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December 8, 2011

Ms. Merran Kelsall  
The Chairman  
Auditing and Assurance Standards Board  
P.O. Box 204  
Collins Street West  
Melbourne, Victoria 8007  
Australia

Re: Proposed Standard on Comfort Letter Engagements

Dear Ms. Kelsall,

This letter contains the comments of our respective firms on the exposure draft dated September 2011 of the Proposed Standard on Related Services ASRS 4450, *Comfort Letter Engagements* (the "Exposure Draft"). Terms used but not defined in this letter have the respective meanings assigned to them in the Exposure Draft.

We understand that the Exposure Draft was prepared in response to Australian auditors' requests for the Auditing and Assurance Standards Board (the "AUASB") to issue a standard equivalent to the Statement on Auditing Standards 72, *Letters for Underwriters and Certain Other Requesting Parties* ("SAS 72"), issued by the American Institute of Certified Public Accountants (the "AICPA"), for Australian auditors to follow when requested by one of their audit clients – an issuer of securities – to provide a comfort letter to certain parties in connection with a securities offering.<sup>1</sup>

I. Background

*Our experience in the Australian marketplace and the types of capital markets transactions on which we work*

Our firms regularly work on securities offerings by Australian companies (and other entities) that involve the U.S. capital markets and, for more than 30 years, collectively have represented a significant number of Australian issuers accessing the U.S. capital markets and

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<sup>1</sup> References herein to SAS 72 include its successors, SAS 76 and SAS 86, as codified in AU ¶ 634 (in each case as defined herein).

almost all of the investment banks involved in such offerings. Our Australian issuer clients include some of the most frequent and largest issuers of securities in the United States, and our underwriter clients include all of the major investment banks that conduct U.S. capital markets transactions for Australian issuers.

The U.S. capital markets transactions on which we work are registered with the U.S. Securities and Exchange Commission (the “SEC”) under the U.S. Securities Act of 1933 (the “Securities Act”), or exempt from registration with the SEC under the Securities Act. In respect of “unregistered” offerings, in some cases the “transaction” is exempt from registration under the Securities Act (e.g., an offering pursuant to Section 4(2) of, and Rule 144A under, the Securities Act, or a private placement pursuant to Regulation D under, or Section 4(2) of, the Securities Act), and in other cases the “security” is exempt from registration (e.g., securities offered by a U.S. regulated branch of an Australian bank that are exempt under Section 3(a)(2) of the Securities Act).<sup>2</sup> These transactions, particularly Rule 144A offerings, often include offerings outside the United States that are exempt from registration pursuant to Regulation S under the Securities Act.<sup>3</sup>

#### *Overview of liability regime under the U.S. federal securities laws*

The U.S. securities laws impose liability for material misstatements and omissions made in connection with the offer and sale of securities. The principal liability provisions that are applicable to a registered offering of securities are Section 11 and Section 12(a)(2) of the Securities Act, and Section 10(b) of, and Rule 10b-5 under, the U.S. Securities Exchange Act of 1934 (the “Exchange Act”). The principal liability provisions that are applicable to an unregistered offering of securities are Section 10(b) of, and Rule 10b-5 under, the Exchange Act.<sup>4</sup>

Pursuant to Section 11 of the Securities Act, any person who acquires a security registered under the Securities Act may bring an action if any part of the registration statement (which includes the prospectus used to offer the securities), when that part became effective, contained an untrue statement of material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading.

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<sup>2</sup> Although in Rule 144A offerings, “underwriters” are referred to as “initial purchasers” in the relevant underwriting or purchase agreements, we refer to them herein as underwriters for convenience and to be consistent with the terminology used in the Exposure Draft.

<sup>3</sup> Regulation S provides a “safe harbor” from registration for offers and sales of securities outside the United States.

<sup>4</sup> While previously most U.S. practitioners advised that Section 12(a)(2) liability may also apply to unregistered offerings, the SEC has acknowledged that, notwithstanding its historical position on the subject, Section 12(a)(2) liability does not extend to false or misleading disclosure in an offering document for an unregistered offering of securities. The SEC advanced this position in an *amicus curiae* (or “friend of the court”) brief, dated November 28, 2006, which, while not a statement of law, provides insight as to the SEC’s views on the subject.

Section 17(a) under the Securities Act is another antifraud provision that applies to both registered and unregistered offerings and is subject to enforcement by the SEC. Most U.S. courts that have considered the issue have held that there is no private right of action under Section 17(a).

Pursuant to Section 12(a)(2) of the Securities Act, liability attaches to any person who offers or sells a security (other than certain exempted securities) by means of a prospectus or oral communication which includes an untrue statement of material fact or omits to state a material fact necessary to make the statements, in the light of the circumstances under which they were made, not misleading.

Section 10(b) of the Exchange Act makes it unlawful to use or employ, in connection with the purchase or sale of any security, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the SEC may prescribe. The SEC promulgated Rule 10b-5, which prohibits “any person, directly or indirectly . . . [from making] any untrue statement of a material fact or [omitting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . in connection with the purchase or sale of any security.” For liability to attach under Rule 10b-5, a plaintiff must establish, among other things, that the defendant acted with “scienter” (i.e., the intent to deceive or defraud, which essentially requires that the materially misleading misstatement or omission had been made intentionally or with reckless indifference to its accuracy).

For all of the above-noted liability provisions, a statement will generally be considered material if there is a substantial likelihood that a reasonable investor would have considered it important in deciding whether or not to purchase the security.

#### *Overview of the U.S. due diligence defense standard*

Underwriters are subject to potential liability under the U.S. federal securities laws, including those described above. For registered offerings, underwriters may avail themselves of the due diligence defense that is available to them under Section 11(b) of the Securities Act. To satisfy the due diligence defense standard established by Section 11(b) (which differs depending on whether the relevant information has been “expertized” or not), an underwriter must as a general matter establish that after reasonable investigation it had reasonable grounds to believe and did believe that the registration statement did not contain a material misstatement or omission. The SEC, in Rule 176 under the Securities Act, has identified certain factors that affect a determination of a “reasonable investigation” or “reasonable grounds” for belief, including the type of issuer, security, person and offering and whether such person’s reliance on officers and employees of the issuer (in light of their functions and responsibilities with respect to the issuer and the filing) was reasonable. For an underwriter, the type of underwriting arrangement, the role of the particular person as an underwriter and the availability of information with respect to the issuer are also relevant.

Under Section 12(a)(2) of the Securities Act, underwriters have a defense to liability if they are able to establish that they took “reasonable care” in determining that the prospectus did not contain a material misstatement or omission. Courts have determined that factors relevant to a determination of what constitutes reasonable care include access to source data against which the truth of representations can be tested and the pecuniary interest of a party in the transaction’s completion.

As a practical matter, there is little difference between what constitutes the “reasonable care” necessary to establish the due diligence defense under Section 12(a)(2) and the “reasonable investigation” necessary to establish the due diligence defense under Section 11(b). While the SEC has, through rule making (including Rule 176) and various releases, attempted to provide guidelines for due diligence, the elements of due diligence have largely developed through custom, practice and judicial decisions.<sup>5</sup> There is no settled view of the U.S. courts on what defendants must do in order to establish that they acted with the requisite degree of care to satisfy this standard. However, the due diligence defense is generally based upon the defendant having made a reasonable investigation and having reasonable grounds to believe that the statements made in connection with the sale of the securities were not false or misleading. The standard of reasonableness is that which a prudent person would make in the management of his or her own property.

For purposes of a Rule 144A or other offerings exempt from registration under the Securities Act, there is no statutory or express due diligence defense under Section 10(b) or Rule 10b-5. However, as noted above, under Rule 10b-5 a plaintiff must prove the defendant acted with “scienter” (which includes intentional or reckless indifference to the accuracy of statements made by the issuer) to establish liability. Thus, a defendant’s ability to establish that it acted with “reasonable care” and conducted a “reasonable investigation” in a Rule 144A or other exempt offering, in accordance with the “due diligence” defense standard under Sections 11(b) and 12(a)(2) of the Securities Act for registered offerings, would likely be relevant to whether such defendant was intentionally or recklessly indifferent to the accuracy of statements made by the issuer in the offering document for the offering for purposes of Rule 10b-5. That is, the defendant’s exercise of reasonable care and conduct of a reasonable investigation would likely demonstrate that the defendant did not know, or should not have known, of any material misstatements or omissions in the Rule 144A or other exempt offering document.

As a result of these liability considerations, comfort letters and so-called “10b-5 statements” are important components of due diligence for most securities offerings.<sup>6</sup> In brief, 10b-5 statements are negative assurance statements from U.S. counsel – typically U.S. counsel to the issuer and U.S. counsel to the underwriters – in which such counsel state, among other things, that nothing has come to their attention that has caused them to believe that the offering document, as of the specified times (typically pricing and closing), included or includes any untrue statement of a material fact or omitted or omits to state a material fact necessary in order to make the statements made therein, in the light of the circumstances under which they were made, not misleading. U.S. counsel customarily exclude from their negative assurance statements any comment with respect to financial statements and schedules and other financial information and data, as such information and data is typically covered by comfort letters

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<sup>5</sup> The seminal cases are *Escott v. Barchris Construction Corp.*, 283 F. Supp. 643 (S.D.N.Y. 1968) and *In re WorldCom, Inc. Securities Litigation*, CCH Fed Secs. L. Rep ¶ 93,057 (S.D.N.Y. December 15, 2004). For a useful discussion of the parameters of due diligence for U.S. securities offerings, see Chapter 5, Liabilities and Due Diligence, in *Corporate Finance and the Securities Laws*, Charles J. Johnson, Jr. and Joseph McLaughlin (4<sup>th</sup> edition, 2010).

<sup>6</sup> Due to the nature of the offering or the security involved, certain U.S. offerings, such as traditional private placements to a limited number of institutional investors (primarily insurance companies) under Regulation D under, or Section 4(2) of, the Securities Act and offerings of commercial paper pursuant to Section 3(a)(3) or Section 4(2) of the Securities Act, do not normally require comfort letters or 10b-5 statements.

provided at pricing and closing by the issuer's auditors. Accordingly, the comfort letters received from the issuer's auditors are an important part of due diligence in relation to financial matters, and are universally requested by underwriters on both registered and unregistered securities offerings. In addition, the comfort letter process benefits issuers in ensuring the accuracy of the financial disclosure in the offering document. The issuer's auditors are in a better position than any other third party involved in the offering process to help assure the underwriters that the issuer's financial disclosure is adequately presented.

*Existing standard for providing comfort letters for U.S. securities offerings*

The standards for providing comfort letters for U.S. securities offerings, as established by the AICPA, are followed by accounting firms (including the global firms with offices in Australia) for all U.S. and non-U.S. issuers (including Australian issuers) that access the U.S. capital markets. Those standards were first adopted by the AICPA in 1993 in the form of SAS 72, after prolonged discussions with the U.S. issuer and investment banking community and based on longstanding practice over many years beforehand. In the course of the original adoption of SAS 72 and its successor statements (Statement on Auditing Standards 76 ("SAS 76") and Statement on Auditing Standards 86 ("SAS 86")), and the codification of SAS 76 and SAS 86 as AU ¶ 634 of the AICPA's *Codification of Statements on Auditing Standards*, care was taken to ensure a procedure that would satisfy the due diligence standards of the U.S. federal securities laws, in light of the applicable U.S. liability provisions, as well as respect the roles of the issuers, the underwriters and the accounting firms in the due diligence and securities offering process.

When providing comfort letters to underwriters of offerings conducted by Australian issuers (whether those offerings are made solely in the United States or outside the United States as well), our collective experience is that the accounting firms have regularly followed SAS 72 and the well-established market practice in relation thereto. Under SAS 72 and customary market practice relating thereto:

- No engagement letter between the auditor and the underwriters is required, whether the offering into the United States is registered under the Securities Act or conducted under Rule 144A or another exemption from registration. Such engagement letters are not required by SAS 72, and are not necessary given that the issuer separately engages its auditor to perform the work necessary for the comfort letters and to deliver the comfort letters, and the relevant procedures are clearly specified in SAS 72 and detailed in the comfort letters, the forms of which are agreed prior to the execution of the underwriting agreement for the offering. This is consistent with the practice for the delivery of comfort letters by accounting firms in the United States, and is also consistent with the practice for the delivery of other due diligence materials required as a condition to closing by underwriters, such as expert reports (e.g., mining, engineering, environmental and actuarial reports), opinion letters and 10b-5 statements by U.S. counsel to the issuer (in the United States, Australia and all other jurisdictions), and opinion letters from Australian and other, non-U.S./non-Australian counsel to the issuer. That is, the issuer – not the underwriters – engages third parties to advise it on the

offering and provide the underwriters with the items required by them for due diligence purposes as a condition to closing.

- In an unregistered offering, a representation letter is delivered by the underwriters to the accounting firms, in which the underwriters represent, in effect, that the due diligence review that they are conducting is substantially consistent with the review they would conduct in a registered offering. This letter is customarily delivered in the form prescribed by SAS 72. It is not required by SAS 72 for an offering of securities registered under the Securities Act.
- Although not required by SAS 72, some accounting firms have in the past five years or so required the non-U.S. affiliates of the underwriters that participate in the part of the securities offering being conducted outside the United States to enter into an “arrangement letter” with the accounting firm in relation to the portion of the offering conducted outside the United States. This practice has evolved in Australia and certain other countries as some accounting firms take the position that SAS 72 does not expressly apply to securities offerings by a non-U.S. issuer conducted outside the United States. While we do not interpret SAS 72 in that manner, such accounting firms believe that the arrangement letter is desirable, in the absence of an expressly applicable standard such as SAS 72, in order to specify the procedures to be undertaken by the accounting firm in delivering the comfort letter in connection with the non-U.S. part of the offering and the terms of that comfort letter. No arrangement letter has been required in connection with the U.S. part of the same offering because (as indicated above) the applicable procedures and relevant terms are clearly set forth in SAS 72 and in the agreed form of comfort letters prior to entry into the underwriting agreement.
- The comfort letter, and any bring-down comfort letter, that Australian accounting firms deliver customarily follow the form of SAS 72 comfort letters with some appropriate differences. For example, instead of performing a SAS 100 review on interim financial information on which the accountants are asked to provide comfort, they perform a review under ASRE 2410, *Review of an Interim Report*, which issuers and underwriters have determined is a comparable standard to SAS 100 and the comfort letter recites this fact.

## II. Comments

We very much appreciate the AUASB’s initiative in developing a standard that seeks to establish a framework equivalent to SAS 72 in connection with the delivery of comfort letters in offerings by Australian issuers. We believe that the adoption of a standard that is equivalent to SAS 72 has the potential ultimately to make the process of cross-border securities offerings by Australian issuers more efficient and seamless in terms of agreeing the scope and content of comfort letters.

However, we believe that it is critical that ASRS 4450, if adopted, be adopted in a form that will be able to co-exist and work harmoniously with existing comfort letter standards

applicable to U.S. and other “offshore” (i.e., non-Australian) offerings, including SAS 72. The Exposure Draft contemplates that the auditors may deliver comfort letters in accordance with ASRS 4450 and the requirements of an equivalent standard, such as SAS 72. As noted below, we believe that the Exposure Draft in its current form conflicts with SAS 72 in several important respects. We also believe that it is critical that ASRS 4450, if adopted, be adopted in a form that will appropriately address U.S. (and other applicable) due diligence practices and U.S. (and other applicable) disclosure and liability standards, to ensure that the delivery of comfort letters under ASRS 4450 will be effective in assisting the underwriters (and other requesting parties) in conducting and documenting their due diligence investigation of the affairs of the issuer in connection with the particular offering. This is critical in order to enable the underwriters (and other requesting parties) to satisfy the applicable due diligence defense standard and/or negate any inference of intentional fraud or reckless indifference to accuracy under Rule 10b-5.

In this regard, we are concerned about a number of aspects of the Exposure Draft, particularly to the extent that it requires procedures and limits coverage on U.S. and global securities offerings in ways that are inconsistent with SAS 72. Differences in procedures and practices could cause delays in the offering process and, in the extreme, could adversely affect the ability of Australian entities to access the U.S. and international debt and equity capital markets. Given the significant reliance that Australian entities have on the U.S. and international capital markets for their wholesale funding and capital needs, if the standard is intended to apply to U.S. and global securities offerings by Australian issuers, we believe that it is critical that the AUASB adopt a standard that is consistent with existing global market practices, such as those followed pursuant to the SAS 72 standard, and represents a consensus of those Australian entities and underwriters that are involved in U.S. capital markets offerings.<sup>7</sup>

We note the AUASB’s request for comments seeks responses to five principal questions. Although this letter does not specifically address each question, our comments generally address questions (4) and (5) relating to the additional costs and benefits of ASRS 4450 and significant public interest matters. We have set forth below our principal comments on the Exposure Draft. We would welcome an opportunity to meet with you and other members and representatives of the AUASB to discuss our comments and concerns, and answer any questions that you may have in relation thereto, or in relation to U.S. and international market practices and the disclosure and liability regimes that apply in the United States. We are also happy to provide you with more detailed comments on the Exposure Draft and the attachments thereto for your further consideration.

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<sup>7</sup> Deviating from the approach followed by the accounting firms for U.S. securities offerings by Australian entities has resulted in significant delays in the past. For example, a few years ago, a large Australian financial institution was effectively precluded from accessing the U.S. long-term debt markets for several months while it and its underwriters negotiated with that issuer’s auditors an agreeable form of Regulation S arrangement letter.

### *Overview of Principal Comments*

Our principal comments are:

- The standard should clarify the types of offerings to which ASRS 4450 is intended to apply, and whether it should apply in addition to, in lieu of, or alongside of, an equivalent standard.
- The standard should be drafted in terms of “guidance” rather than in mandatory terms.
- If an engagement letter is required under ASRS 4450, the letter should only be between the Australian issuer and its auditor.
- The standard should clarify that an arrangement letter is not required where ASRS 4450 and/or an equivalent standard applies to an offering.

If ASRS 4450 is intended to apply to U.S. offerings, our additional principal comments are:

- The standard should clarify the period during which a negative assurance statement may be provided in a comfort letter.
- The forms of comfort letters required by ASRS 4450 for U.S. offerings by Australian issuers should be the same, in both scope and content, as the forms of comfort letters required by SAS 72.
- The form of representation letter required by ASRS 4450 for U.S. offerings by Australian issuers should be the same as the form required by SAS 72.

Each of these comments are discussed in more detail below.

*1. Clarify the types of offerings to which ASRS 4450 is intended to apply, and whether it should apply in addition to, in lieu of, or alongside of an equivalent standard*

The Exposure Draft provides that an auditor *may* undertake a comfort letter engagement in accordance with the requirements of ASRS 4450 *and* an equivalent standard issued by a national auditing standards setting body, such as SAS 72 (*emphasis added*).

However, where comfort letters are to be issued pursuant to an equivalent standard (such as SAS 72), it is not clear to us why ASRS 4450 should also apply to the comfort letters to be delivered for the offering. For example, as discussed above, U.S. capital markets offerings are, of necessity, driven by the U.S. federal securities laws, including the U.S. disclosure and liability regimes, and the due diligence defense standards established in connection therewith. The parameters for delivering comfort letters for U.S. capital markets offerings have been well-established by the AICPA under SAS 72 based on these requirements and market practice. Given the intention of the AUASB is that ASRS 4450 provide an equivalent standard to SAS 72,

we strongly recommend that ASRS 4450 specifically permit the delivery of comfort letters exclusively in accordance with SAS 72 (and not in addition to ASRS 4450), consistent with historical market practice globally and the stated objective of the Exposure Draft. Providing that comfort letters may be issued pursuant to an equivalent standard, such as SAS 72, will enable Australian entities, like other non-U.S. issuers, to access the U.S. securities markets with accountants that look to one standard – such as SAS 72 – that has been developed to reflect the capital markets practice, liability regime and due diligence processes in the United States. We believe applying a second standard will inevitably increase costs and, if the standard is inconsistent with SAS 72 or imposes additional requirements not imposed by SAS 72, will create timing and possibly market access problems. Equally if not more important, it potentially does not provide underwriters and other recipients of the comfort letters with the benefit of the traditional market practice to satisfy the due diligence defense standard and, therefore, may compromise their ability to adequately defend themselves against claims under the U.S. securities laws. Similar concerns would arise in connection with securities offerings in other markets where there are well established standards for comfort letters, such as Canada and Hong Kong.

If the intention is that ASRS 4450 may (in the discretion of the accounting firm or otherwise) apply to certain offerings, including U.S. offerings, *in lieu of* an equivalent standard, such as SAS 72, we are very concerned that ASRS 4450 will not (i) sufficiently assist the underwriters (and any other requesting parties) in conducting and documenting their due diligence investigation of the affairs of the issuer in connection with the offering or (ii) be adequate to enable the underwriters (and other parties with potential liability under the applicable securities laws relevant to the offering) to satisfy the applicable due diligence defense standards or otherwise adequately defend themselves against claims under the applicable securities laws.<sup>8</sup>

If, in contrast, ASRS 4450 is intended to apply *in addition to* the equivalent standard for all parts of an offering (whether or not the equivalent standard is deemed to apply to all or any part of the offering), then, for the reasons stated above, we believe that it is critical that ASRS 4450 address, and effectively accommodate, the disclosure standards and liability regimes, and the due diligence defense standards and practices, of the relevant jurisdictions, including the United States. For purposes of U.S. offerings, to achieve this objective of satisfying both standards for the offer as a whole, we believe that it is critical that ASRS 4450 not deviate in any material respect from SAS 72.

Similarly, if ASRS 4450 is intended to apply *alongside* of an equivalent standard, such as SAS 72, but only in relation to the part of the offer to which the equivalent standard does (or may) not apply, then we would have concerns that the Exposure Draft would establish a standard that conflicts with overwhelming global market practice. Under existing market practice, when SAS 72 is followed for purposes of the comfort letter on an offering because a portion of that offering will be undertaken in the United States, the comfort letter delivered in connection with the other portions of the offering (for example, the portion of the offer conducted pursuant to Regulation S) is also prepared in accordance with SAS 72. This has been the practice for many

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<sup>8</sup> As noted above, we would be happy to provide you with more detailed comments on the Exposure Draft and the attachments thereto for your further consideration. We note that some of these differences are discussed in comments 5 and 6 herein. Our detailed comments would, among other things, highlight additional differences between ASRS 4450 and SAS 72 that could potentially be problematic.

years because the parameters of SAS 72 are well understood by the providers and recipients of the comfort letters, as well as for efficiency and cost reasons to avoid preparing different comfort letters that comply with different, and potentially conflicting, standards.

If, notwithstanding the concerns expressed above, the AUASB determines that ASRS 4450 should apply alongside of an equivalent standard then we believe that ASRS 4450 should be drafted to so provide. For example, if it is intended that in a global securities offering by an Australian issuer, the comfort letters delivered in connection with the U.S. part of the offering will be delivered pursuant to SAS 72, but the comfort letters delivered in connection with the non-U.S. part of the offering will be delivered in accordance with ASRS 4450 and/or another international standard,<sup>9</sup> then ASRS 4450 should be drafted to reflect this approach, and care should be taken to ensure that the standards and procedures under SAS 72 and ASRS 4450 are consistent with one another and do not require significant amounts of additional work. It is also important that, in such circumstances, ASRS 4450 should not impose any requirements in relation to the U.S. part of the offering that are inconsistent with, or otherwise vary from, the provisions of SAS 72.<sup>10</sup>

In addition, we would request that the Exposure Draft clarify whether ASRS 4450 is intended to extend to SEC registered offerings. For the reasons addressed above, we believe that it should not, as underwriters and other parties with potential liability on such offerings will run a significant risk that the comfort letter, under a different standard, will not be adequate to enable them to satisfy their due diligence defense under the Securities Act.

Further, we would request that the Exposure Draft clarify whether ASRS 4450 is intended to apply to Australian equity capital markets transactions in lieu of – or in addition to – the existing market practice, which calls for the delivery of independent accountants and/or experts reports on historical and forecast financial information and other sign-offs by the accounting firm and its affiliates to the due diligence committee and the underwriters in connection with those offerings. In this regard, we note that ASRS 4450 precludes comfort on financial forecasts. In Australian equity capital markets transactions it is well established market practice for accounting firms or their affiliates to report on financial forecasts. These reports on the forecasts are customarily removed from the offering document used in connection with the U.S. offering on such transactions in part because accounting firms take the position that the reports are based on procedures that are inconsistent with the standards of other jurisdictions, including SAS 72. There may be reasons not to remove these reports in the future and, in any event, it is not clear to us whether ASRS 4450 is seeking to modify this practice in relation to the Australian component of the offering. We also note that the AUASB has proposed another new standard, ASAE 3450, *Assurance Engagements involving Corporate Fundraisings and/or*

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<sup>9</sup> For example, paragraph 66 of the Hong Kong Standard on Investment Circular Reporting Engagements (“HKSIR”) 400 “Comfort Letters and Due Diligence Meetings”, revised in October 2011, provides that where there is “no requirement to follow any relevant jurisdictional standards, the reporting accountants refer to this HKSIR for the purposes of their comfort letter and due diligence meetings in relation to the relevant international tranche (excluding any tranche to be offered in the United States, which will typically be covered by a comfort letter in the style of U.S. Auditing Standard AU 634), thereby aligning standards for both the Hong Kong and relevant international portions of the offering.”

<sup>10</sup> As discussed below, if ASRS 4450 were to require underwriters to enter into an engagement letter or an arrangement letter with the auditors for an Australian issuer in connection with the U.S. part of an offering, this would, in our view, be a material deviation from SAS 72.

*Prospective Financial Information* (“ASAE 3450”), and request that the AUASB clarify whether ASRS 4450 is intended to impact or modify ASAE 3450 in relation to the preparation and delivery of reports on financial forecasts permitted under ASAE 3450 as proposed.

Finally, we note that the accounting firms that audit the majority of Australian entities that issue securities in the U.S. capital markets are global accounting firms with substantial U.S. practices and are well versed in complying with and following SAS 72. These firms have substantial experience working on U.S. capital markets transactions and delivering SAS 72 comfort letters in connection therewith. In our experience, on U.S. securities offerings by Australian issuers, the accounting firms regularly seek assistance from their U.S. affiliates and/or U.S. compliance experts on the comfort letters issued under SAS 72. Accordingly, in our view, there already exists among the Australian accounting firms a high level of familiarity with SAS 72 and the market practice in connection therewith.

2. *Draft the standard in terms of “guidance” rather than in mandatory terms*

We believe ASRS 4450 should be drafted as a guide and not as an inflexible standard to be applied in the same manner to all transactions. SAS 72 is drafted as guidance rather than as a mandatory standard, allowing for variations among issuers and circumstances. The capital markets are nothing if not innovative. What may be appropriate for one issuer, type of security, type of offering or type of market may not be appropriate for another. Creating mandatory standards is inconsistent with the nature of the capital markets, could create compliance issues for the Australian accounting firms and could potentially negatively impact the future capital raising abilities of Australian entities.

3. *If an engagement letter is required, the letter should only be between the Australian issuer and its auditor*

The Exposure Draft provides that the terms of engagement for the comfort letter should be set out in an engagement letter among the issuer, the accounting firm, the underwriters and other requesting parties. We do not believe that it is appropriate or necessary for underwriters (or other requesting parties) to be required to enter into an engagement letter with accounting firms in connection with, or for the purpose of receiving, a comfort letter. Underwriters are not required to, and as a matter of market practice do not, enter into engagement letters with accounting firms on offerings in the U.S. capital markets, whether involving U.S. issuers or non-U.S. issuers, including Australian entities. SAS 72 does not contemplate a direct engagement of the auditor by the underwriters, nor is one required. As such, the Exposure Draft represents a material deviation from SAS 72 and historical global market practice.

The principal reason for the absence of a contractual arrangement between an issuer’s accountants and the underwriters for a U.S. capital markets offering is that the accounting firm is, and should be, engaged directly by the issuer of the securities to perform the work necessary to deliver the comfort letters. The accounting firm is engaged by the issuer to work on the offering, and one of its obligations in this capacity is to deliver the comfort letters to the underwriters and other requesting parties. Although both the underwriters and the issuer derive direct or indirect benefits from the delivery of the comfort letters (and the work that goes into

producing it), it is the issuer as the audit client of the accountants, not the underwriters, that engages the accountants to perform the related services. Requiring underwriters to sign an engagement letter is unnecessary where there is a clear standard that is intended to apply to the offering (such as SAS 72 or, if adopted and applicable, ASRS 4450). Furthermore, the forms of comfort letters are agreed prior to the entry into the underwriting agreement for the offering, which generally reflects the expectations of the underwriters in a more precise fashion than set forth in an engagement letter.<sup>11</sup> In fact, in many cases, the agreed form of pricing comfort letter is attached as an annex to the underwriting agreement and is almost always in agreed form on or prior to launch of the offer. As noted in our comments above, this approach is consistent with the existing standard for providing comfort letters for U.S. securities offerings by Australian and other issuers under SAS 72.

In our view, this is no different to the issuer appointing and engaging other advisers and reporting persons on the offering to deliver reports and opinions to parties with potential liability, including the underwriters, particularly where such reports and opinions are included as conditions precedent in the underwriting agreement for due diligence purposes and where the agreed forms of such deliverables are annexed or otherwise agreed. The underwriters do not engage these other experts and reporting persons, nor should they need to. As discussed above, this is the same approach taken in relation to the delivery of expert reports and opinions by the issuer's counsel on the offering. Although the underwriters participate in the offering of securities, it is the issuer's desire to conduct a securities offering and its contractual obligation under the underwriting agreement that require the production of the comfort letters.

Further, we believe that the nature and likely content of an engagement letter, including provisions that may seek, as a matter of contract or under an accountants' professional liability scheme, to limit the auditor's liability to the underwriters (and/or other requesting parties), would not be appropriate or acceptable to underwriters (or other requesting parties) and could potentially preclude certain underwriters from participating in U.S. offerings by Australian issuers. This would obviously not be desirable from a public policy perspective. In any event, based on our collective experience advising Australian issuers and their underwriters on U.S. and global securities offerings, we believe that, if ASRS 4450 were to require U.S. underwriters to enter into an engagement letter (or as discussed below, a new form of arrangement letter) with the auditors for an Australian issuer, the terms and conditions of any such letter particularly given the lack of precedent for such a practice, would entail significant and time consuming negotiations with numerous investment banks before a consensus could potentially be reached on an acceptable form of such a letter. We believe that until such time as a consensus on the form of any such engagement letter is achieved, Australian issuers could be precluded from accessing the U.S. capital markets, which would also not be desirable from a public policy perspective.

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<sup>11</sup> We note that in an analysis of responses by the Fédération des Experts Comptables Européens (the "FEE") relating to an April 2005 FEE Discussion Paper on Comfort Letters, in response to a number of comments disagreeing with the FEE's suggestion that underwriters enter into an engagement letter with the issuer's auditors, the FEE indicated that in terms of underwriters executing engagement letters with auditors, "[t]he most important issue is that each recipient of a comfort letter should be made fully aware of the type of engagement, and the requesting party, be they client or underwriter, should take responsibility for the adequacy of the scope of procedures performed by the auditor so as to avoid any misunderstanding regarding such matters and the extent of the auditor's responsibility." The FEE suggested that while an engagement letter may achieve such awareness, an underlying professional standard or the comfort letter itself may also be sufficient.

Accordingly, we propose that ASRS 4450 should be drafted to clarify that any engagement letter need only be entered into by the Australian issuer and the relevant accounting firm.

4. *Clarify that an arrangement letter is not required where ASRS 4450 and/or an equivalent standard applies*

Although the Exposure Draft does not expressly refer to an “arrangement letter” between the accounting firms and the underwriters for purposes of the delivery of comfort letters in connection with the non-U.S. part of an offering, we wish to address those letters here, to the extent that those letters would be considered by the AUASB in lieu of any requirement for engagement letters to be executed by the underwriters of the U.S. part of the offering.

As noted above, we are familiar with the practice of some accounting firms that, in the past five years or so, have required the non-U.S. affiliates of the underwriters that participate in the part of a securities offering outside the United States (e.g., the Regulation S offer) to enter into an arrangement letter with the accounting firm in relation to the comfort letter delivered for purposes of the non-U.S. part of the offering. As also noted above, these accounting firms believe that an arrangement letter is necessary because they interpret SAS 72 as not expressly applying to the non-U.S. part of the offer by a non-U.S. issuer, and therefore an arrangement letter is necessary to specify the procedures to be undertaken by the accounting firm and the terms of the comfort letters for the non-U.S. part of the offering.

We believe that if ASRS 4450 is adopted, and if it is expressed to apply to securities offerings by Australian issuers – including the non-U.S. part of those offerings where another international standard does not otherwise apply (e.g., Canadian Institute of Chartered Accountants – Section 7200, HKSIR 400) – then it should not be necessary for underwriters, their affiliates and/or other requesting parties to have to execute arrangement letters. This is because the relevant standards and other guidance expressly applicable to the delivery of comfort letters for those offerings, including in respect of the procedures to be undertaken by the accounting firms and the terms of the comfort letter, will be set forth in ASRS 4450, and do not need to be repeated in an engagement or arrangement letter.

It is precisely for this reason that engagement or arrangement letters with underwriters are not required, nor has a market practice developed elsewhere in the world to provide them, under SAS 72. The relevant procedures and terms are set forth in the applicable standard – SAS 72 – and described in the comfort letter itself. Accordingly, we believe no arrangement letter should be required under ASRS 4450.

5. *Clarify the period during which a negative assurance statement may be provided*

As drafted, the Exposure Draft is unclear as to whether the “cut-off” date, which we understand is the date up to which procedures under the comfort letters are to be performed and an “auditor’s statement” (i.e., a negative assurance statement) may be provided by the auditor, is intended to be the day before the date of the end of the entity’s next financial reporting period (see paragraph 10(e) and paragraph 45 of the Exposure Draft) or some lesser period at the

discretion of the auditor (see paragraph A35 of the Exposure Draft). We believe that this date should be defined more clearly and, if there are any discretionary factors to be considered that may have the effect of shortening the “change period” (i.e., moving forward the cut-off date), these factors should be spelled out clearly in the standard.

By way of comparison, SAS 72 specifically provides that auditors may not give negative assurance over changes in specified financial statement items as of a date 135 days or more subsequent to the end of the most recent period for which the auditors have performed an audit or a review (the “135 day rule”). In a SAS 72 comfort letter, the cut-off date is typically considered the date two or three business days prior to the date of delivery (and the date of) the applicable comfort letter, through which procedures have been undertaken by the accounting firm. The date of delivery of the comfort letter may be within or beyond the 135 day rule period.

Under the Exposure Draft, if, as it appears, the cut-off date is intended to be the end of the change period, we would propose that (i) ASRS 4450 should be drafted to clarify whether a negative assurance statement in relation to the change period may be included in the comfort letter up until the day before the date of the end of the entity’s next financial reporting period, and (ii) in relation to factors which may be relevant to setting a different “cut-off” date or that otherwise would affect whether the accounting firm can or should accept the comfort letter assignment, a more comprehensive list of such factors should be set out in the standard to the extent possible. Failure to provide a comprehensive list of factors would raise significant uncertainty regarding when an accounting firm would be permitted to provide change period comfort. For example, if it is intended that a 135 day rule or similar rule will or should apply, the standard should be drafted to make that clear. In our view, SAS 72 adopted the 135 day rule largely as a “bright line test” in order to eliminate that uncertainty.

Finally, since the Exposure Draft uses the terminology “auditor’s statement” rather than “negative assurance” as used in SAS 72, we believe ASRS 4450 should be drafted to make it clear that the intention is for there to be no differences between the two standards. Alternatively, if they are intended to be different, then we believe that ASRS 4450 should be drafted to precisely identify the differences between the two standards.

6. *The forms of comfort letters for U.S. offerings by Australian issuers should be the same, in both scope and content, as the forms of comfort letters required by SAS 72*

The scope and content of the comfort letters that are appropriate for underwriters in U.S. securities offerings are set forth in SAS 72. The standards established in SAS 72 reflect long standing practice that has been developed having regard to U.S. disclosure standards and the U.S. liability regime, and the due diligence standards and practices relating thereto. It is for this reason that, as we indicated in comment 1 above, we strongly recommend that ASRS 4450 specifically permit the delivery of comfort letters exclusively in accordance with SAS 72 or another applicable international standard (and not in addition to ASRS 4450), consistent with historical market practice and the stated objective of the Exposure Draft. If the AUASB disagrees, however, and intends for ASRS 4450 to apply to securities offerings in the United States, underwriters (and other requesting parties) will need to be satisfied, in establishing whether they have received sufficient comfort for due diligence purposes, that they have received

at least the same level of comfort as they would receive under SAS 72. As a result, we believe that there should be no material gaps between SAS 72 and ASRS 4450, and that ASRS 4450 should adopt the same wording as the wording used in SAS 72 for equivalent provisions.

In a number of respects, we note that the Exposure Draft deviates from SAS 72. Again, we believe that any such deviations need to be carefully considered having regard to the disclosure, liability and due diligence standards and practices of the relevant jurisdictions in which the securities offerings are intended to take place, including the United States. For example, we note that ASRS 4450 would not allow comfort on financial forecasts. In this regard, we note that SAS 72 includes provisions allowing for comfort on forecast financial information. As we also noted in comment 1 above, in Australian equity capital markets transactions, it is well established market practice for accounting firms to report on historical and forecast financial information; although the accounting firms' reports on forecasts are customarily removed from the offering document used in connection with the U.S. offering on such transactions, this may change and it is not clear to us whether ASRS 4450 is intended to modify that practice. Further, we also note our request that the AUASB clarify whether ASRS 4450 is intended to impact ASAE 3450 in relation to the preparation and delivery of reports on financial forecasts permitted under ASAE 3450 as proposed.

Another area where ASRS 4450 may deviate from SAS 72 is in respect of the comfort that accountants can provide on pro forma financial information. For example, it is unclear to us how paragraph 33 of the Exposure Draft is intended to operate with paragraph 34 of the Exposure Draft (e.g., is the "limited assurance" referred to in paragraph 34 intended to cover the "auditor's statement" in paragraph 33 or some additional or different circumstances). We believe this should be clarified in the drafting of ASRS 4450.

Also, as noted above, the period during which a negative assurance statement may be provided differs between the Exposure Draft and SAS 72.

Finally, adopting a comfort letter model that departs materially from existing SAS 72-based international market practice would, in our view, impede efforts toward international harmonization in comfort letter practices and therefore contribute to uncertainty and inefficiency for underwriters and issuers.

7. *The form of representation letter required by ASRS 4450 for U.S. offerings by Australian issuers should be the same as the form required by SAS 72*

As discussed above, if ASRS 4450 is intended to apply alongside SAS 72 then, to avoid issues under SAS 72, the representation letter in ASRS 4450 should be the same as the form specified in SAS 72. We would also submit that ASRS 4450 should provide that the requirement for a representation letter does not apply to an SEC registered offering or exclusively non-U.S. offerings, which is consistent with the position under SAS 72.

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We believe that, in order to avoid potential market disruptions and limitations on the ability of Australian issuers to access the international capital markets, it is important that the AUASB involve the issuer, underwriter and accounting communities (and their advisors such as Sidley Austin and Sullivan & Cromwell) in the drafting and finalization of ASRS 4450. In our view, the AUASB should not adopt ASRS 4450 unless there is a consensus among all three communities. As we have noted in our comments above, this consensus approach was taken by the AICPA in adopting SAS 72. In addition, if the AUASB intends that ASRS 4450 apply to the delivery of comfort letters in connection with non-Australian offerings, then we believe it is important that the AUASB involve experts and other relevant participants, including underwriters, from all the jurisdictions where Australian issuers may issue securities in order to ensure that ASRS 4450 does not cause market disruption and impose limitations on the ability of Australian issuers to access the international capital markets.

Representatives of our firms are available should you like to discuss, clarify or otherwise pursue any of the matters we have raised or any other matters in the Exposure Draft on which you would find our input useful. Thank you for this opportunity to provide comments on the Exposure Draft.

SIDLEY AUSTIN

SULLIVAN & CROMWELL