



11 June 2009

Marcus Bezzi
Executive General Manager
Enforcement and Compliance Division
Australian Competition and Consumer Commission
Level 7, Angel Place
123 Pitt Street
SYDNEY NSW 2000

Dear Sir

The Australian Conservation Foundation (ACF) and the Australian Climate Justice Program (ACJP) wish to request a full ACCC investigation of potential breaches of the Trade Practices Act outlined in the attached brief.

The brief sets out 14 instances where 6 corporations have made public statements regarding the impacts of the proposed Carbon Pollution Reduction Scheme (CPRS) upon their operations, profitability and workforce. In each instance there is a clear disjuncture between their public statements and the information that the corporations have formally disclosed to shareholders and investors. There is also a disjuncture between the public statements and independent financial analysis of the likely impacts of the proposed CPRS upon the six corporations' operations and profitability.

We appreciate that the ACCC is not able to take action in relation to every complaint and that it must review each matter according to its enforcement priorities to ensure that resources are effectively applied in the public interest. In this case, we consider that there are very good reasons for the ACCC to investigate. These are set out in the brief.

We would be grateful if the ACCC would give this matter its full attention.

Sincerely,

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per pro
Keely Boom
Executive Officer
Australian Climate Justice Program

Conduct of concern

1. This complaint concerns six corporations:
 - a. Boral Limited
 - b. Bluescope Steel Limited
 - c. Caltex Australia Limited
 - d. Rio Tinto Limited
 - e. Woodside Petroleum Limited
 - f. Xstrata PLC
2. The six corporations named above have made public statements (“the Statements”) regarding the impacts of the proposed Carbon Pollution Reduction Scheme (“CPRS”) upon their operations, profitability and workforce.
3. The Statements have generally been made to the public, the media and key political and policy decision-makers.
4. By way of background on the CPRS:
 - a. In July 2008, a CPRS Green Paper was released by the Federal Government.
 - b. In October 2008, extensive economic modeling titled *Australia’s Low Pollution Future: The Economics of Climate Change Mitigation* was released by the Federal Treasury.
 - c. In December 2008, a CPRS White Paper was released by the Federal Government.
 - d. In the period March to May 2009 hearings were held by two Senate Committees in relation to the CPRS (and climate change policy more generally).
 - e. On 4 May 2009, the Federal Government announced final changes to the CPRS, including a delayed start and additional allocations of ‘free permits’ to energy intensive industry.
 - f. On 4 June 2009, the CPRS legislation was passed by the House of Representatives.
5. There is a clear disjuncture between the Statements and information that the corporations have disclosed to shareholders and investors (as required under the relevant continuous disclosure provisions of the *Corporations Act*). The methods of disclosure that we reviewed were as follows:
 - a. Shareholder announcements through the ASX;
 - b. Press releases that analyse and quantify risk and are publicly available;
 - c. Annual Reports (including contingent liability disclosure);
 - d. Sustainability reports;
 - e. Presentations to analysts; and

- f. Carbon Disclosure Project submissions.
6. The relevant statements and formal disclosures are set out in the table in Appendix 1.
 7. Appendix 1 is supported by a lengthy and comprehensive analysis of public statements and formal disclosures that was prepared by the Australian Climate Justice Program and is available upon request.
 8. There is also a clear disjuncture between the Statements and independent financial analysis of the impacts of the proposed CPRS upon the six corporations' operations and profitability.
 9. A recent research report by Goldman Sachs JBWere indicated that the financial materiality of the CPRS is likely to be insignificant for ASX100 companies.¹ In the GSJBW research note, only four of the top 100 publicly-listed Australian companies are likely to see carbon liabilities over 5% of their earnings (EBIT), *before* taking into consideration any free permits for emissions intensive trade-exposed industries. The CPRS White Paper in December 2008 proposed 90% free permits for those industries, and on 4 May 2009 this was increased to 95% free permits.
 10. The GSJBW research found that carbon liability as a proportion of EBIT for the six companies named in this complaint, *before* taking into consideration any free permits for emissions intensive trade-exposed industries, is as follows:
 - a. Boral – 5%
 - b. BlueScope Steel – 11%
 - c. Caltex – 2%
 - d. Rio Tinto – 4%
 - e. Woodside – 3%
 - f. Xstrata – not reviewed
 11. The Investor Group on Climate Change, an association representing institutional investors with total funds under management of \$550 billion, was unambiguous in its response to the GSJBW research, stating that: "Investors see negligible financial impact for companies from CPRS".² This further highlights the disjuncture between public statements and actual magnitude of impacts.
 12. The disjuncture was also recently highlighted by the Australian Financial Review in an article on 3 June 2009 titled "Investors warn miners on climate stance". In the article investors accused resources companies of issuing "different, more alarmist, warnings about the impact of emissions trading to politicians and the public", when compared to disclosures to shareholders. BlueScope and Rio Tinto were specifically referred to.

¹ Goldman Sachs JBWere Investment Research, *ESG Carbon Trading Update: government announces delays to the Carbon Pollution Reduction Scheme*, 4 May 2009

² Investor Group on Climate Change media release, "Investors see negligible financial impact on companies from CPRS", 7 May 2009, accessed at www.igcc.org.au/

13. Further research undertaken by analysts RiskMetrics for ACF found that:
- a. the total carbon liability for companies has decreased at each stage of the policy development of the CPRS, whilst compensation, in the form of free permits, has increased;³
 - b. the net permit obligations (i.e. cost) under the CPRS for the six most energy intensive industries are relatively small. All six companies named in this complaint are members of those six industries.
14. Other independent financial analysis has reached a similar conclusion, including industry specific analysis by firms including JP Morgan and CitiGroup. One particular example of note is Citigroup analysis from 2008 investigating the financial impact of the CPRS on Woodside's business. Citi Investment Research estimated the carbon cost impact to Woodside's Pluto and North West Shelf operations at just 1-2 per cent of revenue in the early stages of a trading scheme (at a carbon price of \$20 per tonne) with that figure rising to 2-4 per cent of revenue (with carbon at \$40 per tonne).⁴ Changes to the proposed CPRS have only lessened the financial impact since this analysis was undertaken.

Misleading and deceptive conduct

15. In our view, some or all of the Statements may have been made in breach of section 52 of the Trade Practices Act.
16. This is because in fact there are no reasonable grounds for various assertions within the Statements to the effect that the CPRS will cause certain materially significant impacts on operations, profits or jobs. We rely on both:
- a. the formal disclosures made by the corporations; and
 - b. independent financial analysis of the impacts of the proposed CPRS;
- to support this conclusion.

Representations were made in the course of trade or commerce

17. A threshold issue in relation to this complaint is whether the Statements were made in trade or commerce. As you are aware, section 52 was not intended to extend to all conduct, regardless of its nature, in which a corporation might engage in the course of, or for the purposes of, its overall trading or commercial business.⁵ Rather, the conduct must be itself an aspect or element of activities or transactions which, of their nature, bear a trading or commercial character.⁶

³ RiskMetrics Group, *Research Note: The impact of industry assistance measures under the CPRS – Scheme deferral update*, 18 May 2008, accessed at www.acfonline.org.au/articles/news.asp?news_id=2265

⁴ Citi Investment Research, *Carbon pollution reduction scheme: impacts reviewed for ASX100 companies and more*, 22 July 2008.

⁵ *Concrete Constructions v Nelson* (1990) 92 ALR 193

⁶ *Concrete Constructions v Nelson* (1990) 92 ALR 193

18. It might be argued that conduct such as lobbying of governments and generalised public relations is sufficiently removed from the core commercial activity of each company that it is not in trade or commerce. We consider that such an argument is untenable. A reasonable examination of the purpose, nature and likely effect of the Statements reveals direct financial and competitive impact on each corporation.
19. The offending Statements were made to influence political and policy decision makers and members of the public to either:
- a. withdraw support for the CPRS, thereby removing any potential impact on each corporation and its competitiveness, in particular in relation to competing corporations with less polluting operations; or
 - b. only support a CPRS which has a minimal negative impact on each corporation because it provides large allocations of free permits, again ensuring minimal impact on each corporation and its competitiveness, in particular in relation to competing corporations with less polluting operations; or
 - c. gain direct financial support or subsidy for each corporation under the CPRS or complementary policies, again ensuring minimal impact on each corporation and its competitiveness, in particular in relation to competing corporations with less polluting operations.
20. The purposes of the Statements are demonstrated by the success of the companies in achieving:
- a. increased financial support (and competitive advantage) in the form of increased allocations of free permits and direct financial assistance at every stage in the political and policy consultation process;⁷
 - b. the delayed commencement of the CPRS, announced on 4 May 2009; and
 - c. the price cap of \$10/permit for the first year of the CPRS, announced on 4 May 2009.

Consequences of conduct

21. In our view, the Statements would mislead or deceive a reasonable person (including a decision-maker) such that they might conclude that:
- a. the proposed CPRS is likely to have “significant”, indeed “disastrous” impacts on the corporations;
 - b. large amounts of free permits and direct financial assistance should be given to corporations to soften the impact of the CPRS;
 - c. the CPRS should be weakened or delayed.

⁷ RiskMetrics Group, *Research Note: The impact of industry assistance measures under the CPRS – Scheme deferral update*, 18 May 2008, accessed at www.acfonline.org.au/articles/news.asp?news_id=2265

22. The Statements have caused and are causing serious ongoing harm, against the public interest. The Statements have enabled the corporations to obtain:
- a. increased financial support (and competitive advantage) in the form of increased allocations of free permits and direct financial assistance at every stage in the political and policy consultation process;⁸
 - b. the delayed commencement of the CPRS, announced on 4 May 2009; and
 - c. the price cap of \$10/permit for the first year of the CPRS, announced on 4 May 2009;
- thereby placing competing corporations with less polluting operations at a competitive disadvantage, and ultimately retarding the implementation and uptake of cleaner, low carbon technologies that will be needed to avoid “dangerous” levels of climate change and associated impacts.

What should the six companies be required to do?

23. Obviously, the ACCC will reach its own view in relation to the conduct and will take action as it deems appropriate. This complaint has been made with the objectives of:
- a. ensuring that political, policy and media statements such as the Statements are *reconciled and consistent with* formal disclosures to shareholders and investors, and are substantiated by supporting documentation;
 - b. stopping conduct that cannot be reconciled or is not consistent as soon as possible;
 - c. if possible, preventing any further occurrence of the conduct;
 - d. publicly addressing the misleading impressions created by the conduct; and
 - e. facilitating the promotion of a culture of compliance with the TPA at the six corporations.
24. We would welcome a full and thorough investigation by the ACCC.

⁸ RiskMetrics Group, *Research Note: The impact of industry assistance measures under the CPRS – Scheme deferral update*, 18 May 2008, accessed at www.acfonline.org.au/articles/news.asp?news_id=2265

Appendix 1 – Table outlining statements of concern and relevant formal disclosures

Company	Substance of Statements	Detailed Statements	Source	Relevant Disclosure	Disclosure (date & method)	Comments/Analysis
Bluescope Steel	Costs of CPRS would be disastrous for Bluescope Steel	"tens of millions of dollars would be wiped from the company's books in the first year if the plan came into effect". "Costs of this magnitude would be difficult to bear in good economic times - in the current downturn they would be disastrous".	Chief Executive Noel Cornish, as quoted in The Illawarra Mercury, 'Under Threat', 2 April 2009.	No specific disclosure identified.	N/A	Strong and specific claim with no apparent disclosure. Significant gap between claims and disclosure.
		"At \$25 per tonne of CO2 equivalent, the cost of the CPRS for scope 1 and 2 emissions in the first year alone is tens of millions of dollars, after taking account of the government's proposed assistance. Costs of this magnitude would be difficult to bear in good economic times. In the current downturn they would be disastrous."	Chief Executive Noel Cornish to Senate Committee on Fuel and Energy on 1 April 2009, Official Committee Hansard, 28.			
BlueScope Steel	Thousands of jobs would be under threat if the CPRS took effect in its present form.	"Chief executive Noel Cornish said yesterday the viability of the Port Kembla steelworks - along with the 12,000 jobs it supports - would be under threat if the Government's Carbon Pollution Reduction Scheme (CPRS) took effect in its present form."	The Illawarra Mercury, 'Under Threat', 2 April 2009.	No specific disclosure identified.	N/A	Strong and specific claim with no apparent disclosure. Significant gap between claims and disclosure.

Company	Substance of Statements	Detailed Statements	Source	Relevant Disclosure	Disclosure (date & method)	Comments/Analysis
		"CHAIR - But what would that mean in terms of jobs? Mr Cornish - What it means is that if our business becomes unviable in the global marketplace, then the whole Port Kembla steelworks is threatened. CHAIR - So that is 4,500 jobs plus 16,000 jobs? Mr Cornish - Yes."	Chief Executive Noel Cornish to Senate Committee on Fuel and Energy on 1 April 2009, Official Committee Hansard, 31.			
Boral	The financial impacts of the introduction of the proposed CPRS over a ten year period could be profound.	"Modelling by Blue Circle Southern Cement, a subsidiary of Boral, shows that the financial impacts of the introduction of the proposed CPRS over a ten year period, could be profound. Under this scenario smaller scale cement kilns, such as Blue Circle's kiln at Maldon, would be under great pressure in the short term, and the capability of larger kilns, such as our Berrima and Waurm Ponds kilns, would erode over time. This would occur because of the reducing ability to justify ongoing stay-in-business capital, given the decline of financial returns to an unacceptable level."	Submission on CPRS Green Paper, September 2008, 2, 3.	No specific disclosure identified. Only disclosure was that: "Internally we have been undertaking scenario planning to understand potential financial impacts under a range of possible schemes / regulations and we are well prepared for such changes".	Speech by Rod Pearce, the Managing Director and CEO, to customers, investors and analysts in Brisbane, released on ASX 27 June 2008	Strong and specific claim with no apparent disclosure. Discrepancy between claims and disclosure.

Company	Substance of Statements	Detailed Statements	Source	Relevant Disclosure	Disclosure (date & method)	Comments/Analysis
Boral	The CPRS would result in job losses, particularly in regional areas of Australia	"The introduction of the CPRS as proposed in the Green Paper would result in a loss of jobs and typically there is a multiplier impact of about four indirect jobs for each employee position. Blue Circle Southern Cement plants are located in regional areas of Australia, hence, job losses would particularly impact regional communities."	Submission on CPRS Green Paper, September 2008, 3.	No specific disclosure identified.	N/A	Strong and specific claim with no apparent disclosure.
Boral	CPRS will have a significant impact on Boral's business	"The CPRS as proposed in the Government's Green Paper will have significant consequences on Boral's cement business, Blue Circle Southern Cement".	Submission on CPRS Green Paper, September 2008, 1.	"The "Carbon Pollution Reduction Scheme", scheduled for introduction in 2010, will impact emissions-intensive, trade-exposed (EITE) industries such as the cement industry. Recognition of cement as an EITE industry and provision of a "level playing field" for domestic competitors and importers is vital for Boral." "Overall, whilst the potential financial impact of Boral suffering a carbon cost in its TEEI businesses that cannot be passed through is large, the probability of it crystallising is not high."	Boral, Annual Review, 2007/2008, 3. Boral response to Carbon Disclosure Project 2008	Strong claim matched with moderate disclosure. Discrepancy between claims and disclosure.

Company	Substance of Statements	Detailed Statements	Source	Relevant Disclosure	Disclosure (date & method)	Comments/Analysis
				<p>"As a major energy user, climate change has also been high on our agenda. We are assuming that an Australian Emissions Trading Scheme will operate from July 2010 onwards and will result in a significant increase in the cost of carbon. Internally we have been undertaking scenario planning to understand potential financial impacts under a range of possible schemes / regulations and we are well prepared for such changes."</p>	<p>Boral, Speech by Rod Pearse, the Managing Director and CEO, to customers, investors and analysts in Brisbane, released on ASX 27 June 2008, 8.</p>	

Company	Substance of Statements	Detailed Statements	Source	Relevant Disclosure	Disclosure (date & method)	Comments/Analysis
Caltex	The risk of under-recovery of costs could be significant relative to Caltex's profitability and imposes large working capital costs and debt-raising requirements	"The CPRS proposes that suppliers from terminals will have an "upstream point of obligation" i.e. will be required to purchase permits for customers' emissions, which they will then recover by increasing the prices charged to customers. This CPRS design feature will make Caltex the largest single purchaser of permits in Australia at over 40 million tonnes pa or about 12% of the permits available at auction from the Australian Government. These permits will cost about \$0.9 to \$1.6 billion pa based on the CPRS-5 and price cap carbon price scenarios. The requirement to purchase such a large quantity of permits creates the risk of under-recovery of costs that could be significant relative to Caltex's profitability and imposes large working capital costs and debt-raising requirements. For example, if permits were purchased in 12 equal amounts, this would require an additional \$80 to \$130 million in capital, which is significant in relation to Caltex's total debt."	Opening Statement to Senate Select Committee on Climate Policy, April 2009, 3.	"Caltex anticipates the additional cost imposed on these emissions under CPRS will be incorporated into the price of the fuel and therefore passed on to consumers. This will be offset by a government excise reduction for motorists and farmers to help avoid price increases for these customers in the short term."	Caltex, Presentation to Media & Analysts and 2009 AGM, released on ASX 20 February 2009, 11.	Strong and specific claim with no apparent disclosure. Large difference in tone and specifics between claims and disclosure.
Rio Tinto	The CPRS could cost Rio Tinto \$2.9 billion over the next decade and will cost \$130 million in 2010-2011.	"The costs to Rio Tinto of the proposed scheme rise through time from \$130 million in 2010/2011." "Permit decay increases the negative impact on Rio Tinto's aluminium smelting, alumina refining and pig iron smelting EITE industries by a cumulative operating cost of around \$430 million over the first decade of the scheme."	Submission to Senate, April 2009, 1. Submission to Senate, April 2009, 2.	No specific disclosure regarding costs identified. General statement that "Rio Tinto's costs could increase and its results could be materially affected. Rio Tinto is at risk of increased energy prices."	Annual Report 2008; Carbon Disclosure Project 2008 (CDP6)	Strong and specific claim accompanied by limited disclosure.

Company	Substance of Statements	Detailed Statements	Source	Relevant Disclosure	Disclosure (date & method)	Comments/Analysis
		<p>"The costs of getting the allocations wrong, due to some quirk of activity definitions or the application of excessive uncertainty bands associated with retrospectively-prepared eligibility data, are great. They would force onto Rio Tinto's alumina assets additional cumulative operating costs in excess of \$1 billion over the first decade of the scheme."</p> <p>"Rio Tinto conducts five activities that the Government is likely to deem as EITE-qualifying activities – aluminium, alumina, alumina hydrate, lime and pig iron production. This leaves the majority of Rio Tinto's exports (iron ore, coal, bauxite, salt, uranium, diamonds, copper and talc) with no permit allocations and bearing an additional cost of around \$1.5 billion over the first decade of the scheme."</p> <p>"The call follows a recent Rio Senate committee submission that says the scheme could cost the mining giant \$2.9 billion over the next decade."</p>	<p>Submission to Senate, April 2009, 5.</p> <p>Media reports in The Australian, Price of Rudd carbon plan too high, 18 April 2009.</p>			
Rio Tinto	The \$750 million adjustment package over 5 years for the coal industry will equate to approximately 15% of the permit needs for	"The Government singles out the coal industry for inadequate treatment relative to its EITE peers. Although the Australian coal industry meets the 1000t CO2-e/\$M revenue threshold for 60 percent EITE allocation, it will receive no permits. Instead, it qualifies for a \$750 million adjustment package over five years – an offer equivalent to approximately 15 percent of permit needs for the five year period."	Submission to Senate, April 2009, 6.	No specific disclosure regarding costs identified. General statement that "Rio Tinto's costs could increase and its results could be materially affected. Rio Tinto is at risk of increased energy prices."		Strong and specific claim accompanied by limited/no apparent disclosure.

Company	Substance of Statements	Detailed Statements	Source	Relevant Disclosure	Disclosure (date & method)	Comments/Analysis
	the 5 year period. Half of Rio Tinto's open cut mines would likely close around 2020.	"Using Rio Tinto investment criteria and a carbon price similar to the Treasury's CPRS-5, half of Rio Tinto's open cut coal mines would be likely to close around 2020."				
Woodside	Even at relatively low permit prices the premium for Woodside's shareholders would be significantly reduced and at higher permit prices the premium would evaporate.	"The value to Woodside shareholders is a function of the difference between the expected return on these projects and the appropriately risk adjusted rate of return. Even without a requirement to purchase emission permits the premium between the expected rate and the required rate is narrow. With the permit purchasing requirements suggested in the Green Paper, even at relatively low permit prices the premium would be significantly reduced and at higher permit prices the premium can evaporate. Faced with the prospect of limited return, investments in Australian LNG projects would be scaled back."	Submission on CPRS Green Paper, September 2008, 17.	No specific disclosure identified. "It remains too early to determine the impact of the proposed CPRS on current and future projects."	Woodside, ASX Announcement: Record FY 2008 Net Profit of A\$1,876 million, released on ASX 18 February 2009, 4.	Strong and specific claim accompanied by no apparent disclosure.
Woodside	Unless Woodside is granted compensation under the CPRS, it may relocate a multibillion-dollar LNG plant outside of	"The chief executive of Woodside, Don Voelte, threatened to put a multibillion-dollar liquefied natural gas plant on a ship in East Timorese waters, rather than Australian, unless the company was granted compensation."	Media reports in The Sydney Morning Herald, 17 November 2008 and other media.	No specific disclosure identified. "It remains too early to determine the impact of the proposed CPRS on current and future projects."	Woodside, ASX Announcement: Record FY 2008 Net Profit of A\$1,876 million,	Strong and specific claim accompanied by no apparent disclosure.

Company	Substance of Statements	Detailed Statements	Source	Relevant Disclosure	Disclosure (date & method)	Comments/Analysis
	Australia.	"Mr Voelte said that Federal Resources Minister Martin Ferguson and other government officials had "kind of rolled their eyes ... with surprise" when he told them informally of Woodside's position. "I thought they took it very seriously, gee whiz (this project is) right on our doorstep," Mr Voelte said. "It might [be] the first project that Australia loses (because of the ETS)," Mr Voelte said before trying to hose down his stance by insisting that it was "not a threat, it's a comment"."	Media report in The West Australian, 17 November 2008		released on ASX 18 February 2009, 4.	
Woodside	The CPRS could more than double operating costs of the North West Shelf LNG plant operated by Woodside.	"Australia's proposed carbon emissions trading scheme could more than double operating costs of the North West Shelf liquefied natural gas (LNG) plant operated by Woodside Petroleum Ltd, Woodside's chief executive Don Voelte said on Monday. "Our operating cost at North West Shelf is just about half a billion dollars a year, so if you lay that down on top of this, it will be a real differential," Voelte told reporters at the sidelines of a conference in Perth." "The scheme, which envisages a starting carbon cost to industry of A\$20-a-ton, moving to \$40/ton over time, would "double our operating costs", Voelte told reporters on the sidelines of the conference."	Media report in AFX Asia, Woodside: Australia carbon plan may double costs, 20 October 2008. Media report in Dow Jones, 20 October 2008.	No specific disclosure identified. "It remains too early to determine the impact of the proposed CPRS on current and future projects."	Woodside, ASX Announcement: Record FY 2008 Net Profit of A\$1,876 million, released on ASX 18 February 2009, 4.	Strong and specific claim accompanied by no apparent disclosure.
Xstrata	If the CPRS is introduced Xstrata could sack hundreds of	"Xstrata Coal has revealed it could sack hundreds of Queensland workers and bin a \$5 billion project if an emissions trading scheme is introduced by the Federal Government."	The Courier Mail, 17 March 2009.	No specific disclosure identified.	N/A	Strong and specific claim accompanied by no apparent disclosure.

Company	Substance of Statements	Detailed Statements	Source	Relevant Disclosure	Disclosure (date & method)	Comments/Analysis
	Queensland workers and bin a \$5 billion project and the CPRS would cost 1000 jobs, mostly in Queensland, and put 4000 future jobs across Australia at risk.	"Mining company Xstrata has threatened to axe 1000 coalmining jobs if the Federal Government goes ahead with its emissions trading scheme. Xstrata says if Labor's trading scheme was implemented in its current form, it will close four mines in NSW and scrap plans to invest \$7 billion in new coalmining operations in NSW and Queensland that would create 4000 jobs."	The Age, 17 March 2009.			
Xstrata	Xstrata has identified four coal mines that are at risk of premature closure due to the CPRS.	"In the absence of significant transitional assistance Xstrata Coal has identified four operations that are at risk of premature closure from the commencement of the scheme. These operations currently provide direct employment for around 1,000 Australians with a further 3,000 indirect jobs."	Submission to Senate Select Committee on Climate Policy, March 2009	No specific disclosure identified.	N/A	Strong and specific claim accompanied by no apparent disclosure.