lawcommissionofindia.nic.in/reports/report228.pdf>. **3** K Points, 'Commercial surrogacy and fertility tourism in India: the case of baby Manji', The Kenan Institute for Ethics at Duke University, p3. **4** There are no reliable statistics available on the number of Australians who seek ART and surrogacy services in India each year. **5** For an explanation on the meaning of surrogacy, see the Report at 1.3 to 1.6. **6** For example, in some Torres Strait Islander traditions, surrogacy is customary. (P Ban, 'Torres Strait Islander Customary Adoption', *Family Matters*, 35, 1993) Surrogacy is also mentioned in the Bible. **7** In a traditional or genetic surrogacy, the egg of the birth mother is used to create the embryo, which means she is also the biological mother. **8** Linda Kirkman describes herself as 'gestational mother' for her niece Alice (the embryo was from her sister Maggie's egg and sperm from a donor). For an interesting perspective on surrogacy see Linda Kirkman's article, 'The good sense about surrogacy', *Viewpoint* (2), 20-24, 2010, last accessed 4 October 2011, [http://latrobe.academia.edu/LindaKirkman/Papers/163414/The\\_good\\_sense\\_about\\_surrogacy](http://latrobe.academia.edu/LindaKirkman/Papers/163414/The_good_sense_about_surrogacy). Also, see L Kirkman, 'Altruistic surrogacy: a new twist to an old practice' in *Precedent*, issue 88 (September/October 2008), focusing on reproductive rights and biomedical law, Australian Lawyers Alliance, ISSN 1449-7719, pp20-23. **9** See J Seymour 'ART, surrogacy and legal parentage: a comparative legislative review', Victorian Law Reform Commission, 2004. **10** See Standing Committee of Attorneys-General Australian Health Ministers' Conference Community and Disability Services Ministers' Conference, Joint Working Group, 'A proposal for a national model to harmonise regulation of surrogacy', January 2009. **11** The exceptions are Northern Territory and Tasmania. **12** *United Nations Convention on the Rights of the Child and Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption*. **13** Attorney-General's Department, Australian Government, publication date 22 September 2009, last accessed 4 October 2011, [http://www.ag.gov.au/www/agd/agd.nsf/Page/IntercountryAdoption\\_TheHagueconventiononintercountryAdoption](http://www.ag.gov.au/www/agd/agd.nsf/Page/IntercountryAdoption_TheHagueconventiononintercountryAdoption). **14** See UNICEF, last accessed 4 October 2011, <http://www.unicef.org/crc/>. **15** See United Nations, last accessed 4 October 2011, <http://www.un.org/en/documents/udhr/>. **16** Article 16.1 *Men and women of full age*,



without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. **17** Law Commission of India, 'Need for legislation to regulate assisted reproductive technology clinics as well as rights and obligations of parties to a surrogacy', Report 228, August 2009, Part III: 'Surrogacy – bane or boon' seminar, at 3.5(a). **18** Report 228, at 1.14.

**19** Ministry of Health and Family Welfare Government of India, *National Guidelines for Accreditation, Supervision & Regulation of ART Clinics in India Guidelines*, 2005, New Delhi, last accessed 4 October 2011, [http://icmr.nic.in/art/art\\_clinics.htm](http://icmr.nic.in/art/art_clinics.htm). **20** Shri Prasanna Hota, Government of India in the *Foreword* to ICMR Guidelines.

**21** ICMR Guidelines, p4. **22** Report 228, at 3.5(b). **23** Report 228, at 1.15 to 1.17. **24** *Baby Mani Yamada v Union of India* JT 2008(11) SC 150. **25** See Report 228 at 1.17 and, also, D Suryanarayan, 'Made-in-Mumbai baby for Israeli gay couple', *Daily News and Analysis*, published 18 November 2008, last accessed 4 October 2011, [http://www.dnaindia.com/mumbai/report\\_made-in-mumbai-baby-for-israeli-gay-couple\\_1207405](http://www.dnaindia.com/mumbai/report_made-in-mumbai-baby-for-israeli-gay-couple_1207405).

**26** Homosexuality was an 'unnatural offence' under the *Indian Penal Code* s377. In 2009, the interpretation of the section was read by the High Court in Delhi as not including consensual homosexual acts. **27** K Points, 'Commercial surrogacy and fertility tourism in India: the case of baby Manji', The Kenan Institute for Ethics at Duke University, p4. **28** *Assisted Reproductive Technology (Regulation) Bill* (2008), 'Statement of Objects and Reasons' **29** At 4.2. **30** Report 228 at 4.1. **31** C Shah, 'Regulate technology, not lives', *Infochange News & Features*, December 2010, last accessed 4 October 2011, <http://infochangeindia.org/agenda/ethics-of-medical-technologies/regulate-technology-not-lives.html>.

**32** The *Assisted Reproductive Technology (Regulation) Bill* (2010) retains the legal enforceability of the surrogacy contract: s34(1.) The *Indian Contract Act* is applicable to the legality and enforceability of a contract and the *Code of Civil Procedure* s9 applies to enforceability. (Report 228 at 3.5(a) and (c)). **33** Section 7 Effect of Contract, *Surrogacy Contracts Act 1993* (Tas). Under the new NSW legislation, the *Surrogacy Act 2010* 'a surrogacy arrangement is not enforceable' (s6) and penalties apply (s8).

**34** See, for example, Dr Yuki Yamada in the *Baby Manji Yamada* case who refused to collect the child. **35** A Pande, 'It may be her eggs but it's my blood: surrogates and everyday forms of kinship in India', p381 citing Ternan (2006). **36** Which are duplicated in the draft Rules, s34(1). **37** *Assisted Reproductive Technology (Regulation) Rules* (2010) Form J. **38** *Assisted Reproductive Technology (Regulation) Rules* (2010) Form U. **39** For an example of a comprehensive and more appropriate contract, see M Carnelley and S Soni, 'Surrogate Motherhood Agreements', *De Rebus*, May 2011, for a sample South African Surrogate Motherhood Agreement (SMA). **40** This is only one example. There is a range of contractual obligations upon the surrogate, the principle one being to surrender the child or children born to the intending parent/s. **41** Many women who act as surrogates are illiterate, have little business experience and English may be their second language. (See A Pande, 'It may be her eggs but it's my blood: surrogates and everyday forms of kinship in India'). **42** Surrogate births generally involve caesarean section or induced labour. See Pande, note 35 above. **43** I Qadeer, 'Social and ethical basis of legislation on surrogacy: need for debate', *Indian Journal of Medical Ethics*, Vol. VI, No. 1, January-March 2009, p28.

**44** Section 34(24). **45** Natasha Catalbiano was a 29-year-old mother of two and part-time nurse who was a genetic surrogate for a couple who already had five children. B Hoyle, 'Surrogate mother dies 90 minutes after giving birth', *The Times*, January 29 2005, last accessed 4 October 2011, <http://www.timesonline.co.uk/tol/news/uk/article507989.ece>. **46** *Ibid.* **47** Section 35(8). **48** For another example, see M Wade, 'Babies left in limbo as India struggles with demand for surrogacy', *The Sydney Morning Herald*, 1 May 2010. In this case, Jan Balaz and Susan Lohle were refused passports for their twin sons, Nikolas and Leonard, because German nationality 'is determined by the mother'. **49** *Citizenship Act* 1947. See Minister of Public Works and Government Services Canada, 'First generation limit to citizenship by descent', published 17 March 2010, last accessed 4 October 2011, <http://www.cic.gc.ca/english/resources/publications/citizenship.asp>. **50** It is a requirement of the *Australian Citizenship Act 2007* that a child born overseas as a result of a surrogacy arrangement may be eligible for Australian citizenship by descent if at least one of their intended/commissioning parents is an Australian citizen and the person with legal guardianship of the child consents to the application'. (Children born through Surrogacy

Arrangements applying for Australian Citizenship by Descent, [http://www.india.embassy.gov.au/ndli/vm\\_surrogacy.html](http://www.india.embassy.gov.au/ndli/vm_surrogacy.html)). **51** R Aulakh, 'Couple fights federal surrogacy policy to bring their boy back to Canada', *The Star*, published 20 August 2011, last accessed 4 October 2011, <http://www.thestar.com/news/article/1042222--couple-fights-federal-surrogacy-policy-to-bring-their-boy-back-to-canada>. **52** R Aulakh, *Ibid.* **53** The author has endeavoured to find out the final outcome for this case without success. In one media report, Aulakh suggests that the couple returned to Canada and the children ended up in an Indian orphanage. **54** Illegal intercountry surrogacy arrangements are likely to become more prevalent since the surrogacy law reforms around Australia. **55** See, for example, the remarks of Brown J in *Re Mark*: an application relating to parental responsibilities [2003] FamCA 822 (28 August 2003) at [94]: 'The fact that such an agreement would be illegal in Victoria, by virtue of the provisions of the *Infertility Treatment Act* 1995 (Vic), is not a relevant consideration.' **56** The two matters were allocated different pseudonyms under the Family Court process. **57** [2011] FamCA 123 (22 February 2011). **58** [2011] FamCA 502 (30 June 2011). **59** This was under *Surrogate Parenthood Act* 1988 which was replaced by *Surrogacy Act* 2010 (Qld), but the illegality of commercial arrangements has not altered. Under s56, commercial surrogacy arrangements are prohibited and the maximum penalty is 100 penalty units or three years imprisonment. Section 54 applies the legislation to Queenslanders, regardless of where the offence occurs. **60** At [13]-[19]. **61** At [37]-[38]. **62** At [44]. **63** [2011] FamCA 503 (30 June 2011).

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