THE AUSTRALIAN CARTEL PROHIBITIONS:
TWENTY-TWO SPURIOUS OR LUDICROUS "ARGUMENTS" ADVANCED BY POLITICIANS, TREASURY AND/OR THE ACCC TO "JUSTIFY" ABJECT DEFINITIONAL FAILURE

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1. There is no significant problem of over-reach or uncertainty because Australia has condoned similar problems in the context of s 4D for over 30 years.
2. There is no significant problem of over-reach because the decision of the High Court in South Sydney somehow saves the day.
3. There is no significant problem of over-reach given the anti-overlap provisions (eg s 45(6) and s 44ZZRS, as tested and failed in the Visy decision by the High Court in 2003).
4. The ACCC has not encountered issues in relation to joint ventures in the recent past so there can be no problem in the future with the proposed joint venture exceptions.
5. The Explanatory Memorandum and Supplementary Explanatory Memorandum enable the courts to arrive at sensible purposive interpretations.
6. Authorisation and, in the case of collective bargaining, notification, are available for those who want to secure immunity or commercial certainty (and who have a lot of spare time and money).
7. The ACCC will exercise its discretion wisely and the exercise of discretion will be controlled by the MOU with the CDPP and by ACCC guidelines that are high-level and non-binding.
8. The CDPP will prosecute only cases where there is evidence that clearly shows the commission of a cartel offence (be comforted by what happened in the Vizard, Haneef and Pratt cases).
9. While there are examples of over-reach and under-reach, the cartel amendments to the TPA achieve a sound "balance".
10. There are no better overseas legislative models – for example, let's forget about the Canadian model that has been in the pipeline for many years and that was legislated in March 2009.
11. The approach adopted in the cartel amendments follows the OECD recommendations on the measures necessary for countering serious cartel conduct (forget about the concern of the OECD to avoid per se prohibitions that catch conduct that is efficiency-enhancing).
12. The Government has consulted extensively and has considered all submissions made as a result of that consultation.
13. It was premature to consider the ACCC proposals on "understanding" before the cartel amendments were passed.
14. The law abiding have nothing to fear – this law is aimed at evil cartelists.
15. Lawyers have no right to complain given that the cartel amendments are likely to be a stimulus package for them.
16. The Sally Robbins defence as invoked by lawmakers in the Senate Economics Committee hearing: we did our best before we broke down.

17. The priority is to get the cartel amendments in place. Any significant problems can be resolved by amendments later.
18. The statutory details don't matter – since cartel offences are triable by jury all that matters are high level "pop" messages that juries can understand. The Federal Court and the High Court should ignore the wording of the statutory provisions and get with Graeme Samuel's latest vibe in the media.
19. Cartel conduct is like masturbation - executives "should simply stop it" (sermon by Minister Craig Emerson, as reported in AFR 26 August 2009 p 11 – he is the one who appears to have gone blind).
20. There can be no sympathy for lawyers who try to second-guess the line between criminal and civil cartel conduct (what a pathetic red herring and attempted smokescreen – the obvious concern of lawyers is about the over-reach and uncertainty of the civil and criminal cartel prohibitions and no amount of spin could ever resolve those basic problems).
21. The courts can be expected to interpret the definition of a cartel provision in s 44ZZRD more narrowly in criminal cases than in civil cases (see Explanatory Memorandum , Explanatory Memorandum, Trade Practices Amendment (Cartel Conduct and Other Measures) Bill 2008 (Cth), p. 27 [2.13]). Let's wish away the relevant law (the view expressed in the Explanatory Memorandum is inconsistent with the longstanding position of the High Court that the legislature cannot be taken to speak with a forked tongue (see *Waugh v Kippen* (1986) 160 CLR 156, 165).
22. Don't worry about the wording of ss 44ZZRO and 44ZZRP on the new joint venture exceptions and forget about the established approach towards the interpretation of "provision" and other relevant concepts. We obtained advice from senior counsel that the joint venture exceptions are OK. However, we're not really sure about that advice, which explains why we have never disclosed it to the public. We also prefer lack of transparency whenever we think we can get away with it. We're mindful of all the criticism that resulted when the ACCC published the advice of senior counsel on the meaning of 'understanding' under s 45 of the TPA. Public debate is inimical to legislative reform because it bogs the process down and casts doubt on the competence of our bureaucratic system of government.