

Communications Compliance comments on revised TCP Code – public consultation version January 2024

Introduction

1. Communications Compliance (CommCom) welcomes the opportunity to comment on the revised Telecommunications Consumer Protections (TCP) Code (the Code).
2. As set out below, CommCom is supportive of the general approach taken to the revision of Chapter 10.
3. CommCom also strongly supports the addition of extra rules to ensure a meaningful compliance assessment cycle can be run in 2025 as the industry transitions from the 2019 Code to the 2025 code. As currently drafted, the current ‘steady state’ provisions in Chapter 10 do not afford necessary flexibility for CommCom and the Australian Communications and Media Authority (the ACMA) to efficiently manage the compliance cycle when faced with uncertainty of the exact timing of registration of the revised Code.

Scope of comments

4. CommCom is providing comment on Chapter 10 of the Code, the revised chapter which deals with the Code compliance and monitoring framework.
5. The revised Chapter 10 sets out a more detailed and explicit expression of CommCom’s role and functions than earlier Code editions. This makes the revised structure and approach of Chapter 10 directly relevant to CommCom’s core activities and operations and provides the rationale for CommCom to make these comments.
6. CommCom is not seeking to comment on the other chapters of the Code which provide the substantive consumer protection rules. CommCom considers that it is more the role of Communications Alliance, the telecommunications industry and other major stakeholders, particularly the ACMA, to determine the level and standard of these rules and to form judgements as to whether the revised Code provides appropriate community safeguards for the matters covered by the Code.

7. CommCom is pleased to note that the revised Code has substantially addressed the comments made in its submission to the TCP Code review in June 2023. CommCom noted the need for Code rules to more specifically differentiate and identify those obligations applying to residential customers and those applying to small business customers. CommCom also noted that the Code, and its effectiveness, would benefit from improving its accessibility to Carriage Service Providers (CSPs) of all sizes by way of use of “plain English”, and by setting out obligations in a more succinct manner, as opposed to obligations which have multiple cascading clauses.

Background

8. CommCom notes that the Code is the centrepiece of the consumer protection framework provided by Communications Alliance consumer codes.
9. The Code is registered with the ACMA under the telecommunications co-regulatory regime and is enforceable by the ACMA using its powers under the Telecommunications Act.
10. Earlier editions of the Code dating back to 2012 envisaged and designed the current role played by CommCom to provide a compliance monitoring and auditing function.
11. CommCom notes that the ACMA has been active in recent years in enforcing compliance with the Code, providing a significant number of CSPs with formal warnings, directions to comply or imposing infringement notices. Some of these enforcement actions have been directly related to compliance with Code rules relating to CommCom’s compliance monitoring and auditing role.
12. CommCom has been fulfilling this Code compliance monitoring and auditing function for more than a decade. To illustrate, in the 2024 compliance year, CommCom received compliance attestations and evidence from well over three hundred CSPs covered by the Code. CommCom is currently analysing those attestations and intends to provide public information about the outcome of its deliberations in the first half of 2025.
13. To date in the 2024 Compliance attestation cycle, Comm Com has formally referred nine CSPs to the ACMA for potential non-compliance with the Code.
14. The more explicit exposition of CommCom’s role and operations in Chapter 10 warrant close examination to determine whether the proposed new rules and requirements are practical and likely to lead to enhanced outcomes for both consumers and industry.

Summary of CommCom's role and implications for a revised Chapter 10

15. CommCom interprets that the role assigned to it under the TCP Code is to:
- oversee and operate the independent Code compliance assessment processes and requirements
 - provide an independent, timely, efficient and cost-effective compliance monitoring and auditing function
 - operate as a functioning link in the Code compliance escalation and enforcement arrangements
 - assist CSPs to navigate the annual Code compliance attestation process and understand their Code self-assessment and registration obligations
 - provide public transparency on the outcomes of the core compliance processes it operates
 - inform stakeholders about its learnings from the compliance assessment process which are relevant to the successful functioning (or adjustment) of Code rules
16. CommCom considers the revised Chapter 10 should articulate code rules which support these functions and which also:
- signpost key aspects of the annual compliance cycle and associated requirements, whilst affording suitable operational flexibility and discretion to CommCom
 - allow CommCom to design a compliance assessment mechanism which provides process certainty for participating CSPs
 - clearly guide CSPs on their requirements to participate in the compliance self-attestation process and the steps open to CommCom to encourage, foster or enforce compliance, including escalation to the ACMA in defined circumstances
 - support public reporting by CommCom of key outcomes of its operations
 - do not inhibit the adoption of new, updated or technology-driven compliance assessment techniques by CommCom
 - do not prescribe CommCom's ability to share information with key stakeholders and enter MoUs to support such information sharing

Comms Comm's general observations on the revised Chapter 10

17. CommCom considers that the current draft suitably articulates rules addressing the matters described above and provides:
- a set of rules which will support improved **confidence** that CSPs must demonstrate compliance with the code

- greater **clarity** about CommCom’s independence, role and associated attestation processes than earlier Code versions, which is a welcome development
 - a **suitable level of detail** about key requirements for CSPs and key aspects of CommCom’s compliance processes
 - CSPs with suitable **certainty** about how Chapter 10 compliance processes operate, while preserving **operational flexibility** for CommCom
 - **transparency** about the outcomes of CommCom’s processes by mandating an annual report on Code compliance and the attestation cycle
 - a clear mandate and pathway for CommCom to **escalate instances of non-compliance** or uncooperative CSPs to the ACMA for enforcement action
18. CommCom would not support the addition of more detailed (and potentially inflexible) rules concerning its compliance assessment processes. It is important that CommCom be able to exercise independent judgement about its operational processes and preserves its ability to design and manage an efficient, effective and affordable compliance framework.
19. CommCom supports the current approach to the drafting of Chapter 10 and the key elements of the compliance assessment processes it describes. It strikes a suitable balance between articulating specific obligations on CSPs, enhancing transparency of the annual attestation, assessment and reporting mechanism, while allowing CommCom appropriate operational flexibility.

The need for additional tools to manage the 2025 compliance assessment cycle

20. In effect, the revised Chapter 10 sets 1 September each year as the closing date for CSP lodgements into the annual external audit and compliance assessment process run by CommCom, with no flexibility for administrative decision to vary that date.
21. This situation is potentially problematic when considering the impact on CSPs and CommCom of the uncertain timing of when the ACMA may register the revised Code in 2025. Note there is also a three-month lag post registration before the new Code comes into effect, and some five (mostly training related) provisions come into effect a further three months after that, in effect, six months post registration.
22. If this inflexible situation remains it is possible that the 2025 assessment cycle might have to be made against part of the 2019 Code and part of the new (2025) Code. CommCom assumes the most desirable outcome is for the 2025 cycle to relate to the 2025 Code alone.

23. On the assumption that the revised Code is registered by the ACMA at some stage in 2025, three scenarios emerge:
- 1) Registration in early 2025 – before end March 2025: in this case the new Code will have been in force for six months by the end of the lodgement window on 1 September and it may be reasonable for CSPs to be assessed against the new Code rules in the 2025 cycle.
 - 2) Registration in second half of 2025 – after start of June 2025: in this case no part of the revised Code will be in force on 1 September and with current settings the 2019 Code will be the only viable basis on which to run the 2025 compliance assessment cycle.
 - 3) Registration in mid 2025 – in April to late May 2025: in this case some of the new Code will be in force but those sections of the Code subject to transitional provisions may not. For that interim three-month period (3-6 months after registration) for the clauses with transitional provisions CSPs can elect to comply with the 2019 Code provisions or the new 2025 Code provisions, or if no like provisions in the earlier 2019 Code the new obligations commence at the end of the six-month period. This is potentially quite a messy scenario, potentially leading to double handling, delayed compliance assessment outcomes and loss of confidence by stakeholders in the integrity of the 2025 cycle.
24. The diagram attached describes some of the dates and timing factors in play and assists understanding of the scenarios described above.
25. CommCom notes the addition of some rules to afford operational flexibility to adjust the end date of the compliance assessment cycle may allow it to work with the ACMA, Communications Alliance and other stakeholders to “optimise” the 2025 cycle so that it can – if at all possible – be operated using the benchmark of the consumer protections in the newly revised 2025 Code.

First additional clause

26. CommCom suggests clause 10.3.3 (b) could be augmented with additional wording which would allow CommCom, the ACMA and Communications Alliance to agree a different date to the usual 1 September date for completion of the lodgement cycle.
27. For example, clause 10.3.3 (b) could be adjusted with the italicised text below to read:

(b) annually thereafter, by 1 September each year, or at such other date CommCom sets after consultation with the ACMA and Communications Alliance.

Second additional clause

28. Clause 10.3.8 also allows for ad hoc compliance assessments to be made when there are material changes to a CSPs circumstances. A companion sub-clause might be added to allow a further option to add flexibility to cope efficiently with the third scenario (mid 2025 registration). The adjustment could add a further situation when ad hoc compliance assessments could be used – when dealing with the clauses which have the extra 3-month transitional window.
29. The drafting instruction could be along the lines of adding a companion clause which allows CSPs to lodge an ad hoc assessment when the clauses subject to transitional provisions come into effect. That is, on the required date CSPs would make a lodgement for the clauses of the 2025 Code currently in effect, and then a subsequent lodgement relating to the transitional clauses when they become operative.
30. This type of additional provision could provide the ‘least-worse’ option for dealing with the risk of the timing of registration leading to a requirement for double handling and double submission of compliance assessments against both certain clauses of the 2019 code and the clauses subject to 6-month transitional provisions in the 2025 code, all within a few short months of the 2025 cycle.

Conclusion

31. CommCom recommends the adoption of both the above drafting suggestions to afford operational flexibility to support the integrity of the 2025 compliance assessment cycle, and if the timing of registration allows, for that cycle to be run only using the revised 2025 Code.

Again, CommCom welcomes the opportunity to comment on the revised Telecommunications Consumer Protections Code.

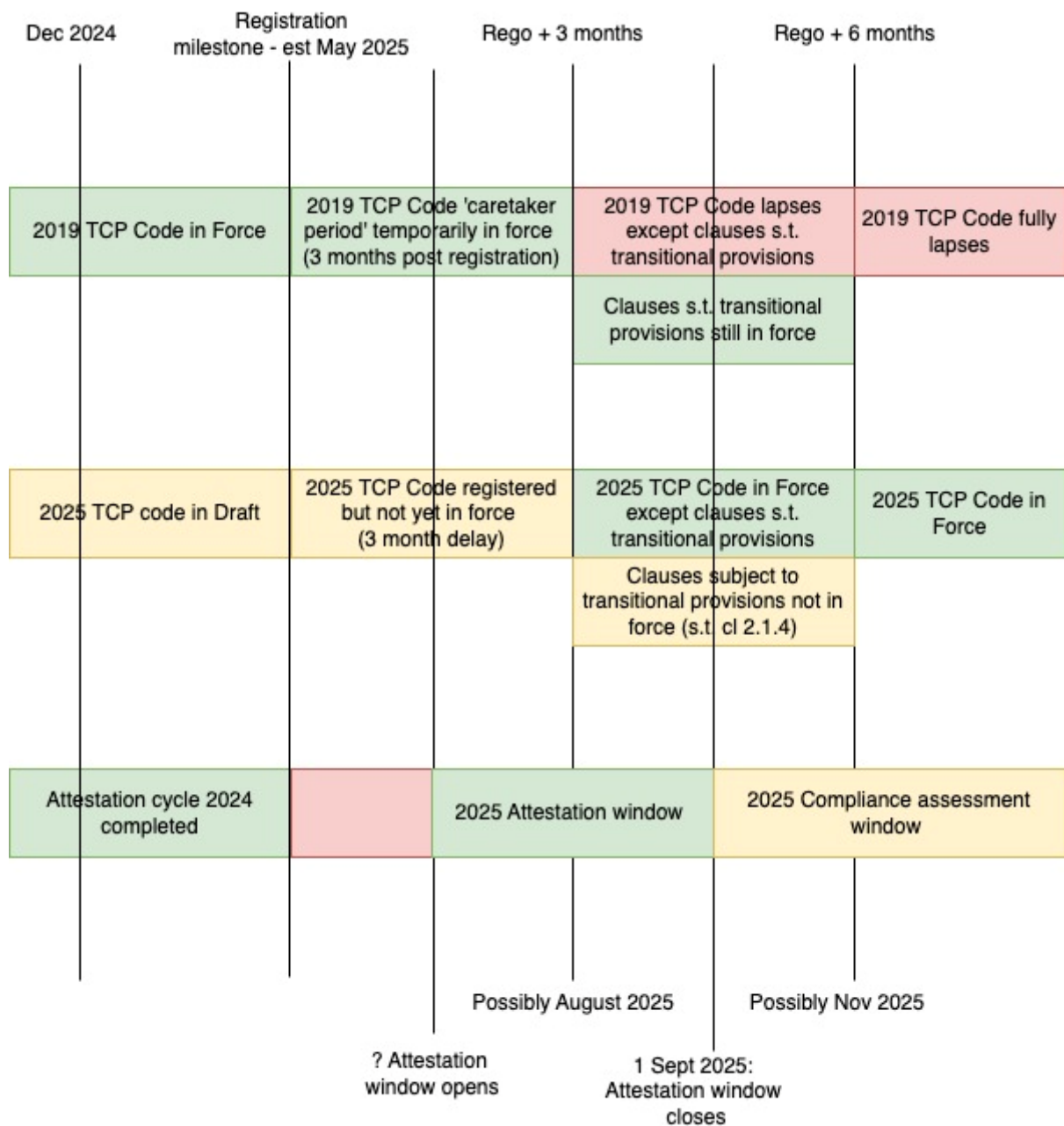
Any questions in relation to this submission can be directed to:

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Attachment over

Attachment: Code registration timing scenarios

The following diagram is provided for information and has been developed to tease out the various scenarios and timing being driven by unknown/variable ACMA Code registration timing. It highlights the potentially complex scenarios arising for the timing and completion of the 2025 attestation cycle against the 2025 Code.



End.