Department for Business, Energy & Industrial Strategy

Pubs Code and Pubs Code Adjudicator: statutory review

Response form

The consultation is available at: www.gov.uk/government/consultations/pubs-code-and-pubs-code-adjudicator-statutory-review

The closing date for responses is 22 July 2019.

Please return completed forms to:

Pubs Code Review Team
Department for Business, Energy and Industrial Strategy
1st Floor, Orchard 3, 1 Victoria Street, London SW1H 0ET

Email: PCAreview@beis.gov.uk

Personal / Confidential information

Please be aware that we intend to publish all responses to this consultation.

Information provided in response to this consultation, including personal information may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see the consultation document for further information.

If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential ☐

Comments: Click here to enter text.

About You

Name:
Organisation (if applicable): Marston’s plc
Address: Marston’s House, Brewery Road, Wolverhampton, WV1 4JT

	Respondent type
☐	Tied pub tenants
☐	Non-tied tenants (please indicate, if you have previously been a tied tenant and when)
☒	Pub-owning businesses with 500 or more tied pubs in England and Wales
☐	Other pub owning businesses (please describe, including number of tied pubs in England and Wales)
☐	Tenant representative group
☐	Trade associations
☐	Consumer group
☐	Business representative organisation/trade body
☐	Charity or social enterprise
☐	Individual
☐	Legal representative
☐	Consultant/adviser
☐	Trade union or staff association
☐	Surveyors
☐	Other (please describe)

Questions

Part A: The Pubs Code

Question 1

How well do you think the Pubs Code has operated between 21 July 2016 and 31 March 2019? What evidence do you have to support your view?

Comments:

The Pubs Code was implemented to provide all parties operating under the provisions of the legislation with a clear and transparent insight into how relationships and business are to be conducted. Whilst the premise behind the legislation is sound, the implementation of the Pubs Code has produced a mixture of successes and unintended consequences.

It has certainly promoted and established better processes, procedures and relationship management within our business, however, ambiguities and issues of clarity have hindered it reaching its full potential with the optimal compliance of all parties.

Issues were to be expected in the absence of a transitional period to implement the new legislation. The realising of early positive outcomes for all parties was always likely to be difficult as the ambiguities of the initial drafting of the Code created issues in its own right. This has led to the PCA law making rather than acting in a purely interpretive role which, in turn, has made the practical impact on areas such as MRO issues unintentionally inconsistent.

Crucially, neither the Code nor the PCA have recognised the fundamental differences between a tied tenancy and a FOT tenancy in terms of the nature of the commercial relationship. Absolute clarity and appreciation of this specific relationship would greatly assist all parties understanding what is and what is not within the actual remit of the PCA. **This is the main obstacle to achieving the positive improvements we all seek.**

Ambiguity has led to the inconsistent application and interpretation of the legislation by the PCA. The Code ought to operate as a clear and comprehensive list of requirements against which actions can be measured objectively and openly. All parties would then know exactly what to do to ensure full compliance. Regrettably, as yet, basic matters such as whether or not a list of unreasonable MRO terms is exhaustive are unclear.

The guidance issued by the PCA does not provide the definitive text. The stance that unreasonableness must be judged subjectively on the individual circumstances of each tenant has only resulted in even greater confusion as to whether or not an MRO offer is acceptable from one case to the next.

Coherent guidance and unequivocal principles that would constitute both acceptable conduct and terms would remove subjectivity.

We have asked, through ourselves, our solicitors and through the BBPA, on several occasions for guidance or feedback on matters such as excepted common terms, SDLT treatment for tax purposes, costs decisions and jurisdiction. Frustratingly, this has been less than forthcoming. On one particular award, we sought such a clarification but the arbitrator refused to provide one. **The operation of the Code would benefit from greater engagement and transparency from the PCA on such matters**.

The timing for arbitrations to be brought to a conclusion and awards to be made is a significant frustration to all parties. In one recent case, the arbitrator sought directions towards determination in December 2018 but the award was not made until July 2019. In another case, an arbitration hearing took place in November 2018 and the award was not made until July 2019. Bearing in mind that Court judgements have to be made within three months of a hearing/trial, eight months between an arbitration hearing and award is only likely to yield unhelpful relationship antagonisms for both parties.

In our experience, costs are becoming higher for the operation of the PCA, with little improvement in either delays to, nor administration of, cases. The ambiguous operation and oversight of the Code is actually generating disputes, which in turn, create more referrals to arbitration, resulting in backlogs and delays.

Question 2

To what extent do you think the Pubs Code is consistent with the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants? What evidence do you have to support your view?

Comments:

The Code is fair insofar as it promotes better, more open practices within our business. Unfortunately, the ambiguous nature of certain provisions and their interpretation fuels inconsistency in the treatment of tenants, which ultimately threatens the fairness to which we all aspire. For example, in a recent case we were forced to relax the initial deposit requirement for a tenant on grounds of affordability, yet on another similar case we were not. This is not a fair and comparable outcome for those two tenants in question.

Of relevance to fairness is that although the measure prescribed by the Code is by comparison with other FOT tenants and their common terms, the subjective approach by the PCA goes well beyond this comparison and **forces Pub Companies to treat tenants opting for MRO significantly more favourably than other FOT tenants in specific areas, particularly affordability.**

This is unfair to other FOT tenants and potentially distorts the market by giving MRO tenants a commercial advantage over other FOT tenants. It also militates against any MRO proposal being fully compliant using this subjectivity. Clarity would give the full compliance sought.

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Question 3

To what extent do you think the Pubs Code is consistent with the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie. What evidence do you have to support your view?

Comments:

The Pubs Code is consistent with this principle, and the reference to terms common in agreements with FOT tenants. However, the actual implementation of the Code is not consistent with this principle and goes beyond it.

Pub Companies are clearly being required to make MRO tenants better off than FOT tenants, a clear breach of the guiding principle of “no worse off”.

The PCA has moved beyond this principle and what the Code actually says or intends.

For example, the recent references to ensuring that the MRO offer is affordable to the individual circumstances of a tenant has no express basis within the Code itself. Arguably, it is actually contrary to the Code as it would not be common in agreements for FOT tenants. However, the principle of “no worse off” has become “better off” than FOT tenants in practice. This was not the original aim of the Code.

“No worse off” could be simply addressed by an agreed list of standard FOT arrangements/terms approved by the PCA, which would give a tangible frame of reference, or as suggested at the outset of the code, PCA approval of draft Pub Company MRO agreements. Such certainty would benefit tenants and Pub Companies alike and significantly reduce the likely areas of dispute and referrals.

We strongly recommend this suggestion.

Question 4

What, if anything, do you think needs to change to make the Pubs Code operate more effectively and/or better support the principles?

Comments:

Greater clarity throughout the MRO provisions is required. A standard form of key provisions and/or MRO lease terms would benefit all parties inestimably.

Greater clarity would be helpful on the intention of, and standards required, under the Code. If the benchmark is intended to be other FOT tenants, then the Code needs to be implemented in this way. If it is actually intended to be more favourable than other FOT tenants, a clear explanation is required of the rationale by reference to the Code.

Clearer wording is necessary on lists of requirements within the Code as to whether they are exhaustive or non-exhaustive, absolute or preferable. Where there is room for discretion within such lists, this should be made apparent and the relevant principles for exercising that discretion should be laid out.

Most importantly, the subjectivity employed by the PCA as being the relevant consideration for compliant MRO terms should be replaced by a much more objective criteria. By its very nature, subjectivity and the circumstances-based approach create less consistency, less fairness, less transparency and less certainty between tenants and the market as a whole.

TPT's are, as recommended, taking independent advice from appropriately and professionally qualified advisors prior to entering a new agreement with a Pub Company. There are concerns that existing TPT's who enter into the MRO process or make a referral to the PCA are employing unregulated advisors. These concerns have also been raised by the PCA.

It would be beneficial for the PCA to issue an advice note for TPT's in respect of this matter. This should assist the TPT's in identifying suitably qualified independent professionals or where their details can be found and giving details of accredited professional bodies. This would ensure that the TPT's are receiving good professional advice from a party working in their best interest. They would also have the benefit of the professional public indemnity insurance, should the need arise.

Part B: The Pubs Code Adjudicator

Question 5

How effective do you think the Pubs Code Adjudicator has been between 2 May 2016 to 31 March 2019 in enforcing the Pubs Code?

Please comment in particular on:

a) Whether the PCA has sufficient and proper powers to enforce the Code effectively.

Comments:

The PCA's powers are sufficient and arguably the PCA actually and perhaps unintentionally or unwittingly strays beyond those powers into territory of law making rather than implementing the legislation as drafted and originally intended. We refer you to clause 6 of the PCA advice Note Market Rent Only-compliant proposals issued March 2018 in relation to unreasonable terms and also the PCA's insistence that MRO proposals are affordable for the individual TPT.

b) How effective the PCA has been in exercising his powers. What has been done well and what do you think could be done differently.

Comments:

The exercise of powers in respect of the management of tenant relationships appears to have improved practices, processes and behaviour.

Further improvement would be appreciated on MRO matters and arbitrations. Such matters need to be addressed in a more timely and efficient manner. More core and absolute guidance is required on the most disputed areas, such as principles of commonality. **The PCA should also look to interpret the Code more rigidly as drafted and not as a moveable feast.**

Responsibility for oversight and public audit on how the PCA is interpreting and implementing the Code is required.

The PCA is quick to chastise Pub Companies and their advisers on matters of procedure and interpretation, even the thoroughly ambiguous, through: regular meetings with senior personal; regular meetings with the Company Compliance Officers; regular correspondence on particular issues. A number of prominent tenant advisers appear in repeated arbitrations and generally are not held to the same standards or level of accountability.

Where professional representatives hold themselves out as competent enough to act for tenants within arbitrations, they should be held to the same standard as those of the Pub Companies.

That would be fair and desirable in all circumstances and in the spirit of the Code.

c) How effective the PCA has been in enforcing the Code. In particular, how effective has the PCA been in undertaking the following:

- **giving advice and guidance;**
- **investigating non-compliance with the Code;**
- **where non-compliance is found, requiring publication of information, imposing financial penalties or making enforceable recommendations; and**
- **arbitrating disputes under the Code.**

Comments:

The provision of advice and guidance has fuelled further ambiguity, as it has stated regularly that most provisions are subjective and lists are non-exhaustive.

Advice and guidance for Pub Companies has been limited, with crucial areas such as common terms and acceptable principles requiring clarity. Published awards are of limited assistance as key principles are not being addressed objectively. Every MRO offer is capable of being unreasonable for different reasons.

It has been proposed that the PCA review their Arbitration Awards and provide ‘golden threads’ that run through the awards to give all parties an insight into decisions made. **There are several referrals made on the same issues and this would assist both parties when dealing with these matters. This is hugely desirable, but requests for these continue to be refused by the PCA.**

Arbitrations simply take too long. The parties are held to a strict timetable and then the arbitrator can often take months to produce an award. As mentioned above, in one case 8 months after the arbitration hearing itself. Directions can also lack relevance, for example on one case the arbitrator ordered the parties to obtain expensive expert evidence on SDLT when the issue had not been raised in either party’s statement of case.

The PCA's stance if you disagree is 'take me to court' which is frustrating and commercially an unviable option and morally obstructive**.** The costs and necessity of a legal challenge would be minimised if the legislation and guidance were clear.

The increasingly frequent trend of appointing third party arbitrators is adding to costs and appears unnecessary, particular as it is being done at the very outset when the parties are still trying to negotiate a resolution without the need for formal steps within the arbitration.

Whilst it may be appropriate on certain occasions, it should not be a step taken when negotiations are ongoing and both parties ask for an initial stay or an additional stay.

Question 6

Do you think the regulations relating to costs, fees and financial penalties should be amended? If so, how and why?

Comments:

In circumstances where the Pub Companies fund the costs of the PCA as a matter of course, the necessity for costs recovery in respect of individual arbitrations should be explained more clearly.

The Impact Assessment produced by the Department of Business, Innovation and Skills, prior to the implementation of the Code, includes an estimate of the cost of the PCA including the cost of Arbitrations. We question whether there is any duplication of funding if Pub Companies already pay for PCA costs generally and then once again for individual arbitrations undertaken by the PCA.

A Deputy Adjudicator was appointed to assist with the workload. Arbitrations are now being referred to external third parties, with no agreed fee scale or cap on fees, leading to higher than expected, or intended, additional costs.

Vexatious is too high a threshold for a contribution to costs by a tenant. It requires a subjective intention on the tenant to cause a nuisance and/or act in bad faith. It allows a tenant to pursue a claim all the way to a hearing and then withdraw, but not be liable for any costs in doing so because the arbitrator has shown an unwillingness to make any finding of vexatiousness without a full determination and any tenant can prevent that determination by withdrawing at any time.

Whilst a tenant must not be unfairly penalised, a lower threshold than vexatious should be applied to give matters a more objective test such as that applicable in small claims court**,** perhaps based on unreasonable conduct and/or prospects of success.

Part C: Pubs Code Regulations

Question 7

There are two sets of regulations that relate to the Pubs Code: The Pubs Code etc Regulations 2016[1] and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016[2].

You may have commented on some of these provisions in response to questions in parts A and B of this consultation[3], but please provide any additional views on the regulations. If you think changes are needed to the regulations, please explain why and how you think they should be changed.

Comments:

General Comment

The Pubs Code does not contain any substantive reference to principles of "fair and lawful dealing" or "no worse off", which are often referred to as the core principles. The references to these principles are actually in the Act and the Secretary of State is required to comply with these principles in enacting the Pubs Code, not the PCA or the parties in implementing what is enacted.

The PCA has exceeded its remit by expanding the reach of this wording where it does not feel the actual words within the Code go far enough. We reference clause1 of the PCA advice Note Market Rent Only-compliant proposals issued March 2018 which states 'A MRO proposal should be consistent with the core principles of the Pubs Code (fair and lawful dealing, and no worse off).The PCA is using these principles to extend its authority in declaring that even if an action is 100% in accordance with the wording of the Code, it is nonetheless contrary to one of these principles and therefore non-compliant.

This is ultra vires. It is also one of the main reasons for the confusion and uncertainty under the Code, as no party is able to say what is compliant in any given circumstances.

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[1] https://www.legislation.gov.uk/uksi/2016/790/contents/made

[2] https://www.legislation.gov.uk/uksi/2016/802/contents/made

[3] Some elements of the Regulations are covered by review provisions in the SBEE Act 2015, for example, Parts 2 to 10 of the Pubs Code etc Regulations 2016 make up the Pubs Code and must be reviewed under s.46 review provision in the SBEE Act. The review of the Adjudicator set out in s.65 of the SBEE Act states that the review may consider whether it would be desirable to amend regulations about costs, fees and financial penalties.

Suggested revisions to Pubs Code:

Regulations 3, 4 & 5

The significant increase in price MRO trigger is inequitable, as some cost increases are regulatory and outside of the control of the Pub company. **A qualification should be introduced for any increases incurred by Government initiated taxation or duties** (e.g. the Sugar Tax) provided that an increase is absolutely limited to that tax duty increase in those circumstances.

Significant price increases should be reviewed over a 12 month period; the current 13 month cycle is inequitable and prevents the passing on of annual price increases imposed by third party suppliers.

Regulations 16 & 20

The requirements for the contents of a rent assessment are imprecise. In addition, there is no explanation of what is to happen if something is missing from the requirements, for example whether it nullifies the entire process and sends it back to the very outset after a lengthy arbitration or should be addressed separately but without requiring an entirely new RAP and process. This needs to be clarified to avoid wasted time and effort, particularly when the requirements are so vague and imprecise.

16(1) (d) (i) & (ii) "any information which-'the tenant requires to understand or negotiate the initial or revised rent in an informed manner and would reasonably be expected to give to the tenant and the pub-owning business would be reasonably expected to give to the tenant" is ambiguous and impossible to interpret with any degree of certainty. This actually leads to uncertainty and disputes**. It does not specify whether this is subjective to the individual tenant or objective to a reasonable tenant or valuer**. It should be an objective exercise with certainty and clarity.

20(1) (b): Refers to information "if it is reasonably available" again **this is ambiguous and impossible to interpret with any degree of certainty**, which leads to the opposite and disputes.

20(1) (c): Refers to "other information as may be required to ensure that the tenant is able to negotiate, in an informed manner, the new rent" this is also ambiguous and impossible to interpret with any degree of certainty, which again leads to uncertainty and disputes. It does not specify whether this is subjective to the individual tenant or objective to a reasonable tenant or valuer**. It must be objective in the interests of certainty**

Regulation 29

29(7): The PCA seems to believe that each MRO proposal should be bespoke to the individual tenant's own circumstances and not unreasonable to their individual requirements, business interests and financial circumstances. Clause 6.1 of the PCA advice Note Market Rent Only-compliant proposals issued March 2018 states ' it is not possible to set out all of the matters which might be relevant in deciding whether terms are

unreasonable as they depend on the circumstances of each case'. If that interpretation is correct (which we strongly suggest is not the case), **28 days is insufficient to allow for such a detailed and bespoke proposal.**

Regulation 30

The PCA do not accept that a proposal is compliant just because it complies with the minimum term specified in 30(2). **If this minimum term is absolute and anything beyond this is compliant, then it should be specified as such**. If any further considerations are relevant to the term to be offered, they should be set out expressly. Otherwise, there is no certainty as to whether a proposal is adequate and this leads to unnecessary dispute and referrals.

Regulation 31

31(2**):** Specifying what is unreasonable but not what is reasonable has led to most of the confusion, disputes and inconsistency under the Pubs Code to date in our experience.

If this list is exhaustive then it should state that terms in compliance with this section are reasonable. If it is not exhaustive, more detail is needed on what else should be included and that is not currently contained within the legislation.

Key common terms could easily be set out in a schedule to the Code to give a framework for everyone to work towards or within. Express reference should also be made to the fundamental differences between a tied tenancy and a FOT tenancy and confirm that a new lease or licence is to be the expected vehicle accordingly.

Regulation 32

32(4**):** the timescale of 14 days is insufficient for discussion between the parties as to the compliance or otherwise and impossible for a Pub Company to revise its proposal accordingly. Adding this extra time and step would allow early negotiation and prevent unnecessary and avoidable referrals from taking up the time of the PCA.

Regulation 33

Where a revised response is required. This provision contains no anticipation of the practical impact of an award requiring a revised response. In particular, who judges if a revised response is compliant and what is the mechanism for resolving any dispute in this regard? This should be expressly addressed to give clarity to both the parties and the arbitrators.

Regulation 39

39(2): The right for either party to refer to the Adjudicator contains no reference to what the Adjudicator is then expected to order, whether it be forced completion, the end of the MRO procedure or something else. Clarity is needed on the rationale for such a referral.

Schedule 2

1: “a summary of methods which must be used…” is clearly a reference to prescribed methods, yet the PCA has interpreted this to mean that a summary of methods used is required. This is not what the provision says, so **either the provision needs to be amended or the PCA needs to accept the words used.**

3: “a list of the matters considered to be… irrelevant”. There are infinite numbers of things that are irrelevant to the rent assessment and without clarity or explanation, this is impossible to comply with confidence.

7: “explain any variance…” is a very onerous requirement, meaning explanations must be given on the most immaterial of variances. This should be **qualified or a minimum variance threshold implemented** in order to add clarity and context.

8: “sufficiently clear and detailed…” is not in any way clear or detailed in its meaning, including whether it is subjective to the tenant in question or an objective criteria. Additional clarity is needed on the required standard.

Suggested revisions to Fees Regulations

<u>Regulation 3</u>

Greater thought needs to be given in the provision on what happens where a referral was not eligible to be made under the Pubs Code and the arbitrator concludes that the tenant’s referral could not fall under the jurisdiction of the Code and/or the tenant had no right to make the referral under the Code. If the arbitrator is to determine their own jurisdiction, reference needs to be made to the costs consequences in those circumstances.

3(3): “vexatious” is an extremely high threshold that requires subjective nuisance/malice on the part of a tenant. This is virtually impossible to prove and has the perverse outcomes referred to above. A similar test as in **Regulation 3(5) should apply with a capped contribution for a tenant on an objective measure of wrongdoing, with no cap where subjective wrongdoing such as vexatiousness is found.**

Part D: Impact Assessment and other information

Question 8

The review will consider the key assumptions made in the Impact Assessments[4] which were published alongside the legislation and regulations. This will include wider impacts, non-monetised impacts or unintended consequences of the changes made. Specifically, we plan to consider any related impact on:

- **costs to businesses and potential pub closures;**
- **redistribution of income from pub companies to tenants;**
- **changes in industry structure or ownership status; and**
- **wider industry trends such as employment and investment.**

We welcome any evidence to support the analysis of these areas, or if there are any other elements of the Impact Assessments you think we should consider revisiting as part of this review.

Comments:

The impact assessment carried out by Europe Economics and summarised within the BBPA submission addresses such points and we agree with the findings.

In particular, changes to industry structure in the medium term are likely to be significant. Faced with a choice of an increased number of FOT tenants or an increased number of managed houses, most Pub Companies will opt for the latter. This will have an adverse effect on assignment and shorter, contracted out leases, more managed houses so fewer long term small and medium businesses within the industry**.**

The level of investment in individual properties will be reduced to reflect the uncertainty of return on capital.

Another important consideration is distortion of the market due to MRO tenants being handed considerably better deals than their FOT counterparts. This is due to the PCA requiring MRO tenants to be treated more favourably on financial matters such as affordability and credit terms. Such distortion is unfair to those FOT tenants who have no special benefits such as those being demanded by the PCA for MRO tenants and will therefore have greater cash flow demands and pressures.

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[4] https://www.parliament.uk/documents/impact-assessments/IA15-002.pdf
https://www.legislation.gov.uk/ukdsi/2016/9780111146330/impacts
https://www.legislation.gov.uk/ukdsi/2016/9780111146323/impacts

Part E: Other comments

Question 9

Please add any points that you feel you have not been able to make in response to the earlier questions.

Comments:

During the initial consultation prior to the implementation of the legislation we argued that Franchise agreements should be excluded from the provisions of the legislation. The two main issues to be addressed by the legislation were the level of rent payable under the tied model and the cost of tied products. As the Franchise model does not include payment of a rent and the products are not purchased by the Franchisee, the Franchise agreement does not fall foul of either of these issues.

The majority of referrals to the PCA, as expected, have been in relation to the MRO. There have been no referrals from any Franchisees on any matters**. Under the circumstances we would ask that the inclusion of Franchise Agreements under the provision of the legislation be reviewed and, more sensibly, removed.**

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply Yes

At BEIS we carry out our research on many different topics and consultations, and your views are valuable to us. Would you be happy for us to contact you again from time to time either for research or about other consultations?

Yes