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LawyersWeekly MASTERCLASS SERIES

Running capital raises and IPOs

Masterclass 2: IPOs

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WORKBOOK

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1. CASE STUDY - Zenith Pty Ltd

Ex-investment banker, Chris Morrison, established Zenith Pty Ltd in 2017 in order to develop software to assist with remote customer experiences. Chris identified a need to provide a seamless solution in the financial services market to remotely take customers through the lifecycle of financial products, from initial advice, product disclosure, application process, execution and restructuring.

Chris recruited several developers to develop and upgrade Zenith's main software. The more senior of these developers were offered equity in the company, subject to a vesting schedule (which has been satisfied).

Chris has used his experience and contacts within the financial services industry to build up a customer base of over 30 major customers in more than 10 jurisdictions, including major retail banks who use the software to assist with personal and home loan applications.

As a result of Zenith's impressive growth, the company has won numerous awards and has received several government grants for early-stage fintech companies.

Zenith has previously undertaken several rounds of fundraising, including Series A, B and C rounds between 2019 and 2021 which were backed by the corporate VC arm of a major retail bank (which is a key customer), an early-stage VC firm, and a sovereign investment fund.

Zenith currently has 200,000 shares on issue. The latest valuation of the company was $75 million.

Zenith's software is primarily developed in-house by its employees, however it has in the past engaged with contractors and third party developers to develop certain functionality. Given the nature of the business of Zenith's key customers, privacy and cyber security is a paramount concern to the company. Whilst it does not store any of its customers' data itself, Chris is well aware of how damaging a cyber breach would be to the company and its reputation in the market. Zenith, whilst based in Australia, has customers which are based in jurisdictions with more rigorous privacy laws than Australia.

Whilst Zenith has been revenue positive for several years, it is still loss making. Zenith's cash burn rate is also very high, mainly due to high labour and R&D costs. Chris draws a salary of approximately $300,000 per annum, and there are two other management shareholders with salaries above $200,000 per year.

Given the high cash burn, Zenith is looking to raise further capital, and Chris plans to IPO the company later this year.

Given your firm acted for Zenith on its Series A, B and C fundraising rounds, Chris has asked you to assist with running Zenith's IPO.

2. What is an IPO, and why undertake one?

Recap of relevant case study facts:

- Zenith is a private company.
- Zenith currently has 30 shareholders.
- Given its high cash burn, Zenith is looking to raise further capital.
- An IPO is planned for later this year.

2.1 What is an IPO?

What is an IPO?

First issue of securities to the public, usually accompanied by admission of the entity to the official list of a recognised securities exchange

What is involved?

- Capital raising
- Sell down
- Admission process
- International offerings
- Cost and time!

What are the main regulations?

- *Corporations Act 2001* (Cth)
- ASIC Regulatory Guides
- ASX Listing Rules
- ASX Guidance Notes

What is offered?

- Shares in a company
- Units in a managed investment scheme
- Stapled securities
- CHESS depository interests

Notes:

2.2 Why undertake an IPO?

Why undertake an IPO?

Pros

- Provides funding and greater access to capital
- Creation of a trading facility for securities
- Increased liquidity
- Prestige and increased profile / awareness
- Incentivisation for management / staff
- Currency for future M&A
- Liquidity event for founders (i.e. profitable sell-down strategy)

Cons

- May not be a complete exit for shareholders (e.g. because of escrow undertakings)
- Increased regulatory burden and scrutiny
- Risk of loss of control over business (and vulnerability to a takeover)
- Change / broadening of management focus
- Higher costs
- Lengthy process
- Market volatility (and market price becomes a measure of 'success')

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Notes:

3. Regulatory framework for an IPO

Recap of relevant case study facts:

- Zenith is a private company.
- Zenith currently has 30 shareholders.
- Zenith develops software to assist with remote customer experiences.
- Given the nature of the business of Zenith's key customers, privacy and cyber security is a paramount concern to the company. A cyber breach would be very damaging to the company and its reputation in the market.
- Given its high cash burn, Zenith is looking to raise further capital.
- An IPO is planned for later this year.

3.1 Overview of regulatory framework

Overview of regulatory framework

Chapter 6D of the *Corporations Act 2001* (Cth) in relation to issuing capital

- **We need to issue a prospectus**
  - Offer of securities requires 'disclosure' to investors unless an exemption applies
- **Prospectus enables on-sale of securities in first 12 months after issue**
- **Fundamental prospectus disclosure standard**
  - The prospectus must contain *"all the information that investors and their professional advisers would reasonably require to make an informed assessment of the rights and liabilities attaching to the securities offered, and the assets and liabilities, financial position and performance, profits and losses and prospects of the issuer"*
- **Specific content requirements**
  - The terms of the offer
  - Consents from advisers and third parties
  - Information about ASX listing and lodgement of the prospectus with ASIC

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There are a number of specific content requirements, for example the terms of the offer, directors' and advisers' fees, consents from advisers and third parties whose statements appear in the prospectus, and information about ASX listing and lodgement of the prospectus with ASIC.

ASIC has issued detailed guidance about prospectus presentation and content in ASIC Regulatory Guide 228 **'Prospectuses: Effective disclosure for retail investors'**, which provides an overview of the requirements to include, in a prospectus, an investment overview, information about the company's business model, risks associated with the company and its business model, the company's financial position, performance and prospects, the directors and key managers of the company and any relevant interests, benefits and related party transactions, and the offer terms, amongst other things.

Notes:

3.1 Overview of regulatory framework

Overview of regulatory framework

Chapter 6D of the *Corporations Act 2001* (Cth) in relation to issuing capital

- **Clear, concise and effective**
  - Prospectus must be worded in a clear, concise and effective manner
  - ASIC has issued detailed guidance about this in ASIC Regulatory Guide 228 *'Prospectuses: Effective disclosure for retail investors'*
- **Lodgement**
  - Prospectus must be lodged with ASIC (with the ASX listing application to follow within seven days)
- **Exposure period**
  - No applications to be processed for 7 days
- **Maximum life**
  - The maximum life of a prospectus is 13 months, after which it expires

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ASIC has the ability to extend the exposure period by a further 7 days (i.e. to a total of 14 days), which may need to be accounted for in a company's IPO timetable.

Notes:

3.1 Overview of regulatory framework

Overview of regulatory framework

Chapter 6D of the *Corporations Act 2001* (Cth) in relation to issuing capital *(cont…)*

- **Prospectus liability**
  - Specific liability regime, allied to general misleading and deceptive conduct regime
  - List of persons with 'per se' liability for the prospectus
    - Issuer
    - Directors (and proposed directors)
    - Underwriters
  - A person who suffers loss because of a defective prospectus may recover that loss from those involved in preparing the prospectus
  - Defences available, especially in relation to due diligence, where a person proves they:
    - made all inquiries (if any) that were reasonable in the circumstances; and
    - after doing so, believed on reasonable grounds that the statement was not misleading or deceptive

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Depending on the structure of the IPO, the liability regime may be extended further. For example, if the IPO includes a sell down, liability will extend to the directors (and proposed directors) of Sale Co, in addition to the directors (and proposed directors) of the company.

Notes:

3.1 Overview of regulatory framework

Overview of regulatory framework

- ASX Listing Rules – Chapter 1 (which governs admission)
  - Satisfy the **profits test** or the **assets test** (it usually being preferable to satisfy the profits test as ASX will then not usually impose mandatory escrow obligations on existing shareholders or additional reporting obligations on the business)
  - Escrow (relevant to the assets test), free float, and spread
- ASX Listing Rules – Chapter 2 (which governs quotation)
  - Compliant security terms
  - Minimum issue price
- Ongoing compliance with the ASX Listing Rules as a listed entity
- ASX Corporate Governance Council's 'Corporate Governance Principles and Recommendations 4th Edition'
  - Proxy advisers

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In terms of ongoing compliance with the ASX Listing Rules, there are a myriad of requirements for listed entities to adhere to. The ASX Listing Rules govern a range of areas, including, for example, continuous disclosure, future security issues and capital raising activity, related party transactions (including the issue of securities to directors of the company), changes to the nature or scale of the company's business, the convening of meetings, and periodic reporting.

Notes:

4. Key players and stages

Recap of relevant case study facts:

- Zenith is a private company.
- Zenith currently has 30 shareholders.
- Given its high cash burn, Zenith is looking to raise further capital.
- An IPO is planned for later this year.
- Given your firm acted for Zenith on its Series A, B and C fundraising rounds, Chris has asked you to assist with running Zenith's IPO.

4.1 IPO participants

IPO participants

Issuer	Underwriter(s) / lead manager(s)	Existing shareholders	Selling shareholders (and selling company) (if any)
New investors	Accountant	Lawyer	Tax adviser
Share registry	Stock exchange (ASX)	Securities regulator (ASIC)	Others as required (e.g. industry experts, other advisers, typesetters, etc.)

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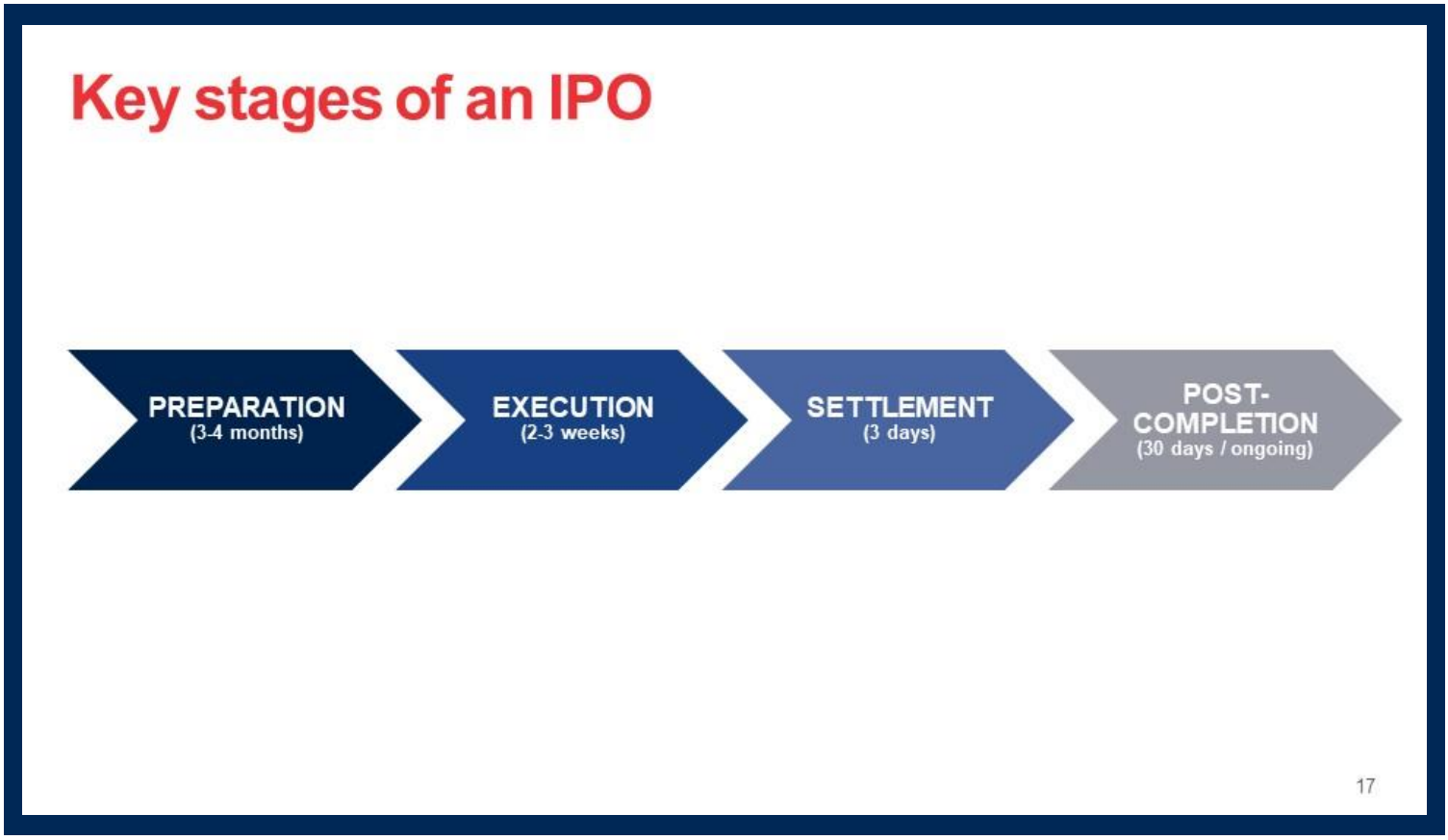
Notes:

4.2 Key stages of an IPO



Whether an IPO timetable is achievable will always depend on the size and complexity of the IPO and the state of the market, amongst other things.

Notes:

4.3 Key stages of an IPO - Preparation

Key stages of an IPO – Preparation

PREPARATION
(3-4 months)

- Considering structuring
- Appointing advisers and agreeing their scope of work
- Conducting due diligence and considering need for regulatory relief
- Arranging preparation and audit / review of accounts
- Agreeing the IPO timetable and valuation
- Settling the company's board composition
- Preparing (and adopting, as the case may be) all required corporate documentation
- Formulating a pre-offer media plan (to avoid contravening legal restrictions on pre-prospectus advertising)
- Considering IPO prospectus insurance
- Preparing prospectus and roadshow materials
- Attending to pre-marketing

Notes:

4.4 Key stages of an IPO - Execution

Key stages of an IPO – Execution

EXECUTION
(2-3 weeks)

- Marketing / roadshows
- Bookbuilding
- Underwriting / pricing

Notes:

4.5 Key stages of an IPO - Settlement

Key stages of an IPO – Settlement

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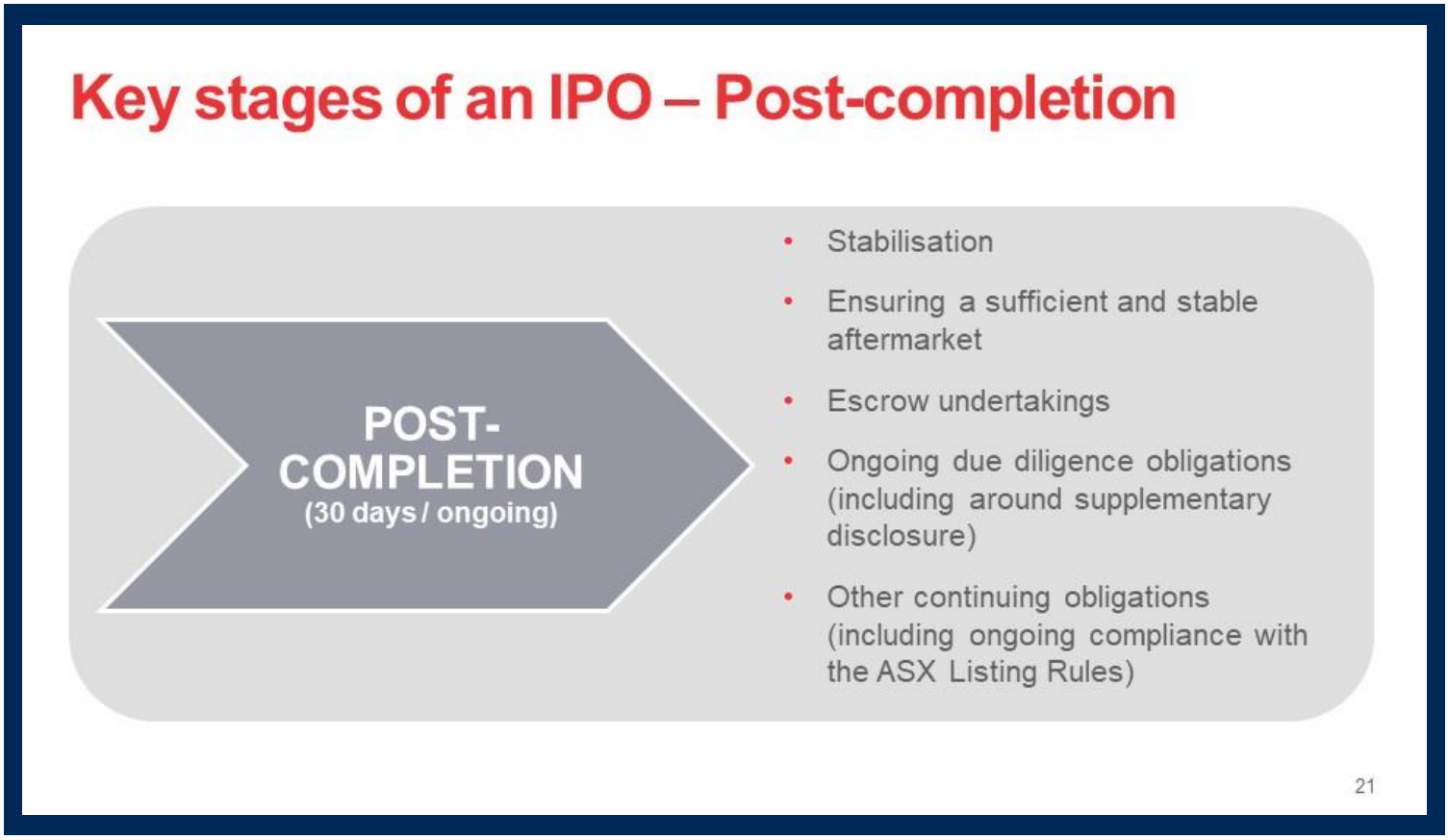
Notes:

4.6 Key stages of an IPO - Post-completion



In terms of ongoing due diligence obligations, these obligations will apply until such time as the securities under the prospectus have been issued. Any new or emerging circumstances before the issue of the offer securities that may affect the prospectus disclosure will have to be considered. The materiality of the issue and what (if any) additional due diligence needs to be undertaken should be assessed, to determine whether supplementary disclosure needsto be made.

Notes:

5. Due diligence process

Recap of relevant case study facts:

- Zenith is a private company.
- Zenith currently has 30 shareholders.
- Zenith develops software to assist with remote customer experiences.
- Zenith has over 30 major customers in more than 10 jurisdictions, including major retail banks who use the software to assist with personal and home loan applications.
- Zenith currently has 200,000 shares on issue.
- Several developers have been involved in developing and upgrading Zenith's main software.
- Zenith's software is primarily developed in-house by its employees, however it has in the past engaged with contractors and third party developers to develop certain functionality.
- Given the nature of the business of Zenith's key customers, privacy and cyber security is a paramount concern to the company. A cyber breach would be very damaging to the company and its reputation in the market.
- Zenith's cash burn rate is very high, mainly due to high labour and R&D costs.
- Chris draws a salary of approximately $300,000 per annum, and there are two other management shareholders with salaries above $200,000 per year.
- Given its high cash burn, Zenith is looking to raise further capital.
- An IPO is planned for later this year.

5.1 Overview of a due diligence process

Overview of a due diligence process

A key element of the IPO workstream

Due diligence committee

- Due diligence planning memorandum
- Agendas and minutes of DDC meetings
- Key issues list
- Management presentations and sign-off(s)
- DDC report and other sign-offs and consents
- On-going due diligence

Legal due diligence

- Questionnaires and data room
- Legal due diligence work plan
- Materiality guidelines
- Legal due diligence report
- Legal opinion

Financial due diligence

- Accountancy firm
- Quantitative materiality guidance
- Independent Limited Assurance Report (public)
- APES 350 sign off (private)

Notes:

5.2 Example legal due diligence materials

Example legal due diligence materials

- Budgets and forecasts relevant to use of proceeds
- Board minutes
- Capital structure table
- Leases and licenses
- Material customer / supplier agreements
- Details of material intellectual property
- Employment agreements
- Finance / facility agreements

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Notes:

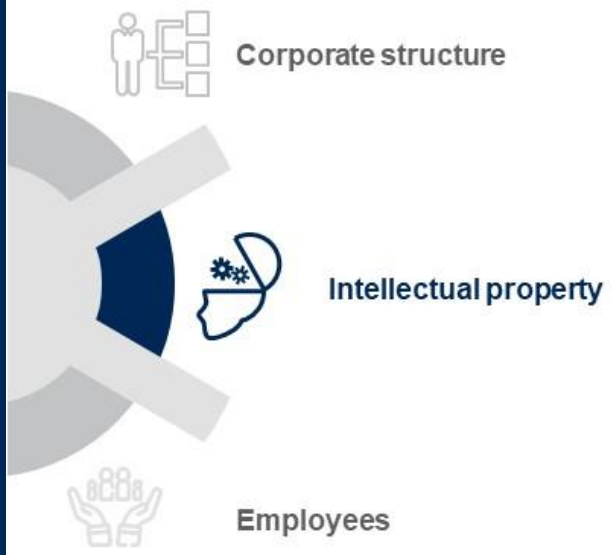
5.3 Example legal due diligence consideration

While it is common for the termination provision in a shareholders' agreement to include listing on a stock exchange, a company may want to consider terminating its shareholders' agreement earlier for a number of reasons. For example, it may want to allow its shareholders to undertake pre-IPO share transfers or disposals without being subject to stringent pre-emptive offer processes.

Notes:

5.3 Example legal due diligence consideration

Example legal due diligence considerations



Proprietary investments and inventions

- Underlying documentation on proprietary information and inventions

Registrations and licences

- Licences, patents, copyrights, trade secrets and other proprietary rights, information, and technology

Teaming agreements

- Underlying documentation regarding any joint development of technology
- Ensuring appropriate IP assignment where IP is produced by employees, contractors or other third parties

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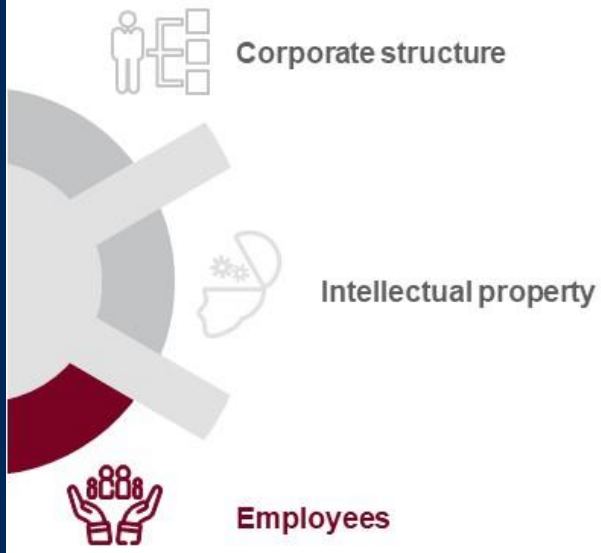
Notes:

5.3 Example legal due diligence consideration

Example legal due diligence considerations



Incentivisation and alignment

- Employee incentive plans
- Bonus arrangements

Non-compete and confidentiality obligations

- Enforceability of confidentiality and non-compete obligations

IP assignment

- Ensuring appropriate IP assignment provisions in employment agreements

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Notes:

6. Key documents

Recap of relevant case study facts:

- Zenith is a private company.
- Zenith currently has 30 shareholders.
- Given its high cash burn, Zenith is looking to raise further capital.
- An IPO is planned for later this year.

6.1 The prospectus

The prospectus

- Key marketing and disclosure document
- Liability for contents (issuer and others)
- Regulatory requirements and market practice
- Due diligence process (hand in hand with drafting)

Notes:

6.2 Prospectus structure

Prospectus structure

	Section
Industry / business	Disclaimers and important notices
	Letter from the Chair, and investment overview
	Industry overview
	Company / business overview
	Key people and corporate governance
Financial	Operating and financial review
	Management's discussions and analysis of financial condition and results
	Investigating accountant's report / independent limited assurance report
	Pro forma financial information
Legal / technical	Risk factors and general taxation implications
	Description of the offer (including offer details and use of proceeds)
	Description of, and rights attaching to, the securities offered
	Summaries of material contracts (including the underwriting arrangements)
	Description of capital structure and other technical information

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Notes:

6.3 Underwriting agreement

Underwriting agreement

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Underwriting agreement

[insert name(s) of Underwriter(s) / Lead Manager(s)]
[insert name of Issuer]
[insert name of SelfCo (if any)]

DRAFT

Table of contents

- Main agreement between the issuer and the underwriter(s) / lead manager(s)
- Records relationship between the issuer and the underwriter(s) / lead manager(s) in relation to matters such as:
  - commitments;
  - offer terms;
  - fees;
  - warranties
  - termination rights;
  - moratoriums on new security issues; and
  - risk allocation, including indemnities

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Notes:

6.4 Other documents

Other documents

- IPO timetable
- Mandate for underwriter(s) / lead manager(s)
- Marketing documents
- Corporate documentation
- DDC documentation (as set out earlier in this presentation)
- Legal due diligence documentation (as set out earlier in this presentation)
- ASX listing application
- Share registry materials

Notes:

7. Common timetabling pitfalls

Recap of relevant case study facts:

- Zenith is a private company.
- Zenith currently has 30 shareholders.
- Given its high cash burn, Zenith is looking to raise further capital.
- An IPO is planned for later this year.

7.1 Common timetabling pitfalls

Common timetabling pitfalls

1

Get ahead of the due diligence game

Get ahead of the due diligence game: Have a data room populated by the time the company is looking to appoint its advisers

Other comments:

- The company's lawyer should always still issue an IPO legal due diligence questionnaire for the company to go through and complete (to ensure that nothing has been inadvertently omitted from the data room), but having started to populate a data room will expedite the legal due diligence process
- This is particularly something to be aware of if the company is looking to list on quite a tight timetable (noting an average IPO takes three to five months, although preparation can be quicker if the company is 'IPO-ready')

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Notes:

7.1 Common timetabling pitfalls

Common timetabling pitfalls

2

Get ahead of items with a long lead time

Get ahead of items with a long lead time: This is particularly important for things that rely on a third party and are not necessarily within the company's control

Other comments: Examples include:

- preparation and audit / review of the company's accounts;
- undertaking AFP national police checks for each director of the company, as well as its Chief Executive Officer and Chief Financial Officer – foreign equivalent checks are also required for foreign persons, which can take some time to arrange; and
- obtaining third party consents – if due diligence identifies any consents that are required in connection with the IPO (e.g. as a result of a change of control provision or counterparty termination right in a major contract), deal with this as early as possible, as third party consent processes can be lengthy (depending on the counterparty)

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Notes:

7.1 Common timetabling pitfalls

Common timetabling pitfalls

3

Convening a general meeting

Convening a general meeting: If the company needs to convene a general meeting to pass resolutions relating to an IPO, it should consider doing this earlier rather than later

Other comments: The company should consider all of the resolutions it might need to have passed, including:

- converting to a public company (if not already done) – this usually takes six to eight weeks, but this can be longer;
- approving a change of name – this should be done for completeness, even if the only change is to reflect the change of company type (i.e. 'Pty Ltd' to 'Limited');
- adopting a new constitution – this will need to be appropriate for a public company, and comply with the ASX Listing Rules;
- approving a director fee pool – this is required to comply with ASX Listing Rule 10.17;
- termination of any existing shareholders' agreement (if required, depending on its terms);
- consolidating or subdividing the company's share capital (if required); and
- re-electing directors (if required),

and allow sufficient time to meet the notice requirements for a general meeting (a minimum of 21 to 28 days)

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Notes:

7.1 Common timetabling pitfalls

Common timetabling pitfalls

4

Applications for ASX waivers and/or in-principle advice

Applications for ASX waivers and/or in-principle advice: If the company needs a waiver in respect of any of the ASX Listing Rules, or in-principle advice from ASX, prepare and lodge the application as soon as possible to avoid any delays to the timetable (with the same going for ASIC relief applications)

Other comments: The company may need a waiver and/or in-principle advice from ASX for any number of reasons, for example:

- if there is anything unusual about the company's structure and operations, such that there is a question as to whether ASX will regard its structure and operations as suitable for a listed entity – this is a requirement under ASX Listing Rule 1.1 (condition 1);
- if the company has pre-existing options on issue with an exercise price of less than $0.20 – this would otherwise breach ASX Listing Rule 1.1 (condition 12); and
- if the company has, or proposes to have, any unusual provisions in its constitution – this is especially the case if they concern voting, distribution, or divestiture rights (as such provisions may otherwise breach ASX Listing Rules 6.10.5 and 6.12.3)

Notes:

7.1 Common timetabling pitfalls

Common timetabling pitfalls

5

Mandatory restriction deeds

Mandatory restriction deeds: If the company is listing under the assets test and has numerous related party shareholders that will be subject to mandatory ASX-imposed escrow, arrange signing of their Appendix 9A restriction deeds as early as possible

Other comments:

- The company should have as many signed Appendix 9B restriction deeds as possible to provide to ASX on submission of its ASX listing application
- While the company can provide any outstanding Appendix 9B restriction deeds to ASX after the date of submission of its ASX listing application (as they are received by the company), it is not advisable to rely on this too heavily
- The company may want to consider preparing a standard form communication to be sent to shareholders explaining the requirement for execution of the Appendix 9B restriction deeds, to avoid fielding numerous individual queries
- The company may also have to arrange execution of a number of voluntary escrow deeds, depending on what it agrees with the underwriter(s) / lead manager(s)

Notes:

Additional notes:

Presenter profiles

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Antony is the head of the Australian Equity Capital Markets team and advises on equity capital markets and public M&A transactions.

Antony has a distinguished 19 year legal career in both private practice and as an in-house lawyer. Antony was, for 10 years until late 2017, a senior member of the in-house legal function at UBS where he advised on transactional matters across the full breadth of its market leading Australasian investment banking business. Antony is able to draw on this significant experience to provide a unique insight to clients across a wide range of corporate finance transactions and other matters.

Antony was a finalist in the Lawyers Weekly Partner of the Year Award for 2020 for Capital Markets

Antony's practice focuses on the full spectrum of capital markets transactions, for both issuers and underwriters, as well as public M&A transactions. He also provides general corporate, fundraising, securities and mergers & acquisitions advice, across various sectors. Antony also has broad experience on financial services regulatory matters affecting investment banks and other financial institutions.

Earlier in his career, he practiced as an intellectual property lawyer and has a professional qualification in intellectual property law and practice. Antony has a degree in Genetics from Cambridge University.

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Adrienne is a Senior Associate in the Australian Corporate Markets team.

Adrienne is a corporate lawyer with more than six years' experience and advises clients on a range of corporate matters, focused on capital markets (including IPOs and secondary capital raisings) and mergers and acquisitions (both regulated and unregulated).

Adrienne has acted on a number of IPOs in recent years, particularly for companies within the energy and resources and technology and communications sectors, the most recent of which was listed in December 2020. Her capital markets practice focuses on primarily issuer-side transactions. Adrienne also provides fundraising, securities, and mergers and acquisitions advice across various sectors, and regularly advises in relation to general corporate advisory matters (such as continuous disclosure and compliance, corporate governance, and stakeholder management).

As well as corporate transactional experience, Adrienne also has some background in tax and structuring and carbon farming advisory work, which she was involved in towards the beginning of her career. Adrienne has a Bachelor of Laws (First Class Honours) and a Bachelor of Business (Distinction) from Queensland University of Technology and a Graduate Diploma in Legal Practice from the College of Law.

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