



5 February 2018

Submitted via email: retirementliving@propertycouncil.com.au

Property Council of Australia
Level 7, 136 Exhibition St
Melbourne VIC 3000

Dear Sir/Madam,

Submission: Retirement Living Council Retirement Living Code of Conduct

This written submission is provided by Consumer Action Law Centre (**Consumer Action**), Residents of Retirement Villages Victoria (**RRVV**), Housing for the Aged Action Group (**HAAG**) and COTA Victoria (**COTA Vic**).

The need to address widespread problems in the retirement housing industry is long overdue. We welcome industry efforts to better protect and promote the rights and interests of older Australians who choose to live in retirement housing. We also generally support the aim of the Draft Retirement Living Code of Conduct (**the Code**), which is to 'improve accreditation standards and coverage, and to set and maintain high standards about the marketing, selling and operation of Retirement Communities'. However, we do not consider that the Code distributed by the Retirement Living Council (**RLC**) would achieve these aims or properly address resident concerns without significant amendments.

Overall, the Code has a disproportionate focus on promoting industry interests and fails to address the harm caused by bad practices in the retirement industry. Much of the Code reads as a public relations exercise without genuine regard given to how resident outcomes might be improved or measured. Importantly, it fails to address key resident concerns, which include:

- complex and unfair contracts including unfair fees;
- difficulty achieving binding resolution of disputes;
- lack of mandatory training and qualification standards;

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- inadequate skills and poor attitude of management;
- problems with maintenance including delays, poor quality work and lack of clarity about responsibilities; and
- lack of resident consultation and limited opportunities to participate in village/park decision making.

In our view, the administration and enforcement provisions in the Code fail to meet the standards set out in the Australian Competition and Consumer Commission's *Guidelines for developing effective voluntary industry codes of conduct (the ACCC Guidelines)*.¹ There is no independent monitoring of compliance and the proposed consumer representation on Code Administration Committee (**CAC**) is limited. The intended aims of the CAC are unclear, and it appears that there will be no public reporting or data collection. The CAC's complaints handling process also seems entirely optional as signatories to the Code are only required to 'acknowledge' the CAC complaints processes in section A2.4.

We are also critical of the compliance mechanisms in the Code. 'Self-certifying' compliance certificates lack accountability mechanisms and are, in our experience, ineffective. Moreover, there are almost no sanctions or remedies for residents if an operator breaches the Code.

Our comments are detailed more fully below.

General comments

We welcome moves from within the retirement living industry to improve standards, particularly in the absence of any independent dispute resolution service such as an ombudsman scheme. However, we strongly doubt that this Code, in its current form, would be an effective tool to bring about any meaningful change.

There are several guides issued by regulators regarding the development of industry codes.² These guides detail best practices that sectors should refer to in the development of various codes. We are unconvinced that best practice examples have been followed despite claims by RLC to the contrary.

Significant portions of the Code more closely resemble a sales brochure or lobbying brief than a genuine industry code of conduct. A Code is no place for marketing or to push a political agenda. For example, promoting a 'deeper knowledge and understanding of the benefits of Retirement Communities' is not a valid objective for an industry code. Nor is a Code an opportunity to tout the benefits of membership to the RLC.³ Content such as this is superfluous and would not deliver any substantive benefits to those living in retirement housing.

¹ Australian Competition and Consumer Commission (**ACCC**), *Guidelines for developing effective voluntary industry codes of conduct*, July 2011

² For example, see ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, July 2011, available at:

<https://www.accc.gov.au/system/files/Guidelines%20for%20developing%20effective%20voluntary%20industry%20codes%20of%20conduct.pdf>; and Australian Securities and Investments Commission (**ASIC**), *RG 183 Approval of financial services sector codes of conduct*, March 2013, available at: asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-183-approval-of-financial-services-sector-codes-of-conduct/.

³ Retirement Living Council, *Code of Conduct - Draft for Consultation*, 2017, 'Objectives of the Code' and 'About the Retirement Living Council'.

Other sections of the Code detail items that any customer-focused business should already have in place, or are required by law, and do not provide sufficient detail. For example, maintaining 'appropriate and effective customer service arrangements', 'inviting feedback', or 'maintaining written policies and procedures' for managing staff or 'concerning general safety and security...and emergency management'⁴ fail to stipulate measurable standards for signatories to comply with. These clauses contain also insufficient detail to assess whether an operator is complying with the Code.

The role of industry codes

The ACCC Guidelines note that the wider the coverage a code has, the more effective it will be.⁵ It is unclear from the draft Code as to whether it will cover the majority of the retirement living industry. However, we understand that RLC membership currently covers less than half of the retirement housing industry, so we anticipate the Code would not achieve comprehensive industry coverage.

Industry codes should improve consumer confidence and deliver substantial benefits to consumers. They should identify issues and problems facing consumers in a particular industry, develop measures that build on pre-existing legislative requirements and detail what signatories to a code must do to comply. To work effectively a code must set a series of substantive core rules that code subscribers will adhere to, which is monitored and enforced by an independent body.

The aim of these rules is to improve industry practices. Improving industry practices in the retirement living industry is sorely needed. However, the Code continues to rely heavily on disclosure as the primary form of consumer protection, or non-committal clauses such as 'maintaining policies and procedures' without detailing what these should be. For example, 'We will provide customers, where possible, with information about any charges payable to third parties' and 'we will provide clear written information about the process and cost of reserving a residence'.⁶ This disclosure is opposed to actual measures that stipulate how industry practices are to be improved to provide benefits to residents. To this end, the Code represents high level guidelines only and not an industry code as we would expect.

Objectives of the Code

The objectives of the Code are broad and principles-based, which we do not oppose. However, these objectives are not supported by the content of the Code itself. There is no mention of the risks and practices that the Code would address, nor any metrics to measure the success of the Code. We also query the appropriateness of some of the objectives listed in the Code. For example, the objective to 'Promote and protect the interests of customers' fails to identify the interests the RLC intends to promote nor is it supported by clauses in the Code that describe how this objective will be achieved. Items listed such as 'Promote a deeper knowledge and understanding of the benefits of Retirement Communities' are also not valid objectives for an industry code that seeks to improve consumer protection.

Development and lack of consultation

⁴ Ibid, sections C1.1, C1.2, C2.1, and C3.1.

⁵ ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, July 2011, p. 9.

⁶ Retirement Living Council, *Code of Conduct - Draft for Consultation*, 2017, sections B1.7 and B1.6

We are disappointed with the lack of consultation with resident/consumer representatives to date, and the lack of transparency around the development of the Code. Effective consultation with all stakeholders when developing a code is standard practice and ensures all issues are identified and appropriate responses can be canvassed. As set out in the Australian Securities and Investments Commission *Regulatory Guide 183: Approval of financial services sector codes of conduct (ASIC RG183)*, code development should include 'effectively consulting with all stakeholders to identify the issues and debate appropriate responses.'⁷ This has not been the case. Further, removing the draft Code from the Property Council website sends mixed messages as to whether the RLC is genuinely open to receiving feedback about the Code.

We are also concerned that no independent party was appointed to develop the Code. Industry codes are generally administered by an industry association. However, when developing a code of conduct it is generally the case that an independent person, with no direct relationship to the relevant industry, oversee the development process.⁸ It is good practice for the body that appoints this person to also engage with consumer representatives prior to the selection.⁹ Having an independent, adequately resourced person do this work sends a message that the relevant industry genuinely wants to improve practices and that consumers can be confident in the code that is produced.

Dealing with complaints and disputes

The requirements in section C4 should be in accordance with the 2014 Australian/New Zealand Standard for complaints management, and tailored in consultation with residents to ensure that they meet the needs of older people in retirement housing.¹⁰ As set out in the ACCC Guidelines, this usually requires a definition of complaint that includes any expression of dissatisfaction with a product or service offered or provided. Currently, there is no definition of a complaint in the Code. Further, it is unclear whether the Code dispute resolution process is to be preferred over existing dispute resolution processes, or what the approach will be should various processes overlap.

We encourage the RLC to include measures in the Code that:

- detail how to make a complaint
- ensure a complaint is responded to and in what time-frame
- detail what it means when a complaint is 'resolved'.

We have reservations about the complaints handling process detailed in C4.7-C4.9. Given the Code's first objective is to 'promote and protect the interests of customers' the processes seem overly complicated and may result in 'complaint fatigue'.¹¹ A resident may be dissuaded from initiating a complaint given the convoluted escalation process set out in section C4.9. These concerns underscore our call for the establishment of an independent

⁷ ASIC, *RG 183 Approval of financial services sector codes of conduct*, March 2013, para 183.50.

⁸ *Ibid*, p. 14.

⁹ ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, July 2011, p. 5.

¹⁰ Standards Australia, *AS/NZS 10002:2014 - Guidelines for complaint management in organizations*, October 2014, available at: <https://infostore.saiglobal.com/store/PreviewDoc.aspx?saleItemID=2764164>

¹¹ For a discussion of this in the telecommunications industry, see ACCAN, *Complaint fatigue persists among telco consumers*, available at: <https://accan.org.au/our-work/1072-complaint-fatigue-release>.

ombudsman service to provide free, fair and binding determinations of retirement housing disputes.

We are also concerned about the mediation process outlined on page 13 of the Code, which states that mediation services 'will be charged at commercial rates and the costs will be borne by the parties in an agreed ratio'. We submit that operators should bear most (if not all) that cost of mediation. Expecting residents to bear the cost of commercial mediation would be an unreasonable barrier to making complaints, and further adds to the imbalance of power between operators and residents.

Extension beyond legal rights

Disappointingly, much of the Code simply restates the law rather than committing to better practices that would benefit residents.¹² For example, section B1.1 merely requires signatories to ensure that 'advertising and marketing material complies with relevant Commonwealth, State or Territory legislation and regulations'. As set out in ASIC RG183, codes should set about raising standards in a particular industry, and complement or exceed pre-existing legislative requirements.¹³ Failure to do this raises the question as to whether the Code will actually bring about improved industry practices, and provide any protections to residents that are not already provided for by law. As it stands, the Code will do little (if anything) to address the widespread problems and community concern with conduct in the retirement industry and is unlikely to improve consumer or community confidence as a result.

For example, fees in retirement housing contracts are unregulated and have long been open to exploitation by operators. Sections D1.1-1.2 appear to acknowledge these problems. Bizarrely, no obligations whatsoever are proposed to remedy these arguably unfair contract terms apart from endeavoring to be 'clear'. We are concerned that the focus will continue to be on disclosing costs, and that no measurable steps will be taken to address resident concerns about excessive or unfair fees and/or fee structures. An approach that relies on disclosure is an outdated, ineffective form of consumer protection.

Administration, enforcement, remedies and sanctions

The effectiveness of a Code can be predicted on how it is monitored and enforced, and the remedies and sanctions that apply when the Code is breached. On this basis, we predict the Code will not be effective as there are almost no consequences for code breaches nor any independent compliance monitoring and oversight.

An effective Code should be administered by an independent body with effective remit and powers, and adequate resources to fulfil its functions.¹⁴ This body should be independent of the industry that subscribe to the code. As set out in ASIC RG183, without such an administrator there is a risk that oversight of industry compliance with the code will be reduced, systemic problems will not be identified, and industry and consumer awareness of the code will be low.¹⁵ In this case, the Code is administered by an RLC-appointed committee, with half of the members (including the 'Coordinator') from industry. This raises

¹² Examples include sections A1.3, the majority of section B1, sections B2.1, B2.3, C1.3, C1.7 and C3.1.

¹³ RG183.57

¹⁴ ASIC, *RG 183 Approval of financial services sector codes of conduct*, March 2013, para 183.76.

¹⁵ *Ibid*, para 183.77.

serious questions about the independence of the CAC. The CAC also does not appear have any powers to monitor ongoing compliance with the Code, nor does it appear to have any remit to collect data or publicly report on code compliance. Further, there is no process outlined for reporting systemic code breaches and serious misconduct to state and federal consumer affairs regulators. The self-certifying compliance certificates are a further feeble attempt at self-regulation that lacks any real oversight or enforcement.

Details of enforcement avenues, available remedies and sanctions in the draft Code are conspicuously absent. The lack of detail and measurable obligations in large sections of the Code, as mentioned above, makes it particularly difficult to enforce. The CAC seemingly has little authority to ensure the Code is complied with or to issue sanctions to signatories found breaching the Code. The Code simply states that the CAC will 'consider questions of non-compliance with the Code of Conduct arising from complaints' according to unspecified 'stringent guidelines'¹⁶. Ideally, the CAC would be able to identify systemic issues and breaches through its own compliance monitoring function as well as complaints received. The Code should also identify potential sanctions, which should include corrective advertising, expulsion from the RLC, fines, warnings and providing remedies to affected residents.¹⁷ At a minimum, available remedies for code breaches should include compensation for loss or damage caused to a resident by the breach of the code, and the ability to make binding non-monetary orders obliging the subscriber to resolve the breach.¹⁸

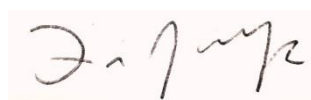
Overall, we are very disappointed by the draft Code. We strongly doubt that in its current form the Code would improve systemic harmful practices in the retirement industry or bring any practical relief to residents. We are not convinced that the RLC has the breadth of membership, nor the appropriate stakeholder relationships and consultation processes in place, to ensure that an industry code would be effective. Unfortunately, it appears that this Code is simply an attempt to ward off long overdue legislative reform and improve the industry's image, rather than a genuine attempt to improve outcomes for residents. On this basis, our organisations will continue to advocate for a more effective regulatory framework.

Please contact Katherine Temple on 03 9670 5088 or katherine@consumeraction.org.au if you have any questions about this submission.

Yours sincerely,



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¹⁶ Retirement Living Council, *Code of Conduct - Draft for Consultation*, 2017, p. 13.

¹⁷ ACCC, *Guidelines for developing effective voluntary industry codes of conduct*, July 2011, p. 11.

¹⁸ ASIC, *RG 183 Approval of financial services sector codes of conduct*, March 2013, para 183.68.

Fiona York
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Lawrie Robertson
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A handwritten signature in black ink, appearing to read 'Lawrie Robertson', on a light-colored background.

Ronda Held
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