



PCA response to questions from CAMRA National Executive

The Pubs Code Adjudicator, Paul Newby, was invited to speak to the CAMRA National Executive in Grantham on 16 November 2019. The Adjudicator was not able to answer all of the questions submitted on the day, and therefore promised to take these away and to reply to them in writing. The PCA is publishing this Q&A for the benefit of all its stakeholders.

- 1) In respect of your interpretation of Regulation 28 of the Code, how does the PCA consider that the rent for any delayed period should be calculated: (a) if MRO is delivered by a Deed of Variation; (b) if MRO is delivered by a new lease?

The PCA has published [statutory advice](#) on the effect of regulation 28 setting out how a pub-owning business (POB) must approach every individual MRO proposal. This confirms that if the MRO procedure ends with the POB and Tied Pub Tenant (TPT) entering into a MRO option (regardless to the vehicle) then the POB is not permitted to recover any additional amount of rent which may have become payable under the tied agreement after the MRO notice was served. As this prohibition is mandatory a POB must not seek to circumvent it by any means.

The PCA has augmented this with further statutory advice in the form of a further chapter to its [Regulatory Compliance Handbook](#) setting out the minimum steps required that a POB must go through when responding to a MRO Notice from a TPT; and requiring all of these to be recorded in a MRO Compliance Record and Declaration that the TPT may request. The office of the PCA has publicised both of these advice notes in its regular [Bulletins](#). The PCA welcomes whatever steps CAMRA and others within the industry can take to help bring these important developments to the attention to the wider tied tenant community.

- 2) Do you think that the Code should include all pub companies regardless of size?

The Department for Business, Energy and Industrial Strategy (BEIS) is concluding a statutory review of the Pubs Code which began during the summer; and invited the views of stakeholders from across the industry. CAMRA will therefore have had the opportunity to set out its own position on this issue.

- 3) Why is the Market Rent Only Option still allowed to be 'gamed' by pub companies? Do you think this is the biggest failing of the Code?

The PCA has published its new chapter to the [Regulatory Compliance Handbook](#) providing detailed statutory advice on what the minimum is required to demonstrate MRO compliance and requiring POBs Code Compliance Officers to sign a declaration that they have been through all of these steps. This year the PCA also launched its first investigation into the suspected use of unreasonable stocking terms by Star Pubs & Bars in proposed MRO tenancies.

The PCA has also published its [response to the BEIS statutory review](#) which sets out in detail its experiences of the MRO provisions in the Code.

- 4) What have you found most challenging about your role?

It has been a challenge to make TPTs, who are a fragmented group, aware of the Pubs Code and the rights it gives them. Also challenging has been managing the





introduction of a new statutory regime which has been the subject of conflicting interpretations and considerable legal dispute.

5) Did you see the Pub Code changing the industry?

We can see evidence of behavioural and cultural change for the better in the regulated pub sector, but this remains as work in progress and there is still much more to be done in both embedding and enforcing the Code.

6) What has been your greatest success?

It is easy to lose sight of what a fundamental change the introduction of the Pubs Code represents within the industry. I have had the opportunity to begin this process of change and seeing it result in better treatment of and deals for TPTs. I believe that in these first years of the Code my team and I have built a solid platform to promote and drive further behavioural and cultural change in the sector.

7) Do you think you could have done things better?

Much good work has been done by the PCA team in challenging circumstances. But there is more work to be done to bring about the sustainable and lasting changes that Parliament intended.

8) What changes to the Code would you recommend to the Government to make it work better?

We have published our [response](#) to the Government's statutory review of the Pubs Code. This has in particular highlighted issues around the MRO process and the suitability of arbitration for resolving Pubs Code disputes.

9) Advice Notes: - When the PCA changes the contents of its advice notes:

- a) Does it review the impact of such changes on earlier decisions and adjudications made under the earlier guidance?
- b) If so, how does it quantify the impact on those adversely affected by such changes in advice?
- c) If not, why not? Is the PCA obliged to pay compensation for any wrongful decisions made as a result of incorrect advice notes?

The PCA has a duty in its dual role as regulator and arbitrator to monitor and enforce the Code. The PCA publishes statutory advice as it considers necessary and appropriate. The PCA has always made it clear it keeps that advice under review.

10) Changing Structure of pub companies - Does the PCA monitor the structural changes taking place within the larger pub companies to inform it as to which pub companies are likely:

- a) to fall outside the PCA's remit and
- b) to become new entrants to that remit?

The PCA regularly collects data from POBs on the size and shape of their estates; and this information is required in their annual compliance reports to the PCA. The PCA also monitors various intelligence sources for reports of industry change both to existing regulated companies and possible new entrants.





- 11) Pubs Code Stocking Clarification 3 March 2017 - the PCA issued a note setting out a clear view that a market rent only MRO compliant tenancy can include a stocking requirement, if reasonable.
- What does the PCA consider to be "reasonable" stocking requirements?
 - What does the PCA therefore consider to be "unreasonable" stocking requirements?

The reasonableness of a stocking requirement will be dependent on the circumstances of the case. The duty is on the POB to ensure that any stocking term is reasonable. The PCA has published a number of [arbitration awards](#) where these questions have been considered.

Also, this year, the PCA launched its first investigation into the suspected use of unreasonable stocking terms by Star Pubs & Bars in proposed MRO tenancies.

- 12) Special Commercial or Financial Advantages (SCORFA): Under EU competition law, contracts containing an exclusive purchasing obligation, such as the beer tie, have only ever been permitted if they provide such "countervailing benefits".
- What countervailing benefits, or SCORFA, does the PCA believe exist in relationships between pubcos and tied tenants? b) What range of values are acceptable for each identifiable type of SCORFA?
 - What elements of SCORFA claimed by pub companies does the PCA believe do not constitute countervailing benefits?
 - Does the PCA have a series of case study examples of itemised and fully quantified SCORFA which demonstrate what is and what is not acceptable?
 - Does the PCA require pubcos to provide an itemised and fully-costed analysis of the SCORFA element of any application of the SCORFA concept?
 - Does the PCA have the statutory power to require such a cost breakdown of SCORFA on an agreement by agreement basis?
 - If it has the power to do so, why has it not done so?

When providing a tied rent proposal under the Pubs Code, a POB must support this by giving the TPT a forecast profit and loss statement, as required by Schedule 2 of the Code. SCORFA accounts for part of the difference between tied rent and free of tie rental levels. The relevance and value attached to SCORFA is determined by the market forces that relate to individual properties in each and every case and is a matter of valuation.

- 13) Disparity of Commercial Entities
- Does the PCA think that there is an imbalance between the size of commercial organisations involved in the tenant - pub company relationship?
 - If so, does the PCA think that this size differential means that in the natural course of events, the commercial relationship between the two is likely to favour the pub company as the dominant partner?
 - If so, does the PCA think that in the role of dominant partner, the pub company is likely to have the resources to fund significant levels of legal and other professional advice at the upper end of the market for such advice?
 - How does the PCA ensure that any imbalance does not unfairly prejudice the ability of tenant to secure a "fair deal" when negotiating agreements with pub companies?
 - How does the PCA ensure that agreements between tenants and pub companies are equitable and are the product of a "level playing field"?
 - What further measures could the PCA reasonably take to ensure that the tenant is not commercially disadvantaged by a possible dominant position of the pub company?





These issues go to the heart of the two core Pubs Code principles – that there should be fair and lawful dealing by POBs with their TPT; and that a TPT should be no worse off than they would be if they were free of the tie. Respect for these core principles should inform all of a POB’s dealings and negotiations with their TPTs. When they don’t, the Code provides the TPT concerned with means of redress. The PCA has set out its position on the effectiveness of the Code against the core principles in its [response](#) to the BEIS Statutory Review.

14) Policing the Pubs Code

- a) What statutory powers does the PCA believe it has to ensure the Pubs Code is applied?
- b) What boundaries and limitations in the PCA's statutory powers does the PCA believe exist which prevent the PCA ensuring the Pubs Code is complied with?
- c) What legal challenges, or the threat of legal challenges have been brought or threatened by either tenants or pub companies?
- d) How have these legal challenges changed the PCA's approach to the way in which the Pubs Code has been applied?
- e) Have legal challenges, or potential legal challenges, created "black holes" whereby the PCA is unable to deliver on either the substance or the spirit of the Pubs Code?
- f) What powers to police and enforce the Pubs Code does the PCA believe it should have but currently does not have?

The PCA has consulted on and published [statutory guidance](#) on how it will approach its investigation and enforcement powers.

The PCA has been subject to applications for Judicial Review during the last three years (in respect of the [MRO advice note](#) published March 2018). These have been documented publicly. The PCA has been involved in proceedings relating to the appeal of individual arbitration awards. Such proceedings are private unless otherwise determined by the Court or there is a hearing on a point of law. As part of its transparency agenda the PCA has published court orders where possible. We have published this [order](#) on our website.

15) Expectations / Delivery Gap

- a) Does the PCA think that there is an expectations / delivery gap between what some tied tenants and their supporters believe the PCA should be doing and what the PCA believes it should be doing to meet its obligations under the Pubs Code?
- b) If so, has the PCA identified what the key elements of that expectations / delivery gap are?
- c) If so, how does the PCA intend to bridge that gap?

Over the last year the PCA has moved decisively from being directly involved in interpreting the law in individual arbitration cases. By the routine use of alternative arbitrator appointments, the PCA has been able to focus on regulatory interventions to increase the pace of behavioural and cultural change and to embed compliance with the Code in the businesses of the regulated POBs

- 16) Are you aware of any pub companies with exceptionally good practices when it comes to commercial relationships with their tenants right through from on boarding to exit?

Admiral Taverns stand out – they have not had a single referral for PCA arbitration in the three and a half years that the Pubs Code has been in force. And that’s not simply because Admiral TPTs are not asking for MRO – some have gone MRO, but they’ve done it through a process of engagement and negotiation with their pub company. My





office has also received very few enquiries from Admiral TPTs. And our tenant surveys have demonstrated that Admiral TPTs have high levels of satisfaction with the state of their relationships with their pub company in general, and their BDM in particular.

The Deputy PCA and I are grateful to Admiral for the way that they have embraced the Code with a culture of making compliance work for their business. Their current expansion of their pub estate speaks volumes for the confidence with which they operate within the regulated sector.

All of this demonstrates how vital the role of Code Compliance Officer (CCO) is in promoting a culture of compliance within a business. That's why the Deputy PCA and I have prioritised strengthening the visibility and authority of CCOs within their businesses. We need all CCOs to follow the lead set by high-performing pub companies like Admiral.

