



Department for  
Business, Energy  
& Industrial Strategy

# Statutory Review of the Pubs Code and the Pubs Code Adjudicator: 2016-2019

Presented to Parliament pursuant to sections  
46(4) and 65(6) of the Small Business,  
Enterprise and Employment Act 2015



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# Contents

Ministerial foreword	4
Government's Review	6
Executive summary	6
Government's proposals	9
Next steps	11
Findings of the Statutory Review	12
Chapter 1 – Operation of the Pubs Code	12
Chapter 2 - Pubs Code Adjudicator's performance	21
Chapter 3 – Changes to the Pubs Code and the Pubs Code Adjudicator	27
Chapter 4 - Impact assessments for the Pubs Code and associated regulations	37
Annex A: The Pubs Code and the Pubs Code Adjudicator	40
Annex B: The Statutory Review: process and Terms of Reference	42
Annex C: Evidence considered during the Review	44
Annex D: Breakdown of responses to the Review	45

## Ministerial foreword



I am pleased to publish this report on the statutory review of the Pubs Code (“the Code”) and the Pubs Code Adjudicator (“PCA”).

The review considers the effectiveness of the Code and the performance of the PCA from when they were established in 2016 to 31 March 2019. There have been some significant wider developments since the end of the review period, not least the Covid-19 pandemic which has presented significant challenges to both tied tenants and pub-owning businesses and will continue to do so for some time. It is too early to assess any longer-term impact of the Covid-19 pandemic on the relationship between pub-owning businesses and their tied tenants and this is not within the scope of this review. The Government will continue to monitor developments and any implications for the Code.

Pubs are at the heart of our communities and are an integral part of the high street. The Government recognises the important contribution that the pub industry makes to national and local economies and as a unique, long-standing British institution that we want to see thrive. The challenges of Covid-19 for the pub sector have highlighted the complex and interlinked interests of large pub-owning businesses and their tied tenants. It has also reinforced the importance of the Code in regulating that relationship and providing a statutory framework to protect tied tenants against unfairness that may arise out of their tied arrangement. Compliance with the Code is enforced by the PCA to ensure the fair and lawful treatment by large pub-owning businesses of their tied tenants and that those tenants are no worse off than if they were free of any product or service tie. I would like to acknowledge here the PCA’s work with the regulated pub-owning businesses to voluntarily ‘stop the clock’ for certain statutory deadlines in order to preserve tenants’ rights under the Code for the duration of the Covid-19 restrictions.

The statutory review was launched in April 2019; the first since the Code came into force and the work of the PCA commenced in 2016. As part of the review, stakeholders were invited over a 12-week period to share their views and I would like to thank all the individuals and organisations who responded.

The views and comments expressed show that while the Code and the PCA may have had a slow start, most recognise that the Code and the work of the PCA present an important step in re-balancing the relationship between pub-owning businesses and their tied tenants and affording individual tenants the legal right and mechanism to change the nature of their relationship when certain circumstances apply.

Reviewing the Code over the 3-year period since it came into effect has allowed the assessment of its effectiveness to distinguish between issues relating to its initial introduction, including the establishment of the office of the PCA, and those arising from its ongoing operation. Since the end of the review period, the PCA has made good progress in reducing the number of live arbitration cases and has taken significant regulatory action in completing its first investigation.

However, more remains to be done to ensure the Code is effective. For example, some respondents to the review said that the complexity of the legislation can be a barrier to tied pub tenants accessing their rights if they are unaware of, or misunderstand, the options open to them at certain times. Difficulties in accessing information and securing good advice can make what is

already a complex area of law more difficult for the lay person. I believe that the operation of the Code could be improved to ensure better access to clear information to enable informed decision-making by tied pub tenants which, in turn, is safeguarded by effective enforcement.

Building on that, we will continue to monitor the operation of the Code, its processes, and the effectiveness of any changes made as a result of this review, and we will consider these at the next review in 2022.

Following an open recruitment exercise undertaken prior to the completion of this statutory review, I am delighted that Fiona Dickie took up her post as Pubs Code Adjudicator on 3 May 2020 to build on the important work achieved by Paul Newby as the first Pubs Code Adjudicator and the positive impact she made whilst appointed as his Deputy.



**PAUL SCULLY MP**

Minister for Small Business, Consumers & Labour Markets  
Minister for London

# Government's Review

1. The Code and the PCA were established under Part 4 of and Schedule 1 to the [Small Business, Enterprise and Employment Act 2015](#) ("the Act") to regulate the tenancies of large estates of tied pubs in England and Wales. The Act and its Regulations require the Secretary of State to regularly review the Code, certain other provisions and the PCA's performance. The first review covers the period from the appointment of Paul Newby as the first Pubs Code Adjudicator (2 May 2016) and the Code coming into force (July 2016) to 31 March 2019.
2. This section summarises the Government's findings from the review and its proposed next steps, including any revisions to the Code. The review was launched by the Minister for Small Business on 30 April 2019 who issued an invitation to all interested parties to submit their views on the Code and the PCA.
3. Seventy-eight responses from a range of stakeholders were received. In addition, the review also drew on published evidence such as the PCA's Annual Reports, the PCA's tenants survey, published arbitrations, a survey of licensees by CAMRA and a report by Europe Economics which was commissioned by the BBPA (full list at Annex C).
4. The review was conducted in accordance with published Terms of Reference, shown at Annex B, and included consideration of the impact assessments that accompanied the Act and associated regulations. These provide important context against which to consider the effectiveness of the Code and the PCA and any proposed changes.

## Executive summary

### The Pubs Code

5. The Act established two overarching principles<sup>1</sup> which underpin the Code and are intended to address the issues that led to its introduction. As a result of the first statutory review, the Government believes that the Code itself is consistent with the principles set out in the Act but that it is not consistently delivering the outcomes the principles are intended to support. It therefore recognises that, even though there have been improvements since its commencement in July 2016, the Code is not working as well as it should, with some tenants saying they found it hard to exercise their 'Market Rent Only' (MRO) rights.
6. The Government does not believe the tied tenancy model is inherently wrong. While some tied tenants suggest the tie can be open to abuse, others are happy with it and value the support provided by their pub-owning company. Where there are issues, the Code allows for certain disputes to be referred to the PCA for arbitration. Evidence of poor behaviour by businesses breaching the Code or which may otherwise be regarded by the PCA as unfair business practices should be shared with the PCA to allow it to consider whether action is necessary and how it should be addressed.

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<sup>1</sup> The principles of 'fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants' and; 'that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie' (section 42(3) of the Act)

7. It is worth noting that pub-owning businesses covered by the Code have legitimate rights over their property and a responsibility to their shareholders and investors to secure returns. It is not unexpected that businesses might adapt operating models in response to regulation and, if there have been increases in pub management models that are not covered by the Code (such as conversion to managed premises), this is not unreasonable provided those models do not result in the kind of unfair treatment that led to the establishment of the Code.
8. Evidence does not suggest that the long-term trend of pub closures has been driven by the tied model or, in more recent times, the Code. The main causes identified by the Office of National Statistics<sup>2</sup> are changes in demand because of short-term economic factors and longer-term changes in consumer habits (moving away from traditional small, wet-led local pubs to larger, food-led establishments). This does not mean the tie is not a factor in individual pub closures, particularly if the lease puts too much strain on the tenant's profit margins, and some responses to the review gave examples of where they believed the tie had contributed to the failure of a tenant's business. On the other hand, there is also evidence of pub-owning companies supporting tenants during difficult periods, such as the Covid-19 pandemic, although the full long-term impact on the pub-sector will not be known for some time.
9. The challenge therefore is to ensure that the Code continues to balance the interests of the pub-owning businesses and tied tenants but:
  - avoids unintended consequences such as the disposal and closure of pubs because they no longer make a sufficient return for the pub-owning business outside the tie; and
  - provides an effective mechanism for seeking redress in cases where exploitation of a tied tenant has occurred.
10. The Government believes that access to good information and advice to help tenants make informed decisions is crucial but is concerned that this is not always happening, particularly for new tenants who may not be sufficiently aware of their Code rights or in a position to assess whether they are no worse off than if they were free-of-tie. The Government will therefore work with the PCA on ways to find out more about new tenants' understanding of their Code rights and what informed their decision to enter into a tied tenancy agreement. We will also look again at the case for making Parallel Rent Assessments available for prospective tenants.
11. The Government attaches great importance to the role of the Code Compliance Officers in verifying the pub-owning businesses' compliance with the Code. They are, in effect, the first port of call for tied tenants to resolve issues and ensure the professionalism of Business Development Managers' support across pub-owning businesses' estates. The Government will ask the PCA for its views on whether the roles of Code Compliance Officers and Business Development Managers are being carried out as intended, particularly during the early stages of the tied tenancy.
12. Much of respondents' attention has been on the right to an MRO option. It should be recognised that, while for some stakeholders the aim of the Code is to go free-of-tie, the MRO process is the mechanism established to deliver the 'no worse off principle' by enabling the tied tenant to determine whether to renew their current terms, opt for the free-of-tie offer following negotiation or try to negotiate a better tied deal. While this has

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<sup>2</sup> [Economies of ale: changes in the UK pubs and bars sector, 2001 to 2019](#)

happened in some cases, other tenants have not achieved their preferred outcome and felt the MRO process was weighted against them, with issues not being resolved quickly enough by arbitration. The strict timing of MRO-related processes combined with the slow pace of the arbitration process was also found not to be working as well as intended.

13. The primary legislation is silent on whether an agreement reached through the MRO process should be achieved by deed of variation of the existing lease or a new agreement and the Act does not give the Secretary of State powers to prescribe the legal vehicle in the Code. This affords an important flexibility which should not be eroded by creating 'template MRO' agreements which might impede the use of a deed of variation. The circumstances for each tied tenant are different and, where the tied tenant is concerned about the reasonableness of an MRO proposal, they should refer this to the PCA to consider whether the proposal is reasonable in respect of the facts of the case, and determine its compliance.
14. However, the Government has noted from pub-owning businesses' Annual Compliance Reports little evidence of the use of deeds of variation in completing the MRO process even though that approach is not unusual in the wider commercial sector. While a small number of free-of-tie arrangements were agreed by deed of variation during the latter part of 2019 and outside the period under review, the Government will continue to monitor whether the use of new leases, rather than deeds of variations, remains a prevalent feature during the next review period.

## PCA performance

15. There were mixed views from stakeholders, although it was broadly acknowledged that the pace of the arbitration process from beginning to end had been too slow particularly during the early part of the period under review.
16. The Government believes there is a strong case to retain the PCA but that there are some areas in which the PCA could continue to increase its effectiveness. The Government supports the PCA's efforts to speed up arbitrations, such as the appointment of Fiona Dickie as Deputy Pubs Code Adjudicator in November 2017. This not only provided additional arbitration capacity, but Fiona was able to apply her legal knowledge, dispute resolution skills and experience of complex cases to unblocking some longstanding cases and to speed up arbitrations through rigorous case management.
17. The Government recognises the role being played by the PCA's appointment of external arbitrators in managing the arbitration caseload and in freeing up the PCA's time to undertake more regulatory activity, but also notes there are some reservations from both tenants and pub-owning businesses about the use of such external arbitrators.
18. The Government notes the following progress in the year since the end of the review period:
  - speed of casework: as at 31 March 2020, the PCA had 68 live arbitration cases<sup>3</sup>, down from 85 at the end of the review period<sup>4</sup>. Compared to 31 March 2019, the number of cases over 6 months old was down from 48 to 32, and those over a year old down from 26 to 18;

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<sup>3</sup> [PCA arbitration data: January - March 2020](#)

<sup>4</sup> [PCA arbitration data: January - March 2019](#)

- the PCA launched its first investigation in July 2019;
  - tenants have welcomed the PCA's interventions over the beer waste and duty<sup>5</sup> issue;
  - twenty-eight arbitrations have been published<sup>6</sup>; and
  - the publication of advice, as part of the Regulatory Compliance Handbook, on the MRO process and the minimum steps the PCA will expect a pub-owning business to take to meet the tests on commonality and reasonableness<sup>7</sup>.
19. It has been suggested during the review that the PCA should publish key performance indicators. The Government has previously been in discussion with the PCA about performance measures. While it is a challenge to identify objective measures, the Government believes there are advantages to the PCA and its stakeholders if there is a clear set of measures which would indicate how well the Code and the PCA are operating and identify areas for improvement.
20. Stakeholders made a number of comments about the information provided by the PCA and other aspects of communications during the period under review. The Government would like the PCA to consider its communications with its stakeholders and clarify how information about non-compliance and complaints about pub-owning business behaviour are dealt with. It would also be helpful for the PCA to increase awareness of when its interventions with pub-owning businesses have resolved issues without resorting to formal investigation, for example through the publication of case studies (without necessarily identifying the parties). While the Government does not intend to change the PCA's powers at this stage, it will ask the PCA to retain such evidence it may come across of persistent poor behaviour by pub-owning businesses where it considers its existing powers are insufficient to enforce the Code. This will allow consideration of whether there is a case for strengthened powers, as part of the next statutory review.
21. The Government welcomes the PCA's work to develop and expand the information available to tenants and pub-owning businesses and recognises the challenge in explaining complex legislation and processes in a way which is easily understood. However, respondents to the review suggest there is demand for one piece of comprehensive, easy to understand, information on the Code to make it easier to navigate the process and clarify parties' rights and responsibilities. The Government would like the PCA to assess how its material is accessed and compiled on its website and to involve end users in ensuring it provides the information they need in an easily accessible format to help informed-decision making.

## Government's proposals

22. The statutory review assessing the effectiveness of the legal framework covers just under a three-year period. Despite its brevity, it has enabled certain issues related to the set-up of a new statutory regime to settle down and for other issues to emerge. The Government's proposals in this section set out a number of potential changes to the Code that the

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<sup>5</sup> [Pubs Code Adjudicator Guidance: Beer Waste and Duty](#)

<sup>6</sup> [Pubs Code Adjudicator Published Arbitration Awards](#)

<sup>7</sup> [Regulatory Compliance Handbook: Demonstrating Compliance with the Pubs Code](#)

Government intends to develop for consultation, with a view to improving the workings of the Code.

23. Many of these proposals were mentioned in the PCA's response to the review of the Code which was particularly helpful given the PCA's central oversight on the workings of the Code and its impact on both the pub-owning businesses and tied pub tenants. Other stakeholders may have different perspectives and it is important that they can give their views on any proposed changes to the Code. The Government will therefore ensure there is appropriate public consultation to enable all parties to have an equal say on the suggested amendments and help identify any unintended consequences. There are also proposals for non-legislative measures and the impact of these and any legislative changes will be monitored and considered as part of the next statutory review. The Government's main proposals are set out below with further detail provided in Chapter 3.

## The Code

### Scope of the Code

24. The Government will:
- retain the current threshold of 500 or more tied pubs but keep this under review;
  - consult on shortening the timings by reference to which companies come within the scope of the Code; and
  - explore with stakeholders on whether tied tenants should have more protection in certain circumstances when their landlord sells their pub.

### Information/advice for tenants

25. The Government will:
- work with the PCA on ways to find out more about new tenants' understanding of their Code rights and what informed their decision to enter into a tied tenancy agreement.
  - not restrict who can provide advice to tied tenants but work with the PCA and representative groups on how to disseminate information to tenants to help them to access appropriate, professional advice and consider whether an expert panel approach, as offered by the [British Institute of Innkeeping](#) (BII) to its members, could increase the availability of independent advice for tied tenants; and
  - consider and consult on whether prospective tied tenants should be able to undertake a Parallel Rent Assessment to assess whether, in their view, the proposed tied tenancy meets the 'no worse off' principle.

### MRO process and MRO compliance

26. The Government will:
- consult on possible changes to improve the restrictive timescales in the Code for the MRO process. This may include whether to allow additional time for negotiation;
  - consult on whether to amend the Code to require the pub-owning business to propose the rent with MRO terms so the tied tenant is able to consider the entire offer being made by the pub-owning business;

- consult on whether to remove the requirement that terms should not be ‘uncommon’ or to retain this as a part of the provisions for an MRO proposal to be ‘reasonable; and
- discuss with stakeholders the implications of making changes to the comparison period and excluding taxes, duties and other unavoidable costs from the Significant Price Increase calculation before consulting on any changes to those provisions.

## Arbitration process

27. The Government will:

- consult on the creation of tailored dispute resolution rules to improve the arbitration process and increase transparency in relation to arbitration outcomes; and
- explore scope for an alternative to the High Court as the arbitration appeal route to make this a more accessible option for parties and consult on proposed changes accordingly.

## Pubs Code Adjudicator

28. The Government will:

- encourage the PCA to increase awareness among stakeholders of how it addresses alleged non-compliance and to publicise where its action short of investigation has resolved issues. It will ask the PCA to retain such evidence it may come across of persistent poor behaviour by pub-owning businesses where it considers its existing powers are insufficient to enforce the Code.
- ask the PCA to identify and publish performance measures and report annually on these;
- ask the PCA, in developing its approach to stakeholder communications, to consider the findings of the review to ensure all parties have an opportunity to contribute their views and that end-users are able to shape how information is provided;
- ask the PCA when engaging external arbitrators to consider the required experience and knowledge of the Code and any training requirements; and
- when a suitable legislative opportunity arises, enable the PCA to recruit its own staff to ensure it is appropriately resourced to fulfil its duties.

## Next steps

29. The actions the Government will take to improve the effectiveness of the Code will require full consultation with pub-owning business, tenants’ representatives and other interested parties. While some of the proposals were suggested by some respondents to the statutory review, most will not have had the opportunity to consider these. The processes relating to MRO and arbitrations are complex and the Government wants to ensure these are fully tested with stakeholders to ensure any changes do not add more complexity and that there are no unintended consequences. Officials will work with stakeholders to develop proposals and draw up formal consultation in the early part of 2021.
30. The Secretary of State will also write shortly to the PCA in respect of the above actions.

# Findings of the Statutory Review

## Chapter 1 – Operation of the Pubs Code

### Introduction

- 1.1 The Code is underpinned by two core principles, as enshrined in the Act: the fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants, and that tied tenants should be no worse off than they would be if they were not subject to any product or service tie. Its purpose is to regulate the relationship between pub-owning businesses with 500 or more tied pubs in England and Wales and their tied tenants. The Code requires pub-owning businesses, prior to agreeing a tenancy, to advise the tied tenant to complete appropriate training, to provide certain information in relation to the maintenance of the tied pub premises and the tied tenancy, and to ensure that the prospective tenant has a sustainable business plan. It also places obligations on the pub-owning business in respect of gaming machines, insurance and flow-monitoring devices. The Code further provides for pub-owning businesses' obligations in respect of their Business Development Managers and requires them to appoint a Code Compliance Officer who must submit an annual compliance report to the PCA.
- 1.2 Pub-owning businesses must provide rent proposals or rent assessments in certain circumstances. The Code describes four circumstances under which a tied tenant may request an MRO offer as an alternative to the tied arrangements and which requires their pub-owning business to present an MRO-compliant proposal in response. Where parties fail to agree the rent payable, the Code enables the appointment of an independent assessor who has a right to see documents in relation to the trading levels of the pub. It further sets out the PCA's functions in resolving certain disputes in relation to compliance with the Code and in relation to the MRO procedure.
- 1.3 This Chapter summarises respondents' main points in respect of the effectiveness of the Code and relates to Terms of Reference 1 and 3. While the Code regulates various aspects of the relationship between pub-owning businesses and their tied tenants, most respondents to the review focussed on issues related to the MRO process.

### Effectiveness of the Code

#### Summary of respondents' comments

##### **General**

- 1.4 There were mixed views about the effectiveness of the Code in regulating the relationship between pub-owning businesses and their tied pub tenants. Some welcomed the provisions in the Code that afforded tied tenants the option to enter into a different type of contract with their pub-owning business, thought the Code had strengthened their rights and negotiating power and had provided better access to information and protection for tied pub tenants. Some thought the Code had worked well overall but that there was room to improve its operation. Some respondents noted the absence of an implementation period

to test the Code's effectiveness which they felt had affected the PCA's and industry's familiarisation with new, complex legislation. However, it was thought that many of the initial teething issues had been largely resolved by the end of the period under review.

- 1.5 Most other respondents felt the Code had been ineffective, with some suggesting that some unfair treatment of tenants had continued. Some respondents thought that the Code should have tackled instances of unfair profit-sharing but had instead resulted in costly delays and legal fees.
- 1.6 Respondents had different interpretations in respect of the proportion of tied tenants who had requested MRO proposals versus the number who had agreed a free-of-tie deal. Some felt that tied tenants had used the MRO process to re-negotiate their tied agreement and rent which, as indicated in pub-owning businesses' compliance reports, had shown the Code was working. These respondents felt there had been a disproportionate focus on MRO as a measure of success and that the other aspects of the Code had worked well, as evidenced by the small number of non-MRO referrals to the PCA.
- 1.7 Some respondents were concerned that the 'better tied deals' were being held up as evidence that the Code was working and thought instead that the low proportion of tied tenants exercising their Code rights showed that the MRO option was inaccessible. Different reasons were suggested, ranging from poor awareness of rights, tied tenants being dissuaded by their pub-owning business to exercise those rights or that MRO proposals had included expensive and onerous terms to make the free-of-tie option unattractive. Some suggested that the Code had created a wider gap between the interests of tied tenants and pub-owning businesses and had encouraged a more adversarial approach to negotiations.

### **Complexity of the Code**

- 1.8 Some responses noted that the Code required cross-reference to the Act to understand its requirements, deterring the lay person with legal complexities and a lack of clarity. Some respondents said that new legislation required time to fully embed and that greater clarity had gradually developed since its implementation. Others disagreed, saying that the Code's drafting had prevented it from reaching its full potential, leaving it open to interpretation which had enabled some pub-owning businesses to be evasive in complying with the Code. Some felt that the drafting of the Code had enabled pub-owning businesses to propose non-compliant MRO offers with steep rent requests and high terminal dilapidation bills to deter tied tenants from using their legal rights.

### **Business Support**

- 1.9 Some respondents thought the Code had led to improved processes, procedures and relationship management within the tied pub estate which had benefitted both tied tenants and pub-owning businesses. Examples included the professionalisation of the Business Development Manager role and the requirement to record business meetings between them and the tied tenant. Some respondents, including individual tied tenants, were positive about the support provided by pub-owning businesses, such as business support services, provision of legal assistance, staff training, access to online design, food and sport promotions and the refurbishing of premises.
- 1.10 However some responses questioned whether the business support provided by pub-owning businesses was of sufficient value to justify the cost of purchasing beer and other products through the tie. While some respondents were positive about their relationship with their Business Development Manager, others thought they had not always been as

supportive as the tied tenant had been led to believe when taking on their tenancy. The new role of Code Compliance Officers was recognised by some respondents in holding pub-owning businesses to account in respect of their compliance with their obligations under the Code.

- 1.11 Some respondents felt that the most important impact of the Code had been the provision of more information and better advice to prospective tenants, coupled with the training requirement and the encouragement for tenants to seek independent, professional advice. It was thought this had led to tenants being in a stronger negotiating position and had minimised future disputes where tenants had signed up to fair deals, as evidenced by the slower income growth within the leased and tenanted pub estate.

### **Awareness of rights**

- 1.12 Some respondents suggested a low awareness of the Code by tied tenants, raising the possibility of poor awareness of legal rights, such as the right to request an MRO proposal under certain circumstances. It was felt by some that, whereas tied tenants were reliant on information published by the PCA, pub-owning businesses had had access to substantial legal help and this imbalance had led tenants to give up on exercising their MRO right due to the legal complexity of the Code. In contrast, some respondents felt that low numbers of MRO agreements did not mean low awareness of the Code. These suggested that the free-of-tie model was not suited to all tenants due to the arm's length relationship with the pub-owning business and the changes to terms, for example full repairing obligations, quarterly rents in advance, upwards-only rent review clauses and deposits, as with most commercial leases.

### **Market Rent Only (MRO)**

- 1.13 While it was recognised that the MRO provisions had led to more choice between tied and free-of-tie agreements, most respondents agreed that the legal complexity of the MRO process had proved more challenging than any other aspect of the Code, in particular its interaction with the Landlord and Tenant Act 1954. Some respondents said that tied tenants using their right to request an MRO proposal had experienced obstacles by their pub-owning businesses which they felt had subverted the MRO process. Cited examples included: the reported pre-emptive use of notices under section 25 of the Landlord and Tenant Act<sup>8</sup>, resulting in the threat of eviction; offers with onerous lease conditions; high terminal dilapidation costs; and rents which had failed to disregard pub improvements paid for by the tied tenant. It was noted that most MRO agreements were delivered by new agreement, even where the tied lease contained a clause enabling it to be altered by deed of variation.
- 1.14 Some respondents reported that tied tenants had used the MRO process to negotiate improved tied terms resulting in fairer tied and non-tied rents. Others disagreed and thought that the Code had driven greater caution around commercial terms resulting in new forms of tied agreements with only marginally better terms for the tied tenant. As the Code had placed the initiative to set the lease terms for MRO proposals with the pub-owning businesses, it was suggested by some that the burden to determine the compliance of the MRO proposal lay with the tied tenant. Some felt that, combined with the tight timescale to refer cases to the PCA, this had led to a disincentive for pub-owning businesses to negotiate the MRO proposal and to a lack of negotiating strength for the tied tenant.

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<sup>8</sup> Under s.25 of the Landlord and Tenant Act 1954, the landlord can issue a notice to end an existing, protected business tenancy, indicating whether renewal is opposed, and if it is, the landlord must be able to rely on at least one of the statutory grounds set out in section 30(1) of the 1954 Act.

- 1.15 Some responses thought the Code should have set out a comprehensive list of requirements against which MRO proposals could be objectively measured to ensure compliance, such as a list of common terms used in commercial leases. Others felt that tied tenants had not had access to a genuine MRO option, citing difficulties for tied tenants to compare the free-of-tie offer against their tied arrangements.

## Timings

- 1.16 Most respondents thought that the tight timescales applying to the MRO process had been unhelpful and it was suggested by some that pub-owning businesses had used this to their advantage, for example, by using internal communication channels to delay rent assessment documents which led the tenant to miss the deadline to issue an MRO Notice. Some tied tenants reported they had missed their opportunity to refer suspected non-compliance MRO proposals to the PCA due to the narrow window for doing so. It was felt by some respondents that the timeline had led tied tenants and some pub-owning businesses into adversarial arbitration before negotiation could be concluded so as to avoid being out of time to refer an MRO proposal to the PCA. The process was compared with other contractual arrangements, such as the renewal under the Landlord & Tenant Act, where negotiation was not commenced by requiring a proposal from one party. Some noted that, while the Code had introduced tight time limits at the start of the process, no time limits had been applied to the arbitration process thereafter.

## Arbitration

- 1.17 As a private dispute resolution process, some respondents thought the preservation of confidentiality aspects of arbitration had led to greater uncertainty for those considering a referral to the PCA. While the publication of arbitration awards had resulted in greater transparency of the process and insight to the PCA's decision-making, agreement to waive confidentiality had not been granted by all parties, leading to a relatively low number of awards being published. Some responses considered that the emphasis of the legislation should have been on 'adjudication' as the confidential nature of arbitration had enabled some pub-owning businesses to take control of the process in a manner that had been difficult to address. Others highlighted that the MRO process meant that, following a lengthy arbitration, where the PCA had concluded an MRO proposal to be non-compliant and had required the pub-owning business to produce another MRO proposal, this had resulted in further arbitration.
- 1.18 Most respondents who commented on the pace of the arbitration system during the review period felt it had been too slow from beginning to end, with some adding that such delays had been to the financial advantage of the pub-owning businesses who had continued to benefit from the tied arrangements. Some reference was made to the pub-owning businesses' published accounts which led some respondents to suggest that, as their income from the beer and other tied products had exceeded that from the property rent, this was a motivation for pub-owning businesses to delay the agreement of free-of-tie deals and frustrate the MRO and arbitration process. Some respondents saw these as unfair business practices which had not been penalised by the PCA, leading some tied tenants to abandon the MRO process and agree to a new tied deal instead. While some respondents welcomed the use of external arbitration in freeing up the PCA's time to regulate, some felt that the appointed arbitrators had not always demonstrated expertise in these types of property disputes and that the costs had been too high compared to an arbitration by the PCA.

## Fair and lawful principle

### Summary of respondents' comments

- 1.19 Most respondents agreed that while the Code had promoted the principle of fair and lawful dealing, this had not always been delivered during the period under review and had been hampered due to the slow pace of arbitration process. It was also noted by some respondents that the fairness aspect had been difficult to deliver due to its subjectivity which had enabled some pub-owning businesses to circumvent and act against the spirit of the Code.
- 1.20 Some respondents considered that unfair practices had remained the norm, one example given being the removal of conditional rent discounts where a breach of the lease was suspected. Due to the large number of pubs covered by their estate, it was felt that some pub-owning businesses had unfairly used their oversight to the disadvantage of tied tenants by providing one-sided information about the risks and/or presenting financially prohibitive MRO proposals. Some voiced concern that the pursuit of the MRO route could have led some of the pub-owning businesses into taking the pub back into management, even where the property was of little value.
- 1.21 Some respondents said that pub-owning businesses had resisted the use of a 'deed of variation' as a quicker, cheaper way to deliver a free-of-tie agreement and had instead pursued new agreements leading to the application of Stamp Duty Land Tax, high legal costs and terminal dilapidation bills at the end of the existing tenancy, using these to deter tied tenants from pursuing the MRO option. While it was acknowledged that some tied tenants had managed to negotiate better terms than initially offered, it was suggested that for others this had been achieved at great expense, time and effort and that the low numbers of completed MRO agreements had deterred other tied tenants. Some suggested that the use of non-disclosure agreements had further stifled the awareness of fair terms. Also raised was the wide variance in rent assessments which, due to a limited number of surveyors qualified to undertake pub valuations, had led to concerns about potential conflicts of interest where surveyors had also been engaged by some of the pub-owning businesses as expert witnesses during the arbitration process.
- 1.22 In contrast, some respondents thought the operation of the Code was consistent with the 'fair and lawful' principle and considered their pub-owning businesses to have been fair, honest and transparent throughout its dealings. The encouragement for tied tenants to seek professional advice prior to entering into a substantive agreement or at rent review was also welcomed. It was noted that the Code had formalised many of the practices in the industry's earlier voluntary code<sup>9</sup>, such as recorded notes of important conversations to aid clarity and to assure tied tenants that concerns had been properly raised and logged.

## No worse off principle

### Summary of respondents' comments

- 1.23 Responses to this question were mixed. Some respondents stated that tied tenants were worse off than if they had been free-of-tie, whereas other respondents thought it had not been possible to determine whether this principle had been met. It was suggested that an

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<sup>9</sup> [UK Pub Industry Framework Code](#)

imbalance of power had enabled some of the pub-owning businesses to negotiate MRO proposals without indicating how rental figures had been calculated, making it difficult for a tied tenant to gauge whether they would be worse off or not. Some respondents alleged that some pub-owning businesses had recovered potential lost tied profits by adding these to the MRO rent proposal presented to the tied tenant. Some thought that the use of new agreements (rather than deeds of variation) had resulted in the requirement of deposits, quarterly rent in advance and the application of Retail Price Index to rental payments.

- 1.24 Some suggested that some pub-owning businesses had circumvented the 'no worse off' principle by using wide-ranging, restrictive terms in tenancy agreements for products and services which pub-owning businesses had argued to be 'common' for the purposes of the Code. Others felt that some of the pub-owning businesses had sought to take some pubs out of the scope of the Code through a mixture of transfers to managed models and various franchised systems, resulting in the replacement of long-standing tied tenants with salaried managers.
- 1.25 Some respondents considered the Code to have been consistent with the 'no worse off' principle where, in many cases, tied tenants had enjoyed terms that had left them better off than a free-of-tie tenant. It was suggested that some analysis of the tied model had focussed too narrowly on the financial aspects of beer prices and respective rent figures but had ignored the benefits of the tied model, which had offered entrepreneurs the opportunity to run a pub for a relatively small investment, despite a potential lack of experience and capital.
- 1.26 Also listed were other benefits of the tied model, including the guidance and support provided by Business Development Managers, investment in refurbishments, funding of apprenticeships, the hosting of events/forums and access to licensees' networks. It was suggested that the MRO process had been designed to enable tenants to make a balanced decision, but that most tied tenants had either decided against the risks of the free-of-tie model with a full repairing / insuring lease or had used the MRO process to achieve a better tied rent. Some respondents felt that, while the Code was consistent with the 'no worse off' principle, the PCA's application of the 'reasonableness' test to MRO proposals had led to arrangements that were 'better than free-of-tie' and thereby had created a two-tier free-of-tie market.

## Government assessment

- 1.27 The Government notes the divergent views from stakeholders about the Code's effectiveness. It believes that the Code itself is consistent with the principles set out in the Act and there have been improvements for some tied tenants. However, stakeholders' comments to the review combined with various surveys which convey some tied tenants' challenges in accessing their statutory rights, leads the Government to recognise that the operation of the Code is not consistently delivering the outcomes the principles are intended to support and therefore is not working as well as it should, with some tied tenants finding it hard to exercise their MRO rights. The Government is concerned at reports of practices to deter tied tenants from exercising their rights, or to lead them to miss the Code's deadlines, thereby undermining the spirit of the Code. Evidence of such poor behaviour contrary to the Code should be shared by tenants with the pub-owning business's Code Compliance Officer, who has a statutory duty to verify the pub-owning business's compliance with the Code, or with the PCA for consideration whether intervention is necessary, including investigative action.

- 1.28 The Government does not believe that the effectiveness of the Code can be assessed simply by looking at the number or proportion of free-of-tie deals resulting from the MRO process. There is evidence from surveys and individual responses to the review that some tied tenants are happy with their tied deal or have used the MRO process to negotiate a better deal. It is therefore feasible that tied tenants may have concluded that they are no worse off, or better off, in respect of their individual circumstances, and remain tied for that reason. However, there is also sufficient evidence that some tied tenants view the MRO option to be inaccessible, for example in the PCA's 2019 tenants' survey which found that 55% of those experiencing an event entitling them to initiate the MRO process did not think MRO presented a genuine choice for tenants. This experience of the process was also reflected by some tied tenants in their responses to the review.
- 1.29 The primary means for a tied tenant to determine that they are no worse off than if they were free of their tied arrangements is the right under certain circumstances to request an MRO proposal. While not a measure in itself of the effectiveness of the Code, the relatively low number of tied tenants who have taken that opportunity, and the evidence submitted that many tenants feel the MRO option is not a genuine choice, creates uncertainty as to whether tied tenants are no worse off than if they were free of the tie.
- 1.30 It is important that tenants make well-informed decisions at the outset and the Government is concerned that, despite the information requirements in the Code, tenants are not always aware of their rights under the Code. A survey of licensees by CAMRA found that nearly 20% were not aware of the Code. The most recent PCA tenants survey showed that in 2019 only 68% felt 'very' or 'quite aware' of the Code, a decrease from 72% in 2017. This was despite the 2019 survey including significantly more tenants (50% of respondents compared to 35% in 2017) that had taken on their tenancy since the Code, and its information requirements for new tenants, came into force.
- 1.31 While this highlights wider concerns about the access to expert advice and support, the Government does not consider it appropriate to dictate how tenants should obtain such advice and that seeking to restrict this to, for example, those with recognised professional qualifications could risk driving up tenants' costs, reduce access to advice and increase the number of tenants with no representation. However, it is important that tenants understand who they are receiving advice from and what to look for when identifying appropriate support.
- 1.32 The Government believes that the challenge is to ensure the MRO process affords a genuine choice for tenants, and notes that a key factor, as reported in the PCA tenants' survey, is often the cost of an MRO agreement, both in terms of the legal and other costs, but also the inclusion of terms in the MRO proposal which, some pub-owning businesses argue, are commonly found in typical free-of-tie agreements in the market.
- 1.33 While the Government recognises the merit of the MRO provisions in enabling publicans to make decisions on how they would like to operate their business, it is right that this is balanced against the legitimate rights of the pub-owning business over the property they own and, for some brewers, a route to market for their products. A move to MRO on demand would introduce significant uncertainty for pub-owning businesses to plan their business on the basis of different types of model and income streams. It is possible that such an approach could result in a greater move to other forms of agreement and managed houses.
- 1.34 The Government recognises MRO as a process by which a tied tenant can pursue a change in the nature of their contractual arrangements with the pub-owning business and enable the tenant to run their business in a different way if they so choose. However, the

Government is of the view that the circumstances for a tied tenancy transforming into a free-of-tie model using the MRO process are likely in most cases to present different considerations compared to a free-of-tie tenancy on the open market. Unlike a new tenant, the tied tenant presents a known quantity to the pub-owning business, who will be able to recognise the tenant's approach. The tied tenant will have made personal and financial investments in the pub and therefore have different options and choices compared to another tied tenant or a prospective tenant able to test the free-of-tie market at will and walk away. The MRO process is, effectively, a re-balancing of the commercial relationship between the tenant and the pub-owning business and the starting point for assessing the market rent should not be approached as simply a re-calculation of the rent in order to replicate profits from the tie.

- 1.35 This does not necessarily mean that commercial terms are unreasonable and pub-owning businesses have suggested that some of those terms reflect the fact that there is less oversight and communication with tenants under the free-of-tie model. The Government therefore believes MRO-compliance should be considered on a case-by-case basis, an approach which the PCA has set out in the chapter on MRO proposals in the PCA's Regulatory Compliance Handbook.
- 1.36 The Government notes that many of the published arbitration decisions have found in favour of the tied tenant. While this shows the value of arbitration as an approach to dispute resolution, it can by its nature be a long and time-consuming process which can be frustrating to the parties. Paul Newby and Fiona Dickie addressed some of the reasons behind the pace of the beginning-to-end arbitration system when they gave evidence to the BEIS Select Committee on 26 June 2018 and set out the steps they were taking to manage and improve this<sup>10</sup>. The pace and effectiveness of arbitration were significantly improved during the review period by the work the Deputy PCA, including her determination of some long-standing and contentious disputes as to the interpretation of the Code.
- 1.37 The Government welcomes recent measures to speed up the process and notes the evidence that this is having an impact. The Government will consider with the PCA whether the creation of tailored dispute resolution rules would help dispose of cases more quickly and will consult on any proposals. The Government will also consider what options there are for an alternative appeal mechanism and consult on this matter.
- 1.38 In respect of extending the threshold of 500-tied pubs, nearly all of the unregulated tied pub companies are significantly below the threshold and most regional and family brewers with tied estates have signed up to the voluntary rent dispute and complaints procedures (PIRRS and PICAS)<sup>11</sup>. Evidence from the Pub Governing Body shows that these voluntary mechanisms have had one complaint referred for consideration in respect of the pub companies with fewer than 500-pubs since the Code was established in 2016 (though there is no right to an MRO option). The Government has similarly received low numbers of correspondence about pub companies that sit outside the Code and therefore does not believe there is a sufficiently strong case to amend the threshold at this point and will instead keep this under review.
- 1.39 The Government has considered the recent mergers and buy-outs in the pub sector and whether this risks a large number of tied tenants losing their rights under the Code following a large acquisition of pubs from a regulated pub company. As established in the Act, a

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<sup>10</sup> [Business, Enterprise and Industrial Strategy Committee: Oral evidence: Pubs Code, HC 1082, Tuesday 26 June 2018](#)

<sup>11</sup> See links at <http://www.thepubgoverningbody.co.uk/>

business becomes a pub-owning business where it has owned 500 or more tied pubs in England and Wales, for a period of at least six months in the previous financial year. While the Act sets out the extended protection for tenants whose pub has transferred to a landlord who is not a regulated pub-owning business, this covers their non-MRO rights only and ends when the tenancy ends or there is a rent assessment.

- 1.40 Where a smaller pub company reaches the 500-tied pub threshold through the acquisition of a number of pubs from one of the existing pub-owning businesses, the tied tenants of the existing pub-owning business would lose their existing MRO rights at the point where the ownership of the pubs changes. While the purchasing company would eventually become a pub-owning business and full Code rights would be restored to their tied tenants, this could take up to 18 months (for example, if a company acquired enough tied pubs to meet the threshold in October 2020, this would not satisfy the 6-month period until the 2021/22 financial year and therefore remain out of scope of the Code for the duration of that period). Issues related to scope are further addressed in Chapter 3.

# Chapter 2 - Pubs Code Adjudicator's performance

## Introduction

- 2.1 A key function of the PCA is to arbitrate disputes in respect of compliance with the Code and in relation to the MRO procedure. The PCA also has other key regulatory functions, including the provision of advice, consulting on and issuing guidance, and the investigation of suspected non-compliance with the Code. In addition, in the review period, the PCA was also required to set up the PCA's office and recruit staff. The PCA's running costs are met through an annual levy imposed on the regulated pub-owning businesses.
- 2.2 This part of the report summarises respondents' views on how effective the PCA has been in enforcing the Code. Specific comments were invited whether the PCA has sufficient and proper powers and how these have been exercised, the PCA's provision of advice and guidance, investigating non-compliance with the Code, the PCA's response where non-compliance was found and arbitrating disputes. This section relates to Terms of Reference 2 and 3.

## Effectiveness of the PCA in enforcing the Code

### Summary of respondents' comments

- 2.3 Respondents' views varied. Some responses thought the absence of an implementation period for the Code had left little time for the PCA to set up its office, recruit suitably skilled staff to meet its operational needs and allow for the familiarisation of new complex legislation prior to the Code coming into effect. Some respondents thought that the PCA had performed in a satisfactory manner.
- 2.4 Some respondents felt the PCA had not fulfilled the potential of the role and that there was scope for improvement, such as more constructive engagement with both pub-owning businesses and tenant representatives. Some respondents felt that the beginning-to-end arbitration system needed to improve in areas such as information on case progression and short deadlines for information from parties.
- 2.5 Dissatisfaction was expressed by some respondents in respect of what they regarded as the lack of direction to some pub-owning businesses or requiring them to act within a specified time. While some respondents thought the nature of the arbitration process had failed to set clear legal precedents to direct parties, it was accepted that the publication of arbitration awards had provided useful insight into the decision-making process.
- 2.6 Some respondents considered that the PCA had become more effective over the course of the period under review, referring to the reduced number of enquiries and referrals to the PCA and the diminishing number of open cases since the appointment of a Deputy PCA. While some observed that the use of external arbitrators had helped to address the high levels of arbitral work and free up the PCA's time to apply its regulatory powers, concerns were raised about the cost of external arbitrators and their perceived lack of familiarity with some of the issues specific to the tied pub sector, such as contract law and pub valuations.

Some queried the operational costs of the PCA, paid for by a levy imposed on the pub-owning businesses, where it was felt that the PCA's impact and output had not met expectations and there had been limited improvement in respect of the administration of cases. It was also felt there had been a lack of clarity on how the levy had been calculated and apportioned between the pub-owning businesses during the period under review.

## Does the PCA have sufficient and proper powers to enforce the Code effectively

### Summary of respondents' comments

- 2.7 This question elicited a range of views from respondents. Some considered the PCA's existing powers to be proper and sufficient for the effective enforcement of the Code though others felt the PCA had not exercised these to their full extent. Some held the view that the PCA had exceeded its remit in applying the principles underpinning the Code to specific MRO proposals, for example in applying a 'reasonableness' test to the terms offered in MRO leases. Others expressed frustration that the PCA's powers appeared 'toothless' in addressing repeated poor behaviour by some pub-owning businesses and needed to be strengthened, although some also acknowledged the PCA's increased regulatory activity.

## PCA's effectiveness in exercising its powers

### Summary of respondents' comments

- 2.8 Some respondents felt that the PCA had exercised its powers satisfactorily, particularly as the legislation had set a new precedent and had presented a challenge for all parties involved. However, some thought that a vagueness in some of the Code's provisions and the PCA's application of a reasonableness test to tenants' individual circumstances had led to some uncertainty about the compliance of MRO proposals. The PCA's application of the test for 'uncommon' terms of an MRO proposal was also raised which, it was felt, had led to inconsistencies in arbitration awards and could have been resolved through the provision of guidance.
- 2.9 Some respondents noted the PCA had not used its powers to refer to the Secretary of State alleged unfair business practices, which were to the detriment of tied tenants, and had aimed to avoid the operation of the Act or the Code. Others thought the PCA had not been sufficiently robust in dealing with advisers who those respondents felt were non-expert and had made unhelpful contributions while representing or assisting tied tenants with their arbitration cases. Some also thought the PCA should have exercised its regulatory powers more, as opposed to focussing on arbitration which, due to its confidential nature, they said had failed to create any meaningful precedents.
- 2.10 Some respondents considered the PCA to have used its powers to good effect in improving practices, processes and behaviours through regular meetings with senior pub-owning business personnel, such as working to address the use of high terminal dilapidations. The establishment of the Code Compliance Officers Forum was welcomed and had served to disseminate information and provide feedback. It was suggested the PCA should similarly use its soft powers to tackle some of the pub-owning businesses' use of non-disclosure agreements thought to reduce the positive effects of the Code. Some respondents

welcomed the PCA's consultation on 'sediment and wastage' and its correction of pub-owning businesses' assertion that an MRO proposal could be achieved only by way of a new agreement. The PCA's publications of arbitration awards was also seen as a positive development.

## PCA advice and guidance

### Summary of respondents' comments

- 2.11 Respondents' views varied. While some respondents considered the information, advice and guidance issued by the PCA to be helpful in promoting an understanding of the processes and identifying best practice, others thought it confusing and ambiguous. Some felt the PCA should have issued plain English guidance on the MRO process and its interaction with the Landlord and Tenant Act provisions with input from tenant bodies and Code Compliance Officers. The PCA's decisions to issue advice in some cases, as opposed to statutory guidance, was questioned by some, as the latter would have required consultation with stakeholders. While the PCA's increased focus on developing advice was seen as a positive, some respondents commented that the withdrawal of a PCA advice note had left both tied tenants and pub-owning businesses unclear. Although some thought that the publication of arbitration decisions had helped, they felt that they were legalistic in nature and difficult for a layperson to understand.
- 2.12 Some expressed the view that the PCA's guidance on interpreting 'common' terms and 'reasonableness' in relation to MRO offers had created a level of subjectivity where most MRO proposals could be deemed 'unreasonable'. Some suggested the PCA should have reviewed pub-owning businesses' standard terms and conditions to clarify their compliance with the Code or issued "golden threads" on the themes and outcomes of awards, particularly for external arbitrators to ensure a consistent approach. While it was acknowledged the PCA had a clear objective to raise awareness of the Code and highlight best practice, some respondents thought that a cost-benefit assessment on their likely impact should have been completed prior to issuing advice, such as the Beer Duty Waste Guidance, which had led to costly changes to some pub-owning businesses' systems.

## Investigating non-compliance

### Summary of respondents' comments

- 2.13 Most respondents observed that the PCA had not undertaken any investigations into non-compliance during the period under review. Some pub-owning businesses' behaviour was identified where it was thought the PCA should have employed its investigative powers, such as the use of terminal dilapidations to deter tied tenants from issuing an MRO Notice or the 'sediment issue'<sup>12</sup> which had been consulted on, as opposed to having been investigated. Some respondents expressed disappointment that levy funds had been returned to the pub-owning businesses because no investigations had been undertaken. However, it was also acknowledged that the PCA may have been hindered in investigating poor business practices due to the demands of the high numbers of open arbitration cases, though this had improved with the appointment of the Deputy PCA.

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<sup>12</sup> [The volume of draught product waste which is unsaleable](#)

- 2.14 Some respondents considered the bar had been set too high, in terms of evidence required to justify an investigation, enabling pub-owning businesses to side-step issues. However, some expressed concern that an investigation would take time to complete during which the pub-owning business under investigation could continue to benefit from the tied arrangements. In contrast, some respondents considered pub-owning businesses to have co-operated fully with the PCA's enquiries and made the point that, had there been evidence of non-compliance, the PCA would have applied its powers, such as naming and shaming, investigating, producing guidance and/or issuing fines.

## PCA effectiveness where non-compliance was found

### Summary of respondents' comments

- 2.15 Some respondents felt that the PCA had not taken sufficient regulatory action when alleged non-compliance by pub-owning businesses had been reported to it. However, the PCA's response to the 'sediment' issue had been welcomed. Others commented that, where recommendations had been made, some pub-owning businesses had appeared to have ignored these or had challenged the PCA with judicial reviews. In terms of information required by the PCA, the complexity of some of the PCA's requests were considered by some to be incomprehensible for non-lawyers, particularly where these had cited legal requirements in the Code.
- 2.16 Some respondents welcomed the clarity afforded by the published awards which some felt had shown some pub-owning businesses to be repeatedly non-compliant. Some respondents noted that no penalties had been imposed on the pub-owning businesses and thought this had served to encourage further breaches. It was suggested that, as arbitration awards could be long and complex, the PCA should have issued summary guidance of each award as well as cumulative guidance summarising the main themes of published awards, highlighting any key points of interest to tied tenants and pub-owning businesses.

## Arbitrating disputes under the Code

### Summary of respondents' comments

- 2.17 Some respondents commented that, despite the improvements made, the process had remained too slow over the review period, resulting in tenants giving up and settling for re-negotiated tied deals. Some respondents noted that while the Code imposed a strict timetable to the MRO process, it did not apply timings to the process of arbitration itself and suggested that the beginning-to-end arbitration process had, at times, taken too long to result in an award. Some respondents noted that the number of open arbitration cases diminished following the appointment of the Deputy PCA. Some welcomed the PCA's introductions of "stays" to enable the parties to complete negotiations without the pressure of arbitration being triggered though also questioned whether such 3-month stays had been sufficient.
- 2.18 While the PCA's referral to external arbitrators had been welcomed in helping to reducing the number of open cases and enabling the PCA to focus on its regulatory obligations, some respondents questioned whether all external arbitrators had been sufficiently aware of the Code's nuances. Some respondents raised concerns about the costs related to the

use of external arbitrators whose fees were much higher than the PCA's arbitration fee. Some respondents commented that with day hearings costing up to £2,800, these varying costs had made it difficult to accurately budget referral costs. Others also mentioned the high costs of arbitration, highlighting that while the PCA's £200 referral cost might be low, some tied tenants had spent significantly more on lawyers and/or experts during arbitration.

## Government assessment of the PCA's performance

- 2.19 The Code introduced complex new regulations interacting with an existing legal framework established by the Landlord & Tenant Act 1954 and the Arbitration Act 1966, against a challenging implementation timetable. New legislation requires time to bed down and requires familiarisation by both the regulator and the parties within its scope. The Government recognises that, in addition to carrying out its duties as arbitrator, the PCA in this period also had the task of setting up its office; recruiting suitably skilled staff; ensuring that the necessary administrative processes were set up and issuing guidance, all of which was achieved in a relatively short period.
- 2.20 The Act does not provide for the PCA to directly recruit its own staff. While the PCA has successfully recruited good staff through the use of secondments, usually from Government Departments, the Government recognises that this can be a lengthy process and limits the flexibility of the PCA to recruit expertise. The Government will continue to work with the PCA to streamline the recruitment process and, when a suitable legislative opportunity arises, seek to enable the PCA to recruit its own staff to ensure it is appropriately resourced to fulfil its duties.
- 2.21 The Government notes respondents' views on the slowness of the beginning-to-end arbitration system and the time taken to conclude some cases. While the confidential nature of the arbitration process serves to protect the parties, it has hampered the transparency of the process and the sharing of best practice. That is being addressed by the PCA's efforts in obtaining parties' agreements to publish arbitration awards which, in many cases, have ruled in favour of the tied tenant.
- 2.22 The published arbitrations set out the procedure and chronology of the cases which can be helpful in illustrating why some take time to resolve. The published awards also show how the Deputy PCA was able to speed up some of the outstanding casework following her appointment in November 2017. Fiona Dickie was able to draw on her judicial background, dispute resolution skills and experience of complex cases to resolve some of the longstanding arbitration cases. This included the consolidation of several cases with common issues at an oral hearing, dealing quickly with cases that included complex and/or novel issues such as compliant stocking requirements, setting the pace of proceedings as the arbitrator, rather than leaving this to the parties, and producing conclusions on the law and facts in relation to common legal issues that repeatedly arose in Pubs Code arbitrations.
- 2.23 The Government notes that arbitration processes can, by their nature, take time to resolve and welcomes the continued progress that has been made since the end of the review period to speed up the beginning-to-end arbitration process. The Government will work with the PCA to consider if the speed of casework can be increased further, whether administratively or by changes to the Code and, where appropriate, bring forward proposals for consultation.

- 2.24 The Government recognises the value in using external arbitrators to tackle the arbitration caseload and enable the PCA to focus on regulatory interventions but believes it would be useful for the PCA to consider the required experience and knowledge of the Code and any training requirements when engaging external arbitrators.
- 2.25 The Government recognises the importance of tied tenants and pub-owning businesses being able to access comprehensive, plain language information to inform them of their rights and responsibilities. This could include short case-studies drawn from past arbitration awards, learning points or summaries of key outcomes or ensuring that published arbitration decisions are easy to understand and locate. The Government notes the other points made by stakeholders about aspects of communications during the review period. The Secretary of State will ask the PCA, in developing its approach to stakeholder communication, to ensure all parties have an opportunity to contribute their views and that end-users are able to shape how information is provided.
- 2.26 Certain types of complaints can be referred to the PCA for redress and, where it is in possession of evidence of poor behaviour by pub-owning businesses contrary to the Code, the PCA can launch an investigation which could result in significant penalties. The Government welcomes the clarification brought by a recent High Court judgment<sup>13</sup>, which supports the PCA's powers to reference pertinent information obtained in the course of its investigatory role, where fairness requires it, to determine the compliance of MRO proposals during arbitration. However, stakeholders would like a better understanding of what the PCA's regulatory interventions might entail and when they have been successfully used. The Government will encourage the PCA to increase awareness of how it addresses alleged non-compliance, and where it has taken action short of investigation to resolve issues. The Government will also ask the PCA to retain such evidence it may come across of persistent poor behaviour by pub-owning businesses where it considers its existing powers are insufficient to enforce the Code, so that the next statutory review can consider whether there is a case for strengthened powers.
- 2.27 The Government believes there needs to be better understanding of both the action taken by the PCA and how it monitors its impact and that of the Code. The Secretary of State will therefore ask the PCA to identify and publish performance measures and report on these annually.

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<sup>13</sup> [England and Wales High Court \(Chancery Division\) Decision, 24 March 2020](#)

# Chapter 3 – Changes to the Pubs Code and the Pubs Code Adjudicator

## The Code: changes proposed by respondents

### Summary of respondents' comments

- 3.1 Some respondents suggested that legal changes to the Code should be avoided as these might have a detrimental impact on the viability of the tied pub model. These added that the success of the Code should not be measured by the number of tenants wishing to depart the tied model and that the 'silent majority' of tied tenants should not be neglected. However, the Government notes that for the period under review, many tied tenants would not yet have experienced a 5-year rent review as the most common circumstance enabling a tenant to initiate the MRO process. Nor should the desire to maintain the viability of the tied pub model take precedence over the need to address the possibility of abuse of tied tenants. The Government will consider necessary improvements to the Code to ensure there is a proportionate enforcement regime available to allow for redress in the face of non-compliance.
- 3.2 The following chapter summarises, by topic, the main improvements to the Code and the role of the PCA which respondents indicated they would like to see.

### Principles of 'no worse off' and 'fair and lawful dealing'

- 3.3 Some respondents proposed strengthening the core principles to include the delivery of a "fair distribution" of profits. Some also wanted to enhance the PCA's role and powers to ensure their effective enforcement. Specific measures were recommended by some respondents to safeguard against what they described as a 'use of tactics' to deter tied tenants from using the MRO option, such as the front-loading of costs, for example, dilapidations and increased deposits. Although outside of the scope of the review, some proposed a tightening of the Landlord and Tenant Act to protect against the conversion of leased pubs into managed operations.

### Government assessment: principles

- 3.4 The 'fair and lawful dealing' and 'no worse off' principles underpin the Code's provisions, which manage the relationship between the pub-owning business and the tied tenant in a way that is intended to balance the rights of both parties. While the Government believes the Code itself to be aligned with the principles, the operation of the Code is not consistently delivering the outcomes of fair and lawful dealing and that tied tenants should not be worse off than tenants not subject to a tie. It has identified a number of changes to improve how the Code operates, as set out below.

### Scope

- 3.5 Some respondents proposed lowering or removing the Code's 500 or more tied pub threshold to extend its provisions to smaller pub-owning companies. Others suggested the removal of the threshold in respect of non-MRO issues that might occur across all tied pub arrangements, for example 'sediment and wastage'. Some proposed that short-term,

contracted out agreements should be included in the scope of the Code as such tenants do not usually have the opportunity of a 'rent review' MRO event. A two-year extension to the PCA's jurisdiction after a tied tenancy had ended was proposed to address latent issues appear only at a later stage. Some also suggested the exclusion of franchise agreements as franchisees were neither required to make rental payments nor purchase products as in tied pubs.

### **Government assessment: scope**

- 3.6 Due to the low number of complaints about the pub-owning companies that sit outside the Code (paragraph 1.38), the Government will retain the current scope provided there continues to be good engagement by them in the voluntary framework and the level of complaints remain minimal. The Government will keep the threshold under review.
- 3.7 Pub franchise agreements are exempt from the Code's rent and MRO provisions, although its 'fair dealing' provisions, such as pre-agreement requirements as to training and business planning, and access to a business development manager, do apply. The Government considers their continued inclusion to be appropriate in providing a level of protection which would otherwise be absent. Nor is an extension of the PCA's jurisdiction after completion of the MRO process justified as tied tenants who opt to break their tied arrangements should obtain appropriate advice on the likely impact of going free-of-tie, including the loss of recourse to the PCA. Similarly, with short-term contracted out agreements, the Government encourages tenants to obtain advice prior to signing such legal contracts so those concerned understand any rights they might lose and can weigh these up against possible benefits, for example, lower rent or a cheaper lease.
- 3.8 Protections already exist in the legislation where change is not within the tied tenant's control, for example through the extended protection provisions. However, the Government will consult on the timing of when pub-owning companies come within the scope of the Code and whether tied tenants should have more protection when their pub is sold by their landlord in certain circumstances.

### **Access to information and advice**

- 3.9 While the Code contains existing provisions requiring pub-owning businesses to share certain information for the purposes of new agreements, rent proposals and rent assessment proposals, some respondents felt these should be extended. Proposals included the publication of tied price lists, independent rent assessment decisions and the production of a public register of tied and free-of-tie rents of pub-owning businesses' properties to enable the negotiation of fair rents. A requirement for pub-owning businesses to waive their right to confidentiality under the CI Arb Rules was also suggested to aid transparency.
- 3.10 Some proposals were put forward to increase the availability of impartial and professional advice. These included the creation of a panel of professionally vetted, qualified experts, such as chartered surveyors, building surveyors, solicitors and accountants to advise parties. A PCA advice note was proposed so that tied tenants could check for professional credentials and ensure that advisers hold public indemnity insurance to protect against any detriment suffered by the tied tenant due to having acted on poor advice.

### **Government assessment: information and advice**

- 3.11 The Government considers the Code's existing information requirements to be broadly fit for purpose in balancing the needs of the tied tenant and the protection of pub-owning businesses' commercial sensitivities. However, to ensure new tied tenants have been

provided with the information as required by the Code, the Government will discuss with the PCA how best to gather more information on whether new tenants understand what they have signed up to and their rights and responsibilities. The Government will also consider and consult on whether prospective tied tenants should be able to have access to a parallel rent assessment to enable them to assess whether, in their view, the proposed tied tenancy meets the 'no worse off' principle. It will also ask the PCA for its views on whether the roles of Code Compliance Officers and Business Development Managers are being carried out as intended, particularly during the early stages of the tied tenancy.

- 3.12 The Government believes that, rather than seek to restrict advisers to those with professional qualifications, efforts are better placed in ensuring the availability of quality advice to enable tied tenants to make informed decisions about their particular circumstances. The Government will work with the PCA and representative groups on how to disseminate information to tenants to help them to access appropriate, professional advice and consider whether an expert panel approach, such as offered by the BII to its members, could increase the available pool of independent advice available to regulated tied tenants. The Government will also continue to engage with the Royal Institute of Chartered Surveyors on its decision to revisit its 2010 guidance on rent valuations.

### Investment exception

- 3.13 The Code contains an investment exception provision where an investment by a pub-owning business, which meets a qualifying investment threshold<sup>14</sup>, allows for the deferral of a tied tenant's use of the MRO Notice on grounds of renewal or rent assessment for a period of up to seven years. Suggested proposals to amend this included the lowering of the threshold to allow for smaller investments to be made or to increase the waiver period. Also suggested was an opt-out of cyclical rent reviews (as an MRO event) in return for smaller, more regular investments or that the qualifying threshold should include pub-owning businesses' investments made as required in the terms of the tied tenancy.

### Government assessment: investment exemption

- 3.14 The investment exception mitigates the potential chilling effect of the potential to go free-of-tie on capital investment and creates sufficient time to enable the pub-owning business to recoup its investment. As there must be additional benefits to the tied tenant for an investment to qualify, repairs and maintenance as required by the terms of the tenancy should not count towards the investment threshold nor does the Government consider an additional dilution of tied tenants' MRO rights to be justified in return for smaller investments. The Government considers the current threshold of 'twice the rental value' to be set at an appropriate level.

### MRO event/circumstances

- 3.15 An MRO Notice can be issued by the tied tenant if any of four specified MRO events occur. Some responses sought greater clarification, such as when a circumstance constitutes an MRO event and in respect of the tenant's requirement to produce a 'forecast' of its likely impact. The removal of all MRO events was proposed by some respondents to enable tied tenants to sever the tied arrangement on-demand.
- 3.16 Changes were proposed to the 'significant price increase' MRO event, such as including in the price increase threshold the higher costs of ingredients or commodities where this did

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<sup>14</sup> The qualifying investment threshold includes, among other conditions to be met, an investment the amount of which is equal to, or greater than, twice the rental value

not increase a pub-owning business's profit margin. It was proposed that the Code's exclusion of increases in alcohol duty should be extended to other potential tax increases, such as the 'sugar tax' where the possibility of triggering an MRO event meant it had not been passed on to the consumer. Changes to the formulas used to calculate a 'significant price increase' were also put forward. An amendment to the 'comparison period' used to determine a "significant price increase" was suggested by changing the definition from "four weeks *ending* with the day 12 months before the invoice is issued" to "four weeks *starting*.." as some respondents said the existing wording had, in practice, created a 13-month comparison period thereby potentially bringing two annual price increases in scope as potential MRO events.

### **Government assessment: MRO events/circumstances**

- 3.17 The MRO events capture the appropriate times to enable a tied tenant to consider whether the trading conditions used to calculate the original lease have changed and whether the terms might need to be re-negotiated. The Government does not consider it reasonable that a tenant, who has freely entered into a tied arrangement, should be able to break that contractual arrangement at any time, thereby impacting on pub-owning businesses' rights as the property owner and creating significant uncertainty.
- 3.18 In respect of the comparison period, the Code aims to compare the same 4-week period, one calendar year apart, in order to determine whether a significant price increase had occurred as an MRO event. The Government will discuss with stakeholders the implications of making changes to the comparison period and the exclusion of taxes, duties and other unavoidable costs from the significant price increase calculation before consulting on any proposals for change.

### **Rent assessments/renewal**

- 3.19 Some respondents sought the simplification of the renewal process for experienced tied tenants who had remained with the same pub-owning business, including a right for the tenant to waive the requirement for training and take independent professional advice. Also suggested was a fast track option to refresh broadly unchanged business models and financial terms or the exemption of the business plan requirement where a tied tenant renewed their lease under the Landlord and Tenant Act. Greater protection against unsustainable rent increases was proposed by requiring negotiated capped Retail Price Index (RPI) annual rent increases.

### **Government assessment: rent assessment/renewal**

- 3.20 The Code enables tied tenants to forego training requirements in specific cases, including for tenants with certain levels of experience. The benefits of regular training and professional advice should not be underestimated in helping tied tenants to make informed decisions prior to entering new or renewed contractual agreements, including the application of RPI annual rent increases.

### **Independent Assessors**

- 3.21 Some felt that the MRO rent review process needed to be reconsidered to improve consistency as it was suggested that the small number of Independent Assessors qualified to undertake pub valuations could lead to conflicts of interest. A requirement of three independent rent valuations was proposed to determine an average, the cost of which was to be shared equally between the parties. An amendment to the Code was suggested to

enable Independent Assessors to recover fees where, due to the statutory timings, work had to be completed despite a lack of payment by the parties.

### **Government assessment: Independent Assessors**

- 3.22 While the relatively small size of the pub sector naturally limits the availability of assessors qualified to undertake pub valuations, where a conflict of interest is suspected, a complaint should be taken up with the Independent Assessor and if necessary, submitted to the relevant governing body. Unpaid fees can be recovered as a debt using existing procedures.

### **Market Rent Only (MRO)**

- 3.23 A number of changes were proposed to the MRO provisions in the Code. The main ones have been summarised below, followed by the Government's response.

#### **MRO process**

- 3.24 The simplification of the MRO Notice was suggested as some thought this had served as a barrier to some tied tenants accessing the MRO option. Others pressed for the requirement of a parallel rent assessment to enable tenants to determine whether an MRO proposal met the 'no worse off' principle or that the pub-owning business should be required to justify or break down a proposed MRO rent. Also proposed was a right for tied tenants to commence the MRO process where a pub-owning business had breached the key principles or where the working relationship had deteriorated. An amendment to the Code's requirement to settle MRO terms prior to assessing the proposed rent was suggested to enable the tied tenant to consider the combined offer of the terms and the rent as a full package.
- 3.25 Greater alignment with the Landlord and Tenant Act was proposed, particularly in respect of the definition of 'market rent' so that the effects of goodwill and capital investments made by a tied tenant to their pub was disregarded during a rent assessment under the MRO process. An amendment to the minimum MRO lease term (the remaining term of the tied lease) was suggested in order to align with similar provisions in the Landlord and Tenant Act where a renewed lease term is determined by the length of the existing lease, up to a maximum of 15 years.

#### **MRO proposal: reasonableness and use of common terms**

- 3.26 Some respondents considered that the large number of 'common terms' used by some pub-owning businesses across their property estate made it difficult for a tied tenant to challenge the reasonableness of such terms when included in an MRO offer. An amendment to the Code was suggested to remove these aspects leaving in place the 'reasonableness' test to challenge the use of any 'uncommon' terms, thereby reducing the need for costly expert advice.
- 3.27 Some respondents proposed an amendment to the Code so that it prescribed the terms of an MRO proposal to fulfil both the reasonableness test and the requirement to use common terms to ensure compliance. Some suggested the PCA's validation of each pub-owning business's MRO proposal as a way to alleviate disputes, whereas others pressed for this to be resisted on the basis that this would enable some pub-owning businesses to rule out the use of a deed of variation to change contractual arrangements. Also suggested was that the right to preserve a route to market for brewers' products should carry equal weight in the PCA's application of reasonableness used to determine the compliance of an MRO proposal so as to safeguard future investments in breweries and pubs. It was also

proposed that the Code should specify the terms considered to be 'reasonable' as opposed 'unreasonable' and to list common terms which could then be reviewed and updated annually.

## **MRO vehicle**

- 3.28 A number of changes were proposed on how a 'free-of-tie' agreement should be effected under the MRO process. Proposals from respondents included that a 'deed of variation' should be established as the default vehicle as a matter of course, or where an existing tied tenancy already contained provisions regarding a loss-of-tie which would minimise costs and the PCA's involvement. Other respondents argued that a new lease or licence should be the expected MRO vehicle. Some felt that that the MRO vehicle should be judged on a case-by-case basis to protect against the retention of onerous or restrictive tied terms in deeds of variation.

## **Government assessment: MRO**

- 3.29 The Government considers the circumstances under which a free-of-tie arrangement is achieved via the MRO process is, in most cases, not likely to be the same as a free-of-tie arrangement agreed on the open market. A tied tenant will likely have made a personal and financial investment in the pub, built up custom and probably lives there, placing them in a different negotiating position from a prospective tenant who is freer to test the market. The Government does not therefore accept that an MRO proposal should only be achieved by issuing a new agreement as would be the case with a prospective tenant considering a free-of-tie tenancy. Nor does the Government view a default for a deed of variation to be the right approach either, particularly where archaic terms or obsolete conditions could be carried forward into the free-of-tie tenancy (paragraph 3.28).
- 3.30 Neither the Act nor the Code prescribes the legal vehicle by which a free-of-tie arrangement should be effected thereby resulting in important flexibility to allow the different circumstances of each tenancy proposal to be taken into account. The creation of an MRO template, the validation of pub-owning businesses' MRO proposals or a list of 'reasonable' or 'common' terms could curb the Code's flexibility and adversely affect the choice of MRO vehicle. Nor does the enabling legislation allow the Secretary of State to require or restrict the use of a deed of variation, or a new tenancy. While the PCA cannot prescribe the vehicle to be used, it should apply a reasonableness test on a case-by-case basis to MRO proposals referred to it for arbitration to enable the PCA to decide the case according to the facts and circumstances of each case. This approach is supported by the Government.
- 3.31 In respect of the use of 'uncommon' terms (paragraphs 3.26 and 3.27), the Government recognises stakeholders' concerns that this complexity may have created a barrier for some tied tenants in accessing their rights and a lack of clarity for pub-owning businesses about which terms are deemed 'common' or 'not common' resulting in uncertainty about the compliance of MRO proposals. The Government will consult on whether the Code's provisions which make it unreasonable to include uncommon terms, should be revoked leaving the terms put forward to be considered in the round as part of the reasonableness test or whether the provisions barring the use of uncommon terms should be retained in the Code. In respect of an MRO proposal, the Government will also consult on amending the Code to require this to set out both the proposed terms and the proposed rent to enable the tenant to consider the offer in its entirety.
- 3.32 In relation to the length of tenancy to be offered as part of the MRO offer, it should be noted that while the Code sets out that the minimum MRO lease term should not be less than the

remaining term of the tied lease, the length of a lease offered as part of an MRO option must also be reasonable in all circumstances, aside from meeting the statutory minimum. Taking these considerations into account, the Government considers that the current provisions strike the right balance.

- 3.33 Regarding proposals for a parallel rent assessment (paragraph 3.24), the MRO process enables an existing tied tenant to determine whether their tied arrangements meet the ‘no worse off’ principle, provided certain criteria (MRO circumstances) are met. The Government does not consider an additional process of a ‘parallel rent assessment’ to be justified for existing tied tenants but will, as previously noted, consider this for prospective tenants. To clarify the MRO process, the Government notes that the PCA has produced a factsheet to help tied tenants complete an MRO Notice so that it fulfils the requirements of a valid request.
- 3.34 The Act defines “market rent” so without amending the enabling powers, it is not possible in the Code to make a different provision. However, the Government will consider what scope there may be to enable tenants’ investments and goodwill to be disregarded during pub valuations.

### Stocking requirements

- 3.35 The Act allowed the use of a ‘stocking requirement’ in MRO lease proposals from pub-owning businesses that are also brewers which obliges the tenant, subject to conditions, to stock that brewer’s beers or ciders. It was suggested the Code should be amended to protect the rights of brewers who own the pub to require it to stock its own brands. It was proposed by others, that, as stocking requirements could stifle innovation and consumer choice, and could serve as a deterrent to tied tenants from pursuing an MRO agreement, the Code should be amended to allow for a reasonableness test to be applied to proposed stocking requirements.

### Government assessment: stocking requirements

- 3.36 The Code allows an MRO proposal to include a stocking requirement which can specify that certain landlord products must be stocked but do not have to be purchased from the pub-owning business. While a stocking requirement can restrict the sales of other beer or cider products, it cannot prohibit such sales but the Government notes that specific stocking requirements included in the MRO offer still need to be reasonable. The Government has no plans to amend the stocking requirement but will review this following the outcome of the PCA’s investigation into the use of stocking requirements.

### Timing related to the MRO process and PCA referrals

- 3.37 Most respondents sought an amendment to, what they regarded as, the Code’s restrictive time-lines which were reported either to have led to premature referrals to the PCA or to have caused tied tenants to miss the deadlines to refer an MRO proposal to the PCA. Proposals included an alignment of the Code’s timescales with the Landlord and Tenant Act, an extension to the negotiation period by mutual consent, PCA referrals once negotiations had either concluded or reached deadlock and an amendment to enable parties to negotiate terms and rent simultaneously prior to a formal offer being made to the tied tenant, either of which or both could be referred to the PCA. Greater clarity was sought in respect of the start and ending of the negotiating period which some stakeholders thought should be amended to allow for the completion of meaningful negotiation.

## Government assessment: timing of referrals

3.38 The timelines in the Code were intended to prevent parties from delaying the MRO process. However the Government recognises some of the concerns raised by respondents. The Government will consider and consult on changes to the timescales relating to the issuing of an MRO Notice and that of the process to refer a dispute in respect of an MRO proposal to the PCA.

## Arbitration process (MRO)

3.39 Most responses pressed for measures to speed up the pace of arbitration, some of which included proposals to incentivise pub-owning businesses to conclude these more quickly, such as the backdating of agreed terms and the rent to the date of the original MRO Notice. Other suggestions included the introduction of a duty on the pub-owning businesses to negotiate or compel pub-owning businesses to revisit the MRO proposal during negotiation period. Greater protection for the tied tenant was proposed, including the introduction of a moratorium to prevent a pub-owning business from evicting a tied tenant until the MRO process had completed.

3.40 Other proposed amendments to the arbitration process are summarised as follows:

- **tailored dispute resolution rules** – to replace the CI Arb rules<sup>15</sup> with a tailored set of rules to simplify the process;
- **Courts** – to enable tied tenants to refer Code disputes to the Courts in a similar way as for other contractual disputes so that lease renewal terms can be agreed as part of the Landlord and Tenant Act process which would result in a low cost, effective option and the creation of case law. An expert Chamber was proposed to issue quick decisions on MRO terms without exposing the tied tenant to the cost and process of a High Court appeal. The application of the Civil Procedure Rules in statutory arbitrations, such as Code disputes, was also suggested;
- **publication of awards** – to require that awards on MRO-related matters are publishable on agreed terms by parties or as considered appropriate by the PCA to aid transparency for third parties. Also suggested was the publication of all awards as a matter of course, with sensitive data redacted; and
- **a speedy alternative dispute resolution** – (as opposed to referral to the PCA) able to direct a pub-owning business to provide a full response to the MRO Notice where it had failed to do so.

## Government assessment: arbitration process

3.41 The Government will consult on proposals to improve the process, such as a tailored set of dispute resolution rules, consider the scope to speed up the publication of arbitration awards to improve transparency and explore options for an alternative appeal route.

## PCA: changes proposed by respondents

3.42 Some respondents felt that no legislative changes were warranted and suggested the focus should be on effective enforcement to address, for example, some pub-owning businesses'

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<sup>15</sup> The Chartered Institute of Arbitrators: [The CI Arb Arbitration Rules](#)

alleged repeat use of unreasonable clauses in offers of free-of-tie leases under the MRO process which should be investigated and fined.

- 3.43 Some responses sought changes to the PCA's powers, such as the ability to require the publication of rent assessments of tied rents and independent assessments. Also suggested was a power to direct changes to MRO proposals to make these compliant and to award punitive damages to compensate tenants for mistreatment and/or stress. Some respondents suggested PCA powers to order compensation for the tenant's loss of profit for the period of delay where they had remained tied or to penalise the pub-owning business with a fixed penalty for each month of delay. Financial penalties for pub-owning businesses were proposed for all breaches of the Code or where the pub-owning business had presented a significantly disparate rental valuation compared to an independently produced one.
- 3.44 Other suggestions for PCA powers included:
- where a dispute had been settled between the parties, the PCA should have the ability to check whether this had fulfilled the 'no worse off' principle;
  - the ability to deal with day-to-day complaints of tied tenants that the voluntary Industry Framework Code did not have the authority to deal with;
  - to adjudicate as opposed to arbitrate; and
  - to extend the PCA's power to request information for non-MRO disputes to MRO related disputes.
- 3.45 Some respondents thought the PCA should have greater discretion to award costs against the tenant where they, or their adviser, had brought or persisted with an unreasonable claim. An amendment to the definition of 'vexatious' was suggested to disincentivise tenants from making referrals as part of a commercial negotiation strategy and to require the tenant to make a capped payment towards pub-owning businesses' arbitration costs and uncapped where the referral was deemed 'vexatious'. Some respondents thought the PCA's referral fee of £200 should be refunded by pub-owning businesses where the PCA had found in favour of the tenant.
- 3.46 Some proposed that the PCA should issue written guidance and require mandatory familiarisation sessions to ensure external arbitrators understood the tied pub sector, pub valuations, the Code including terms such as 'common' and 'reasonable', experience of property and leases and associated disputes and to ensure the availability of suitable arbitrators. Also suggested was that the PCA should impose an hourly rate for external arbitrators reflecting the rate payable to the PCA or to introduce mandatory mediation prior to arbitration.
- 3.47 In terms of the PCA's performance, greater direction by the Government was suggested by some respondents, including:
- the creation of a timeline setting out the PCA's required actions, including response times to parties' correspondence;
  - improved procedures to keep parties informed on progress and to afford tenants an opportunity to comment on a pub-owning business's response prior to concluding a matter;
  - service and performance standards to track the PCA's performance, including accountability for the length of time each referral had taken;

- ‘golden threads’ guidance setting out themes and outcomes of referral awards;
- prior consultation and transparency on the apportionment of the annual levy imposed on the regulated pub-owning businesses which cover the PCA’s operating costs;
- a service similar to the [PICA-Service](#) paid for by the PCA to produce a best practice guide on dilapidations, inventory purchases and sale back, and deposit returns; and
- comprehensive, quality guidance produced by the PCA

### Government assessment: proposed changes to the PCA

- 3.48 The PCA is a separate statutory entity independent of government and must discharge its functions in accordance with public law as it considers appropriate. While the Government may give guidance to the PCA in relation to its functions, there is no power of direction. The Code preserves a careful balance between the rights of the tied tenant and those of the pub-owning business and the Government will therefore not amend the PCA’s powers, including those relating to penalties and fees, at this early stage in the life of the Code. The PCA is able to use its existing investigative powers, or action short-of-investigation, where there is evidence of repeat poor behaviour by pub-owning businesses that is contrary to the Code. The Government will ask the PCA to consider how it can raise awareness of such interventions and its approach to dealing with reports of alleged non-compliance. The Government encourages tied tenants to share evidence of such poor behaviour that is contrary to the Code with the PCA to enable it to determine if a regulatory intervention might be warranted.
- 3.49 The Government is aware that the arbitration process can at times lead to protracted arbitrations, particularly as the PCA (or alternative arbitrator) must consider the compliance of revised, successive MRO proposals. The Government has, in its response in Chapter 2, set out proposals that may help to speed up the process of arbitration and which would deliver greater transparency in respect of the PCA’s public accountability. The Secretary of State will further ask the PCA to consider the required experience and knowledge of the Code and any training requirements when using its powers to engage external arbitrators.

# Chapter 4 - Impact assessments for the Pubs Code and associated regulations

## Summary of respondents' comments

- 4.1 Respondents were invited to consider the assumptions in the Impact Assessments and to provide evidence of wider impacts of the Code, including costs to businesses, pub closures, income redistribution from pub-owning businesses to tied tenants, changes in industry structure and ownership and wider industry trends such as employment and investment. This section relates to the Term of Reference 4.

### Costs to businesses

- 4.2 In the impact assessment for the Code provisions, it was estimated that the additional costs to business from this policy would be £3.9m per year, with a substantial part of this cost formed from the ongoing costs of the PCA.
- 4.3 Pub-owning businesses felt the cost of compliance with the regulations, the costs of arbitration and the levy to fund the PCA were significantly greater than the costs envisaged in the impact assessment.
- 4.4 The PCA's levy was set at £1.5m for 2016/17, £1.74m for 2017/18 and at £2.55m for 2018/19. These levies all fall within the range of annual costs of the PCA estimated in the original impact assessment (with a low estimate of £0.6m and a high of £3.6m per annum). The PCA's levy is increasingly focused on the least compliant, ensuring costs are more directly targeted at harms, as envisaged by the impact assessment.
- 4.5 Both pub-owning businesses and tied tenants reported experiencing costs when seeking to deal with the Code, for example due to the length of time dealing with the arbitration process, rent negotiations, legal costs and the PCA levy. While some respondents provided information on the costs to them of dealing with the Code, there is currently insufficient evidence to assess whether overall costs have disproportionately fallen on certain businesses or are higher than estimated in the impact assessment.

### Pub Closures

- 4.6 The impact assessment estimated 390 annual closures due to the introduction of the Code, at a cost per closure of £18,000 to pub-owning businesses and £25,000 to tenants with a total cost to business of £16.7m. These are classed as an indirect effect.
- 4.7 Some tenants suggested continuing pub closures were as a result of the Code and pub-owning businesses using section 25 notices under the Landlord and Tenant Act 1954 to avoid the MRO requirements under the Code. Other tenants felt that pub closures were a wider issue with consumer behaviour making some pubs unsustainable, regardless of model. Others commented on how removing the tie would enable tenants to offer more locally produced beer and other products to respond better to local consumer demand and help small independent brewers access the market.
- 4.8 Some pub-owning businesses thought closures had been greater in free market/houses and that the Code has not been a significant factor in closures as tied pubs were performing better than other businesses in accommodation and food service.

- 4.9 Given the indirect nature of the effects of the Code on pubs closures, it is difficult to assess whether any closures are due to its introduction. Pub closures could be due to a number of factors, including changes in consumption patterns, increased competition and increased cost of doing business. ONS data shows a negligible change in the trend of pub closures since the introduction of the Code. The Government therefore does not believe there is substantive evidence to indicate that the Code has led to more closures than estimated in the impact assessment.

## Income Redistribution

- 4.10 The impact assessment estimated a transfer of value where tenants are not currently treated fairly and that the transfer would be proportionate to the current level of unfair treatment.
- 4.11 A [BBPA Commissioned report by Europe Economics](#) raised concerns that any transfer of value away from pub-owning businesses to tenants and third-party suppliers is likely to be detrimental to investment by pub-owning businesses in their tied pubs in the long term.
- 4.12 Some respondents to the consultation thought that while some tenants were getting better deals, the relatively small number of tenants who had exercised their right to an MRO offer meant the opportunities of the Code had not been fully realised with income not being redistributed as expected. There was limited quantitative evidence provided to verify the extent to which those who had not pursued an MRO option had managed to negotiate a better tied deal and the value to them of such deals. Some stakeholders commented about the cost implications of the outcomes delivered by the Code, including the length of the processes meaning tenants experienced a delay in seeing the benefits of a new tied agreement or MRO.
- 4.13 Tenants and their representatives felt there had been very little redistribution of income from pub-owning businesses to tenants with a suggestion that pub-owning businesses were proposing MRO terms and rent to replicate the share of profit from the existing tied deal, rather than proposing a fair market rent.
- 4.14 Ei provided evidence to the [BEIS Select Committee](#) that pubs which were operated by the same publican on either tied or new free-of-tie agreements delivered like-for-like net income decline of (0.8%) for the Group compared to like-for-like net income growth of 0.6% achieved for the total EiG estate. Ei suggested this was in part due to the stronger position for publicans which the Code has delivered and represented a tangible transfer of value to tied pub tenants.
- 4.15 Currently Government has not been provided with substantial enough evidence to draw broader assumptions across the sector that income has been redistributed unfairly as a result of the introduction of the code, in a way that deviates from the assumptions in the impact assessment. The Government recognises that the review period may be too short to assess the full impact of the transfer and will look to monitor and assess this in more detail over the next review period.

## Changes to ownership status

- 4.16 Some campaigning groups believe that, as the majority of MRO opportunities arise because of the cycle of five yearly rent reviews and lease renewals, pub-owning businesses have sought to reduce their exposure to longer term leases. There has been some evidence provided to the PCA that the majority of open lettings are now for 5-year

terms, however this has been disputed by others. The evidence provided so far indicates it is too soon to assess substantive changes resulting from the Code.

## Industry Trends

- 4.17 Due to the dynamic and unpredictable nature of markets, the impact assessment suggested that there could be a number of unintended consequences due to the introduction of the Code.
- 4.18 Some respondents to the review questioned whether pub-owning businesses might respond to the risk of tied pubs going free-of-tie by taking more profitable pubs into managed status and reducing investment in the rest of their tied estate. However, the Government has not yet seen substantial quantitative evidence to suggest a significant difference in the way pub-owning businesses invest in managed and leased pubs. It will look to assess this further in the next review period.
- 4.19 Others suggested that the pub-owning businesses had increased the number of 5-year contracted out agreements under the Landlord & Tenant Act to prevent them being subject to MRO events of renewal or rent review. It was noted that this practice had not been replicated by pub-owning companies which were outside the Code.
- 4.20 Whilst some evidence has been presented of changing industry trends as a result of the Code, the evidence provided has not been substantive enough to draw clear insights as to broader unintended consequences of the introduction of the Code and whether they risk significantly undermining the objectives of its introduction. The Government will continue to monitor industry trends as they emerge.

## Conclusions

- 4.21 There is insufficient evidence to suggest the Code has led to more pub closures than estimated in the impact assessment. Analysis of ONS data shows a negligible change in the trend of pub closures since the introduction of the Code. The ONS suggests that such changes are predominately driven by other factors, such as consumer behaviour. It is possible that the Code has influenced decisions by pub-owning businesses on the type of lease or management arrangement but it is too early to assess the extent to which the Code has driven these changes and how widespread any impact is across all pub-owning businesses.
- 4.22 The Government thinks it possible that there has been some limited redistribution of income from pub-owning businesses to tenants in MRO deals and renegotiated tied agreements, although there is no quantitative evidence to show this, nor the extent of any redistribution.
- 4.23 The 2019/20 PCA levy of £3m per annum worked out to £320 per regulated pub. While this is an increase on the cost of the PCA for the first full year when it was established, the current levy figure is within the range set out in the impact assessment. It is also possible that a significant amount will be returned to pub-owning businesses, as in previous years because it had not been spent, but also if an investigation finds a breach of the Code, there are powers to recover the cost of the investigation from the pub-owning business.

# Annex A: The Pubs Code and the Pubs Code Adjudicator

The role of the PCA, conferred upon it by the Small Business, Enterprise and Employment Act 2015 (the Act), is to enforce the Code and to encourage and monitor compliance with it, and to arbitrate disputes as provided for in the Act and the Code.

The large pub-owning businesses within the scope of the Code are (for the period covered by this report) were:

- Admiral Taverns
- Ei Group Ltd
- Greene King
- Marston's plc
- Punch Taverns
- Star Pubs & Bars (Heineken)

In brief, the Code:

- a. Imposes certain requirements on pub-owning businesses in relation to their dealings with prospective tied tenants, for example, they must ensure such tenants have a sustainable business plans, and during the course of the tenancy or licence, requires the large pub-owning businesses to ensure their Business Development Managers deal with their tied pub tenants in a manner consistent with the principle of fair and lawful dealing. A compliance officer must be appointed to verify and report on compliance with the Code and see that the Business Development Managers receive suitable training.
- b. Imposes certain duties on pub-owning businesses in relation to rent assessments and rent proposals.
- c. Entitles a tied tenant in certain circumstances to seek an offer of a free-of-tie tenancy or licence that is "MRO-compliant", and provides for the parties to negotiate to reach an agreed outcome.
- d. Provides for a dispute resolution procedure in relation to certain disputes identified in the Act and the Code as "arbitrable". These include disputes that may arise about certain aspects of the MRO process.

The PCA has a duty to arbitrate where referrals are made and may arbitrate or appoint a third party to do so. The PCA has the power to investigate where there are reasonable grounds to suspect a breach of the Code. Where, after concluding an investigation, the PCA is satisfied that a pub-owning business has failed to comply with the Code, the PCA may take one or more of the following enforcement measures:

- make recommendations;
- require information to be published; and/or
- impose a financial penalty.

## Role of government

The PCA is a separate statutory entity independent of government.

The Secretary of State for Business, Energy and Industrial Strategy is responsible for appointing the PCA. The current PCA was appointed following an open competition in accordance with Cabinet Office guidelines on public appointments. Staffing at the PCA is subject to certain approvals by the Secretary of State and the Secretary of State may provide the PCA with staff, premises and facilities or other assistance.

The PCA may, with the consent of the Secretary of State, require pub-owning businesses to pay an annual levy towards the expenses of the PCA. In practice and to date, the PCA has been wholly funded through the levy. The PCA must submit a levy proposal and supporting business case in advance to the Secretary of State who will consider the proposal and write to the PCA confirming whether consent is given. Once in receipt of this approval, the PCA may invoice the pub-owning businesses that are within the scope of the Code for their share of the levy. Non-payment of the levy is recoverable by the PCA as a civil debt.

# Annex B: The Statutory Review: process and Terms of Reference

1. Sections 46 and 65 of the Act, regulation 68 of the Code and, regulation 7 of the Pubs Code (Fees, Costs and Financial Penalties Regulations) 2016 requires the government to periodically review the effectiveness of the Code and the performance of the PCA. This first review covers the periods from the creation of the PCA (in May 2016) and the commencement of the Code (in July 2016) to 31 March 2019.
2. This report is informed by the responses received from interested parties as well as evidence led from published reports and/or data. Details of the evidence base are set out in Annex C.
3. The Act and the Code specify the issues which the review must address. A list of respondents and a breakdown of responses by group is included at Annex D.
4. The primary purpose of the consultation covering the statutory review was to seek views and evidence to enable the Government to make an assessment of the effectiveness of the Code and the PCA's performance against the measures set out in the Act. This single report covers all the statutory review requirements as required by the Act. These measures are reflected in the Terms of Reference set out below.
5. As a result of the findings of the section 65 review the Secretary of State may also:
  - give guidance to the PCA about any matter relating to the PCA's functions, which the PCA must take account of in carrying out PCA functions;
  - by regulations abolish the (office of) PCA if the Secretary of State is satisfied that the PCA has not been sufficiently effective in securing compliance with the Code to justify the continued existence of a PCA or that it is no longer necessary for there to be a PCA to secure compliance with the Code, or if the Code is revoked and not replaced.

## Term of Reference 1

In accordance with [section 46 of the Act](#), consider the operation of the Code (as set out in Parts 2 – 10 of the Code etc Regulations 2016, as read with the Act) from 21 July 2016 to 31 March 2019, in particular, the extent to which the operation of the Code is consistent with:

- the principles of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants; and
- the principle that tied tenants should not be worse off than they would be if they were not subject to any product or service tie.

## Term of Reference 2

In accordance with section 65 of the Act, consider the PCA's performance from 2 May 2016 to 31 March 2019, in particular how effective the PCA has been in enforcing the Code and whether it would be desirable to amend or replace any regulations relating to costs, fees and financial penalties.

## Term of Reference 3

To review the provision of the Pubs Code etc Regulations 2016<sup>16</sup> and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016<sup>17</sup> which are not covered by review provisions in the Act 2015.

## Term of Reference 4

To review the assumptions made in the impact assessments for the Pubs Code provision in the Act<sup>18</sup>, the Pubs Code etc Regulations 2016<sup>19</sup> and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016<sup>20</sup>.

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<sup>16</sup> [SI 2016/790](#)

<sup>17</sup> [SI 2016/802](#)

<sup>18</sup> <https://www.gov.uk/government/publications/pub-companies-and-tenants-pubs-code-and-adjudicator>

<sup>19</sup> [The Pubs Code etc. Regulations 2016](#)

<sup>20</sup> [The Pubs Code \(Fees, Costs and Financial Penalties\) Regulations 2016](#)

# Annex C: Evidence considered during the Review

Sources of information that have been considered as part of the review include:

- [responses to an invitation for views](#)
- evidence submitted as part of this review
  - [BBPA Commissioned report by Europe Economics](#)
  - CAMRA survey of licensees about the economic viability of pubs which received 704 responses, including 155 responses from tenants covered by the Pubs Code, between the 8th of March and the 6th of May 2019.
  - CAMRA licensee survey regarding tied publicans on the Pubs Code has received 410 responses, including 298 responses from tenants covered by the Pubs Code, between the 19th of June and the 16th of July 2019
- PCA Annual reports
  - [Annual report 2018-19](#)
  - [Annual report 2017-18](#)
  - [Annual report 2016-17](#)
- [PCA Tenants survey](#)
- [Published Arbitration Awards](#)
- reports prepared by the PCA and other relevant material available on the PCA's website
- Impact assessments published with the SBEE Act 2015 in relation to the Code provisions, and the Regulations made under those provisions
  - [Pubs statutory code and adjudicator: final impact assessment](#)
  - [The Pubs Code etc. Regulations 2016](#)
  - [The Pubs Code \(Fees, Costs and Financial Penalties\) Regulations 2016](#)
- [ONS data](#)
- [BBPA data](#)
- [Select Committee enquiries evidence](#)

## Annex D: Breakdown of responses to the Review

<b>Respondent type</b>	<b>Total*</b>
Tied pub tenant	29
Non-tied tenant	2
Pub-owning business with 500 or more tied pubs in England and Wales	6
Other pub-owning business	9
Tenant representative group	12
Trade association	3
Consumer group	1
Business representative organisation/ trade body	3
Charity or social enterprise	1
Individual	7
Legal representative	1
Consultant/adviser	5
Trade union or staff association	0
Surveyor	3
Other	5

\*Respondents who identified with more than one category have each been reflected as indicated which accounts for the total number of responses above exceeding the 78 respondents who replied to the review. Where no such indication was provided, the nature of the response was used to determine the most appropriate category where possible.

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This publication is available from: [www.gov.uk/government/publications/pubs-code-and-pubs-code-adjudicator-statutory-review-2016-to-2019](http://www.gov.uk/government/publications/pubs-code-and-pubs-code-adjudicator-statutory-review-2016-to-2019)

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