

# The Retirement Villages Act 2003

A Presentation  
by

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Limited



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# Why have Retirement Village Legislation?

Vulnerable Consumer in view of:

- Complexity of documentation
- Substantial level of individual investment
- Strong negotiating position of manager
- Diminishing abilities of consumer over time
- Debt risks especially for new schemes



# Balancing the Interests

- Individual interests of residents
- Collective interests of residents
- Interests of the operator/Owner
- The interests of external financiers
- The long term needs of the village infrastructure



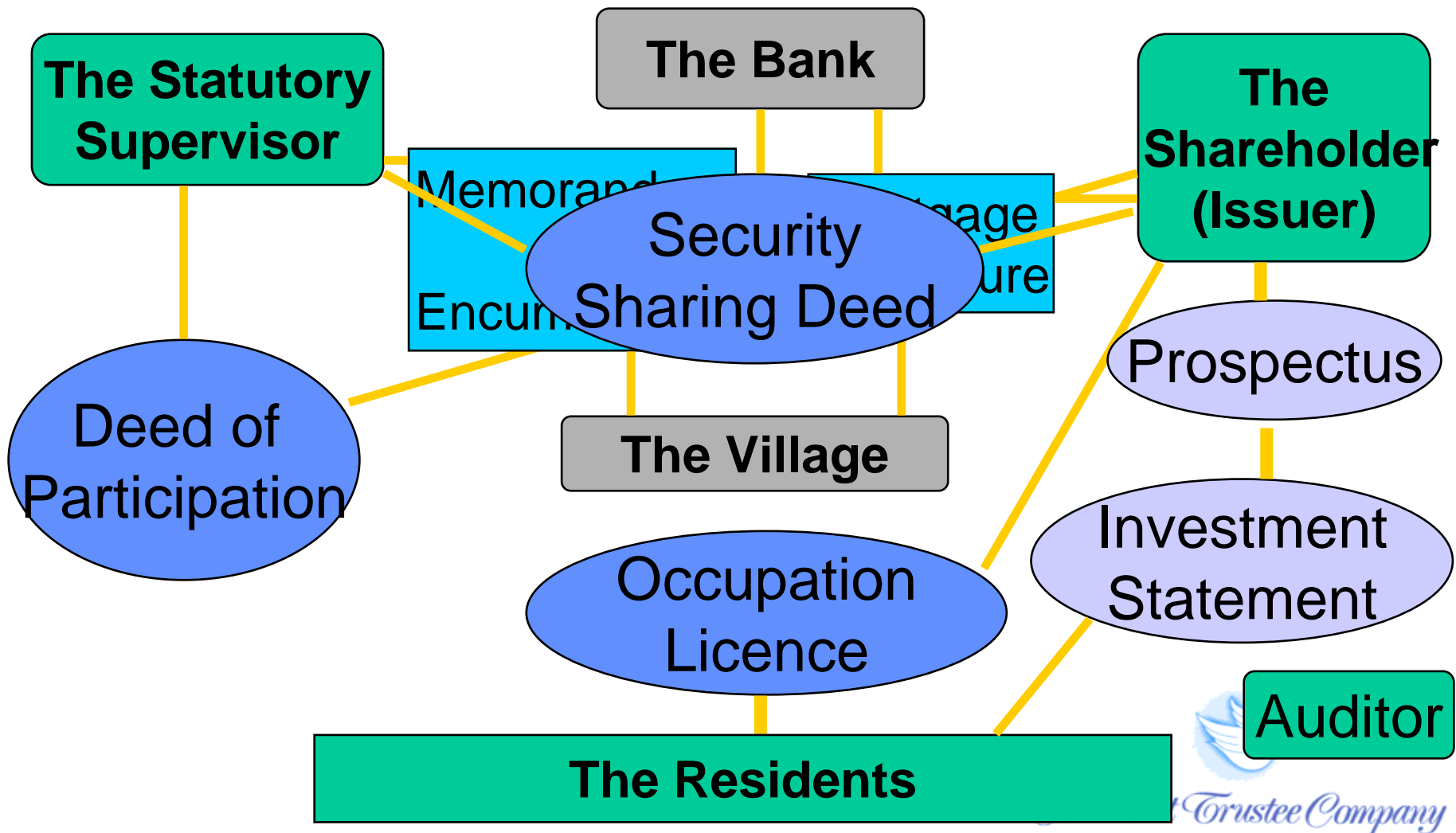
# New Zealand Legislation

## Basic Statutory Principles

- Disclosure based - prescriptive
- Broad based minimum contractual requirements
- Independent scheme supervision

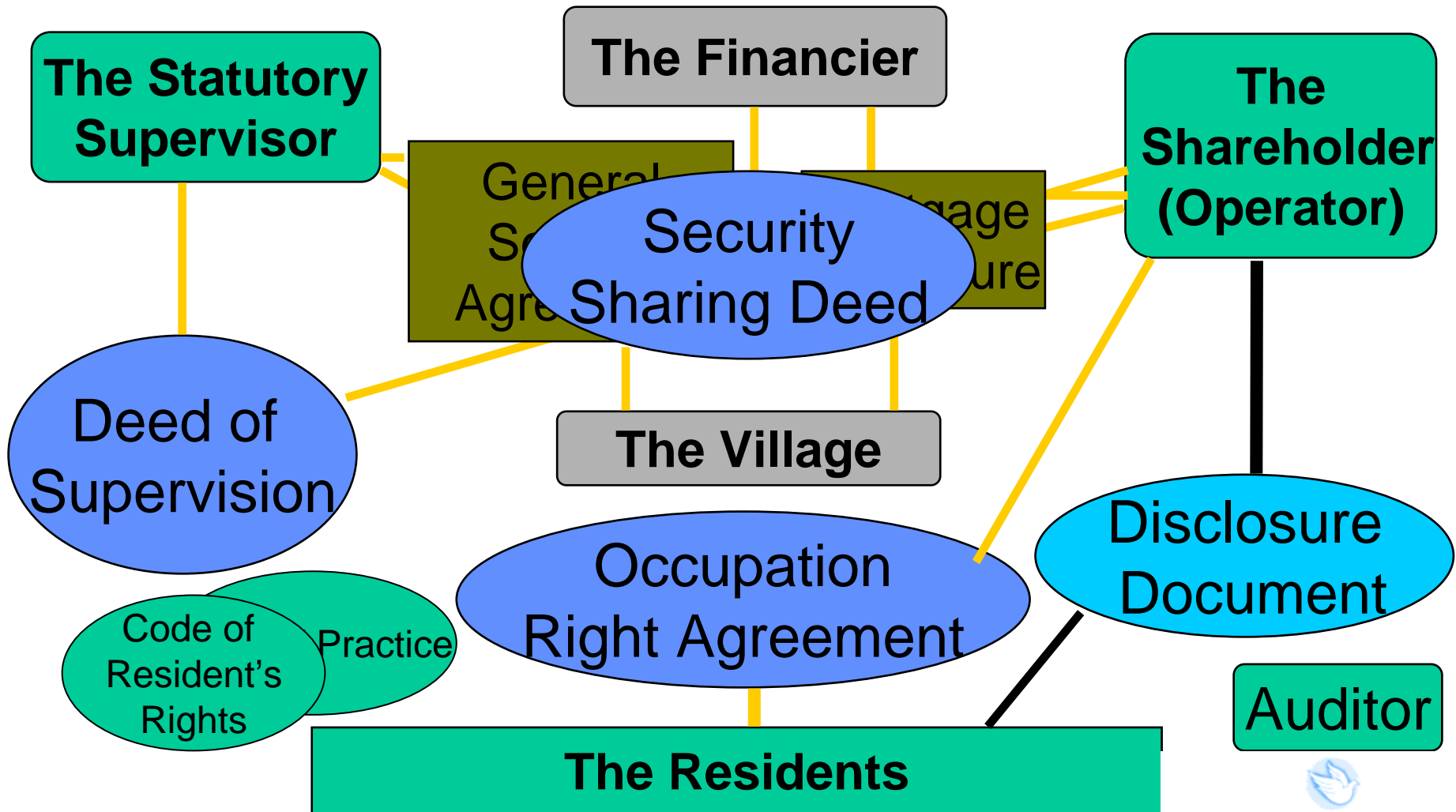


# Going to the Public - Usual Situation Securities Act 1978



# Retirement Villages Structures

## Retirement Villages Act 2003



# Who is Affected

- All retirement villages will need to comply with the Act
- 2 Units or more
- Will impact on operators, residents, financiers and statutory supervisors



# When

- The Act became law on 1 February 2004
- The operational provisions of the Act will come into force on a date appointed by the Governor General in Council.
- This can not occur until the regulations have been agreed.
- The Ministry of Building & Housing have indicated the regulations will be published in June and the Act operative September





# Registration

- All villages must register within 6 months of effective date
- No offer can be made, or occupation right entered into after 6 months if not registered.



# Registration Requires

- A copy of the Disclosure Statement
- Full legal description of the property with copies of plans etc
- Details of the Statutory Supervisor and a copy of the contract (Deed).
- Occupation right agreement
- The fee
- Anything else required by regulation.



# Statutory Supervisors' Appointment

- Registrar of Companies now approves statutory supervisors not the Securities Commission Section 37
- Statutory Supervisors approved by the Securities Commission are also approved. Section 37(2) - but can be revoked Section 37(4)
- Operator appoints Section 38
- Registrar's consent needed to terminate or not renew Section 39
- Registrar has power to exempt Section 41



# Primary Duties Section 42

- Stakeholder facility for deposits
- Monitor financial position of village
- Report annually to registrar and to residents
- Perform any other duties imposed by Act, regulation and documents of appointment



# 7th Schedule of Securities Act

“The Statutory Supervisor shall exercise reasonable diligence to ascertain whether or not any breach of the terms of the deed or of the offer of the participatory securities has occurred and, except where he is satisfied that the breach will not materially prejudice the interests of holders of participatory securities, shall do all such things as he is empowered to do to cause any breach of those terms to be remedied”



# Statutory Supervisor's Powers

## Section 43

If it believes the financial position, security of the interests of residents, or management inadequate it may:

- direct the operator to supply information to residents
- direct the operator to operate the village in a specified manner
- apply to the Court under Section 49 of the Securities Act

Can direct that advertisements including the disclosure statement not be distributed under certain circumstances.



# Other Powers

- Make public statements with Registrar's consent Section 44
- May require the operator to provide information relating to financial position, security of residents' interests, or management. Section 46
- Require the auditor to answer questions or provide information - given 20 days to answer. Section 47



# Operator must advise the Statutory Supervisor if (Clause 34)

- Any proposal to develop or re-develop the village or acquire contiguous land
- Receipt of notice of suspension of registration from the Registrar
- Any request from the operator to cancel registration
- Any decision to exempt the village from appointing a statutory supervisor or from complying with the Code
- Appointment of a new statutory supervisor





# Operator must advise the Statutory Supervisor if (Clause 34)

- Any proposed increase in secured liabilities
- Threatened action by creditor over \$1000
- Actual or threatened legal action affecting residents
- Refusal to insure by insurer
- Any action by a creditor to put the operator into receivership or liquidation.



# DEED OF PARTICIPATION

Contract between the Company and the Statutory Supervisor

Duties and Powers of the Manager

To provide the services set out in the disclosure documents and the licence to occupy

Set accounting and financial statement obligations

Required to provide quarterly reports to S.S.

Sets limits on the issuers ability to sell, distribute, or encumber assets or provide guarantees without the Statutory Supervisors consent

Limits borrowing powers.



# DEED OF PARTICIPATION

- The Statutory Supervisors powers and duties are set out in the Act and the Deed of Participation
- Terms of appointment of the Statutory Supervisor. These include;
  - ⑩ Rights to take legal and other professional advice at the cost of the Issuer
  - ⑩ Is indemnified for costs incurred in the performance of duties
  - ⑩ Remuneration provisions
  - ⑩ Access to company records
  - ⑩ Etc.
- Sets out meeting requirements



# WHAT DOES A STATUTORY SUPERVISOR DO?

## Practical Considerations

- ☉ Negotiate initial terms and structures to best protect the interests of residents and to establish an appropriate monitoring regime.
- ☉ Monitor financial structure and performance, sales and debt servicing ability.
  - ☉ Approvals for loans and security arrangements
  - ☉ Capital requirements
  - ☉ Control distributions
  - ☉ Review forecasts for reasonableness
- ☉ Receive and review quarterly directors' certificates.
- ☉ Receive and review six monthly and annual financial statements.
- ☉ Review Disclosure Statements



# WHAT DOES A STATUTORY SUPERVISOR DO?

## Practical Considerations (Continued)

- ⊙ Receive all applications and deposits and process final settlements
- ⊙ Check termination calculations
- ⊙ Review the service fee budget often in consultation with residents.
- ⊙ Attend the Annual meeting of residents and appoint the Chairman.
- ⊙ May attend other meetings between management and residents.
- ⊙ Monitor covenants of Manager to Residents under the documentation
  - ⊙ Provision of community facilities
  - ⊙ Provision of agreed services



# WHAT DOES A STATUTORY SUPERVISOR DO?

## Practical Considerations (Continued)

- ☉ Meet with Manager on future plans/products
- ☉ Monitor maintenance reserves/funding arrangements to ensure the quality of the schemes assets
- ☉ Negotiate with financiers when a village is in difficulty. Facilitate a smooth transition to new owners where this is required.
- ☉ Mediate informally in disputes.
- ☉ Respond to queries from management and residents.
- ☉ Generally promote the welfare and security of Residents



# Practicalities

- Lenders want certainty in their ability to take suitable recovery action in the event of default
- An encumbrance will still be required on the property title(s) to give notice to any person wanting a security interest of the involvement of the statutory supervisor.
- A General Security Agreement will be required to give effect to the power to direct the operator to manage the village in a specified manner.
- A Security Sharing Deed will be required this regulates the relationship between the parties, and sets the boundaries for the lenders and the statutory supervisor.



# Exemption (Section 41)

- Registrar can exempt in accordance with any regulations
- An exemption can only be granted in circumstances where the appointment is “..unnecessary for the protection of residents’ interests or undesirable”
- Exemptions will be very rare
- Cost may be a factor to consider but exemption itself will incur costs as the Registrar will have to monitor compliance but will not have powers of the statutory supervisor





# Disclosure Statement

- Content will be set by regulation but will need to comply with Schedule 2 of the Act
- Must be given to all intending residents
- Must be given to all current residents within 12 months.



# Applications (Section 30)

- Before any occupation right can be entered into, the intending resident must receive
  - Disclosure statement
  - Residents' code of rights
  - Code of practice
  - Copy of occupation right agreement.
- Occupation right is voidable up to 12 months if the above is breached in a substantial respect. (Section 31)



# Applications

- All deposits and progress payments to be held in statutory supervisor's trust account. (Section 29)
- The intending resident has a 15 day "cooling off" period from the date of signing the agreement. (Section 28)
- A independent lawyer must witness the application and must certify they have explained the general effect of the agreement and its implications. (Section 27(3)-(7))



# Memorial on Village Title (Sections 21-23)

- Memorial will be registered on village land
- Effect is that the holder of a security interest or receiver or liquidator etc can not:
  - Dispose of the village other than as a going concern
  - Disclaim an occupation right agreement
  - Evict a resident or limit access to facilities
- Encumbrance is still much more effective



# Code of Practice

- Matters to be included are set out in Schedule 5
- Drafted by a working group of the RVANZ
- Has been the subject to consultation with operators and other representative groups.
- Has been the subject of detailed recommendations by the Retirement Commissioner.
- Will set a minimum standard
- Compliance will be obligatory although exemptions can be sought.
- Can override existing occupation rights



# Draft Code of Practice

Staffing

Safety and Personal Security

Fire and Evacuation procedures

Minimum Insurance requirements

including waiving rights of subrogation

Meetings

Communication

Requirement for a complaints facility



# Draft Code of Practice

- Minimum invoicing requirements
- Maintenance and upgrading requests
- Requirement for a long term maintenance plan
- Annual report on the maintenance plan including how it will be funded.
- Separate bank account for resident contributed funds for long term maintenance
- Minimum construction standards



# Draft Code of Practice

- Minimum termination requirements – these include:
  - Notice requirements
  - Limits to the payment of ongoing fees.
  - Communication of procedures following termination.
  - Ongoing consultation and reports on resale.
- Requirements for a written policy for communicating with people for whom English is a second language or for whom the ability to communicate is limited





# Disputes

- Operator must establish a complaints facility
- Either resident or operator can initiate a formal dispute
- Retirement Commissioner will approve people to deal with disputes
- Disputes panel for problems with resales.
- Statutory supervisor must be informed if any disputes affects its responsibilities



# Other Operator Obligations

- Prepare and file audited financial statements
- See that advertising complies with the Act
- Comply with the Code of Practice
- Comply with the Code of Residents Rights, especially noting requirement to consult on certain matters
- To inform residents of matters set out in Section 34.



# Issues you may have to face

## Initial Compliance

- Some may have to consider amalgamating
- Appropriateness of your current legal and governance structures.
  - Limiting risk – keep it simple
  - Appointment of suitable directors/trustees
  - Review the terms of your Occupation Right Agreement
- Disclosure issues - life may become very public
- Audited Financials
- Legal and other advisers – please use specialists.
- Initial compliance costs
- Timing will be tight for villages not complying with the Securities Act 1978



# Issues you may have to face

## Ongoing

- Ongoing reporting to a statutory supervisor
- Internal control systems
- Financial survival – the numbers must stack up
- Restructure to reduce eliminate disputes
- Dealing with a more prescriptive rather than principle based regime
- Staying innovative
- Long term maintenance
- What will be your point of difference?





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# Covenant's Professional Team



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