



## **PUBS CODE AND PUBS CODE ADJUDICATOR**

### **Statutory Review**

**Submission by Greene King PLC  
22 July 2019**

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

	<b>Respondent type</b>
<input type="checkbox"/>	Other (please describe)

**Contact Information**  
[Redacted]

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 [Redacted]

## ABOUT GREENE KING

- Greene King is the UK's leading brewer and pub retailer and has brewed our beer in Bury St. Edmunds, Suffolk and sold it through our pubs for over 200 years. Today we employ 38,000 people and we operate c. 2,700 managed and tenanted pubs, restaurants and hotels across England, Wales and Scotland. Our leading managed brands include Greene King Local pubs, Hungry Horse, Farmhouse Inns and Chef and Brewer.
- Greene King also brews quality ale brands from our Bury St. Edmunds and Dunbar breweries, and is the UK's leading cask ale brewer and premium ale brewer with brands such as Greene King IPA, Old Speckled Hen, Abbot Ale and Belhaven Best.
- Greene King is one of the six pub-owning businesses (POBs) covered by the Statutory Pubs Code and Adjudicator due to the size of our tenanted estate. As of 31 March 2019, Greene King (through its various group companies) owned 886 tenanted pubs in England and Wales which are let out on a range of leases, tenancies and franchises. This represents approximately 6% of the tenanted tied pubs in England and Wales.
- The tied model, now governed by the Code and Adjudicator, has formed an integral part of our successful business and has adapted over the years to offer flexible, transparent and competitive agreements to our tenants. Today, Greene King is recognised for the quality of its pub estate and the strong partnerships we have with our tied pub tenants (TPTs). A key part of establishing this reputation has been our continued, significant level of investment in our tied estate and the value provided to TPTs through SCORFA<sup>1</sup> benefits. The type of support provided to Greene King tenants includes transformational investments, building repairs and decoration. We estimate that we will have invested in excess of £115 million in our tied estate over the last five years through maintaining the quality of our estate and supporting our tenants with transformational schemes.
- We view our pub tenants as entrepreneurs with their success inextricably linked to our own. We also pride ourselves in providing business development support to help them thrive, including management advice, brand and outlet promotion support and marketing as well as business rates advice, licensing and legal support.
- Our Business Development Managers (BDMs) play a key role. The BDM acts as a personal business consultant, undertaking business development reviews, looking at different ways to advise the tenant in their business to build both sales and profit, and to improve the overall business performance. They would typically discuss areas including product range, margin management, marketing support, social media, training opportunities and potential investment opportunities. It is important that the BDM is aware of the local trading markets and so they will often be reviewing competitor venues and sharing their findings with the tied tenants. They will also meet with prospective tenants as recruiting the right type and calibre of tenant is vitally important. They are the life-blood of our business and it is important to ensure any prospective tenant understands what it means to run their own pub business. In addition, the BDM will provide ongoing day-to-day support with matters such as general marketing and promotional support, rent review and agreement renewal information and supporting newly appointed tenants as well as those who may be exiting.

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<sup>1</sup> Special Commercial or Financial Advantages

In relation to our TPTs' views of the quality of their BDMs, the average score is 7.1 out of 10<sup>2</sup>.

## OUR SUBMISSION

- Since its introduction, Greene King has worked closely with Paul Newby, the Pubs Code Adjudicator (PCA) and Fiona Dickie, the Deputy Pubs Code Adjudicator (DPCA), and we are committed to continuing to work with all parties to ensure that the Code can be as great a success as possible for tenants and POBs. We welcome this review of the Statutory Code which offers an opportunity to make improvements that will benefit both POBs and TPTs.
- When developing this consultation response, we undertook polling of our tenants and BDMs to inform our thinking. We have included the various findings of this activity throughout this submission. It is based on:
  - An MRO process review, surveying 30 Greene King tenants/leaseholders – undertaken by an independent research supplier.
  - A survey of 20 Greene King BDMs.
- While there is still a way to go, we believe that the Code has made considerable progress towards delivering against its stated objectives and has been embedded within all of our business activities. With that in mind, we would caution against the introduction of wholesale and far reaching reforms. As an industry, we have been through a period of major change and continue to be faced with a highly challenging economic environment. The complexities of the Code, only three years on since implementation, mean we are still adjusting.
- Changing the legislation is not going to address the issue of pub closures. Unfortunately, this remains a common misconception. In reality, there are many complex reasons why we have seen a significant reduction in the number of British pubs over the last decade – these include the burden of business rates, increased competition in the casual dining sector, rising cost pressures linked to the National Living Wage and changing consumer habits. However, based on our interpretation of the December 2018 report by the Office for National Statistics (ONS)<sup>3</sup>, the Code has not been a significant factor. This indicates that tied pubs are performing better than other businesses in the accommodation and food services industry group shown in the report.
- Equally it is simply wrong to benchmark the success of the Code against the modest take-up of Market Rent Only (MRO) agreements. Unfortunately, there has been an over fascination with this particular aspect of the Code, and misguided arguments claiming that the lack of take up of MRO agreements is evidence that the Code is failing. The reality is that tied agreements continue to provide the best opportunity for prospective tenants across the UK to be able to enter the industry and be supported to run a successful pub.
- The tied model, as a partnership:

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<sup>2</sup> Kam Media Licensee Index (Autumn 20018)

<sup>3</sup> <https://www.ons.gov.uk/businessindustryandtrade/business/activitysizeandlocation/bulletins/businessdemography/2017>

- Provides a significant degree of business support for TPTs including investment opportunities;
  - Continues to represent a low cost entry into the pub sector, allowing entrepreneurs to grow and flourish;
  - Enables the TPT to obtain credit from the POB on flexible trading terms that are reviewed in times of financial difficulties;
  - Provides flexibility in tied product ordering to meet customer demand; and,
  - Assists in riding out trading volatility.
- A free-of-tie lease provides none of these and is an arms-length commercial arrangement where none of the support available under SCORFA or otherwise would be available. The tied partnership model is an effective and attractive option for new entrants. The start-up costs can be very low with flexible terms. Tenants recognise this value and that is why so few have decided to take up the opportunity to remove themselves from the tied partnership model, despite being aware of the opportunity to do so at the point of their rent review and agreement renewal.
  - Out of the total number of MRO requests Greene King has received since the Code came into force, only 6% entered an MRO agreement, with the vast majority of tenants accepting a new tied settlement, either through settling new tied rent terms or a new tied agreement. According to the survey of our tenants who participated in the MRO process, 50% chose to stay tied because they managed to secure a better deal when negotiating or because they could not see any improvements in going free-of-tie.
  - The complaints made by tenants and campaigners that the tied pub model is fundamentally unfair or "universally bad" simply cannot be reconciled with the evidence. The majority of TPTs have expressed satisfaction with the tied model and their relationship with their landlords. According to the Impact Assessment undertaken by the Government 70% of tenants would sign up again with their POB. This is, we would suggest, an indication of general satisfaction with both their POB and the tied model. Much weight has been placed on anecdotal examples of isolated poor behaviour but these do not make the case that the tied model is universally bad. Quite the reverse; with 70% of tenants stating that they would sign up again with their POB this points to the fact that the tied pub model is a tried and tested contractual arrangement that on the whole works for both parties.
  - When undertaking this Review, we would urge policy makers to reflect on the original purpose of the Pubs Code, namely to make sure that TPTs were treated fairly and lawfully, that they should be no worse off than if they were not subject to any tie, and that they are able to seek redress when warranted. Again, we believe that the current framework is delivering this. The Code is not, and should never be, an attempt to distort the market and arbitrarily cushion TPTs, nor deliver a scenario whereby free-of-tie tenants receive the same level of support as TPTs.

## PART A: The Pubs Code

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

- 1.1. We believe that the Code has made considerable progress towards delivering against its stated objectives despite the lack of any transition period. There are a number of areas where it is working well and it has been embedded across our business as a result. We set these out below and, in addition, make a number of recommendations for improvements in our answer to question 4. However, in other ways the Code has been a regressive step – specifically in relation to MRO, which we detail further in section 1.4.
- 1.2. Before doing so it is worth acknowledging that some elements of the Pubs Code have become very legal in their operation. The processes are run by lawyers and it would be unwise for either party to try to do so unrepresented. However, even lawyers find aspects of the Pubs Code and its processes difficult to interpret and to navigate. For example, for policy reasons there was a desire not to add to the responsibilities of the County Courts and so an adjudicator was created. However, to provide for proper processes to be followed, those who drafted the legislation simply incorporated the provisions of the Arbitration Act 1996. In some ways this appears as a neat and easy solution. However, arbitration by its nature is a private dispute resolution process intended to preserve confidentiality. However, that very confidentiality has been a barrier as it has not provided the certainty or clarity as to what the result may be for those considering referring a dispute to the PCA. Some practical steps have been taken by the POBs and the PCA in collaboration to address this flaw but it is not entirely satisfactory since the agreement by the POBs to waive confidentiality has not been matched by all TPTs.
- 1.3. There are a number of areas we perceive the Code to be working well:
  - 1.3.1. **Provision of information and business planning:** The information that POBs are required to provide to TPTs and assignees is extensive and goes beyond what was required under the voluntary Industry Framework Code. In our survey of BDMs, we found that nearly 60% felt that the quality of business planning had improved since the Code was introduced. We also welcome the increased focus on ensuring that TPTs have obtained independent professional advice – legal, business, surveying – before entering into an agreement so that TPTs go into a tenancy fully informed on both the challenges and the opportunities from running a pub. Again, in our survey, over 90% of Greene King BDMs thought that tenants were now seeking independent professional advice following the introduction of the Code. However, it is important that TPT advisors are appropriately and professionally qualified to ensure the advice being provided is relevant and appropriate to the circumstances of the individual TPT. While Greene King was not subject to a high level of misrepresentation claims pre-Code, we can see that this will have reduced the number of these types of complaints across the industry.
  - 1.3.2. **Rent assessments:** POBs always anticipated that one of the biggest areas of interaction with the Pubs Code would be tied rent assessments, whether at the start of the tenancy, at rent review, on renewal or where there is a "significant price increase" or "trigger event" within the meaning of the legislation. This has proven to be the case. Rent assessments provide the right level of detail and have been prepared in accordance with RICS standards by qualified valuers.
  - 1.3.3. **Code Compliance Officers (CCO):** This is a new role and, in our experience, has been a positive step. It has ensured that our Code obligations remain a central focus of everything

that we do as a business. The CCO Forum is also a useful means of sharing knowledge and it has worked with the PCA to disseminate information and provide feedback.

- 1.3.4. **An increase in average tenure:** Current average tenure of a Greene King TPT is now 6 years 2 months. At the commencement of the Code in July 2016 this was 5 years 3 months, indicating a better and stronger tenant business and support by Greene King.
- 1.3.5. **Flexible tenancy options:** Our tenants have more choice than ever before and as a result we can offer them the right pub and the type of tenancy that is most suited to them.
- 1.3.6. **Awareness of rights to take up the MRO option:** We have worked hard to ensure that all our tied tenants understand the Code, how it works and what rights they have. According to the latest PCA tenant report, Greene King tenants' awareness of the Code and the PCA was above the industry average at 74%. Our own research verified this – 73% of our tenants feel either quite well informed or very well informed about the MRO process. It is important not to misinterpret statistics of low take up as evidence of poor behaviour by POBs. The reality is that the vast majority of our tenants choose not to switch to an MRO-compliant agreement because they recognise the benefits of the tied model. The assumption that lots of tenants would go free-of-tie has not materialised primarily because a free-of-tie lease creates a very different, much more arm's length relationship with the POB. The success of the tenant's business is not unimportant but the POB does not usually have a direct interest in the sale of beer and other products. In this respect the property is no different to any other form of property investment and so terms that one sees in such leases - full repairing obligations, quarterly rents in advance, upwards only rent review clauses and deposits – are not really any different than one would see in any other type of commercial lease. A very small number of Greene King's tenants are comfortable taking on this type of commercial agreement. As previously mentioned, only 6% of TPT's who entered the MRO process opted to take a MRO agreement. However, for most of Greene King's tenants this is not a model that suits them.
- 1.3.7. **Professionalisation of the business development manager role:** At Greene King, we have always supported the training and development of our BDMs. However, the Code has ensured that all BDMs have a certain level of knowledge, skill and capability to operate in a statutory environment. This was verified in our own survey which found that nearly 80% of our BDMs regularly look at the PCA website, while 70% felt that the level of training they had received had improved following the introduction of the Code.
- 1.4. The area where the Code is not delivering is in relation to the MRO option:
  - 1.4.1. **The original legislation:** Without wishing to dwell on the past, it is worth acknowledging the manner in which the original legislation was passed, via an amendment to the Bill through the House of Commons and against the original desire of the Coalition Government, which has generated challenges. The process of reconciling MRO with existing statutory and contractual processes affecting landlord and tenant law proved to be a complicated and drawn out one. It meant that by the time that the Pubs Code came into effect, neither POBs, TPTs nor their advisers had proper time to prepare and to understand what it actually provided for. This has been demonstrated in the high number of MRO-related referrals made to the PCA early on.
  - 1.4.2. **MRO related referrals:** As previously mentioned, there has been a high number of MRO-related referrals as demonstrated in the table shown below. Of the 40 PCA referrals Greene King has received, up to and including 31 March 2019, 32 of them have been related to MRO. This indicates the complexities and level of understanding around the MRO option. All but three of the Greene King referrals were withdrawn.



The PCA data shown below is taken from the PCA's quarterly arbitration data report published 17 April 2019 and represents the total number of accepted referrals.

*Number of referrals - July 2016 to March 2019*

	PCA	Greene King
MRO related	276	32 33% of valid MRO requests
Non-MRO related	36	8 0.9% of our pubs in England and Wales

- 1.4.3. **MRO is negatively changing the model:** The introduction of the MRO option is already starting to have a negative impact on the tied model, which has been in existence for over 200 years. An unintended consequence is the way in which we are now more cautious around the commercial terms we are prepared to propose to new and existing TPTs. Greene King is mindful of the way in which the MRO option is appearing to undermine the tied model, which is explained in a report commissioned by the big six POBs through the BBPA. This report, produced by Europe Economics and available on the BBPA website<sup>4</sup>, sets out an impact analysis of the Pubs Code, and explains the unintended effects such as; the impact on the number and types of tied pubs; impact on market entry; the impact of the risk-reward scheme; the impact of long-term sustainability; and, the impact on investment in the pub sector, see section seven (pg 49-52). As POBs become more attuned to the commercial impact to their business it is likely that the overall support provided to the current tied tenants will diminish as it will become unsustainable. In addition, it is likely that POBs will be more careful around the granting of longer term leases, alongside the introduction of management contracts, therefore the opportunities for individual entrepreneurs to run their own pub business will so reduce.
- 1.4.4. We are also seeing the way in which TPTs and their advisors are using MRO as a way to negotiate improved tied terms, which one might argue increases the negotiating power of the TPT. The analysis of this by Europe Economics describes how this could have detrimental indirect effects on the tied market, which are explored in section 7 of the report.

**2. To what extent do you think that 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?**

- 2.1. In essence this is a question about the contents of the Pubs Code. On the whole, with one or two exceptions, it does not seek to change the general law of landlord and tenant as expressed in the common law and in other statutes. Instead its focus is on practices and procedures. The question of lawfulness is therefore not a significant issue. The more pertinent question is whether the practices and procedures it creates are fair? In this respect, with one or two exceptions we would say that it is fair. The areas where improvements could be made are set out in our answer to question 4.

<sup>4</sup> <https://beerandpub.com/policies/property-and-planning/statutory-code-and-pca/>

3. **To what extent do you think that 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?**
  - 3.1. Before answering, it is worth stating that it is extremely difficult to make comparisons between a TPT and free-of-tie tenants. As the TPT is running his or her own business, the POB is not entitled to see the TPT's actual trading accounts. Even at rent review or lease renewal, this information may not be shared and indeed the rent is based on "the fair maintainable trade" i.e. the potential profit based on a reasonably efficient operator, rather than the actual performance by the tenant in question. And so, while the POB may have more of a sense of the success of the TPT and profitability of the pub, it is an inexact science. In relation to free-of-tie pubs, as explained above, there is no publicly available data that can be used to assist with this.
  - 3.2. Ultimately, we believe that the Code is consistent with this principle. By way of example:
    - 3.2.1. **Provision of information and the requirement for a sustainable business plan by new tenants and assignees:** A prospective tenant would ordinarily be subject to information asymmetry and it will be for the prospective tenant to make the necessary inquiries. However, under the Pubs Code, the TPT benefits from extensive obligations on the part of the POB to provide information. The free-of-tie tenant is not required to produce a sustainable business plan and so might be said to be worse off than the TPT. However, by ensuring that the plan is robust and sustainable we consider this is a benefit and in any event most prudent free-of-tie tenants would produce a business plan and would need to do so to secure third party funding. They would also seek independent professional advice. As previously mentioned in 1.3.1, it is important that TPT advisors are appropriately and professionally qualified to ensure the advice being provided is relevant and appropriate to the circumstances of the individual TPT.
    - 3.2.2. **PCA's powers to investigate issue sanctions and to deal with complaints:** These are not available to the free-of-tie tenant.
    - 3.2.3. **Restrictions on upwards only rent reviews:** This is generally not available to the free-of-tie tenant as a free-of-tie lease would usually contain an upwards only rent review clause.
    - 3.2.4. **Rent assessments:** With a free-of-tie lease there are no requirements for this information to be provided nor as to the format and content unless and until the matter proceeds to a third party determination. The TPT is therefore better off than the free-of-tie tenant.
    - 3.2.5. **Dilapidations:** The Pubs Code places additional obligations on the POB to provide this information but dilapidations is dealt with under a Pre-Action Protocol regardless of the tie so the effect of the Pubs Code is neutral.
4. **What if anything, do you think needs to change to make the Pubs Code operate more effectively and/or better support the principles?**
  - 4.1. There are a number of areas where the Code has not resulted in the kinds of changes that both POBs and TPTs had hoped for and we recommend some practical improvements to make it more effective.

### ***Stocking requirements***

- 4.2. **The issue:** The 2015 Act provides that a stocking requirement may be included in an MRO agreement, which was confirmed through a clarification note issued by the Department for Business, Energy & Industrial Strategy (BEIS) in March 2017 and the subsequent PCA advice note published in March 2017 also. The PCA has been subject to a number of referrals by TPTs following receipt of their MRO proposal containing a stocking requirement.
- 4.3. **Proposed solution:** To reduce the number of referrals based on this point, it would be helpful to have the stocking requirement conditions included within the Code. This will provide the additional clarity to TPTs that a stocking requirement is permitted by Landlords who are producers of beer and cider, yet it can be procured from any supplier.

### ***Significant increase in price***

- 4.4. **The issue:** The current regulations determine various price increase thresholds plus the annual percentage change to the Consumer Price Index (CPI). Since coming into force, this has presented difficulties for Greene King. The threshold as it stands fails to reflect the realities of extrinsic price increases for ingredients/commodities.
- 4.5. Taxation price increases are limited to Duty only and make no allowance for other tax price increases, e.g. sugar tax in 2017.
- 4.6. In addition, it cannot be right that by applying an 'expected' annual increase each year, we subject ourselves to a significant increase in price due to the 'comparison period' of 13-months. The result of this is that our price increase moves forward by four-weeks each year to ensure the tenant is not appearing to get two annual price increases in the same period. This can result in the POB artificially subsidising the TPT's business by not passing on costs which competitors would be passing on to their customers. We would suggest that this was not what Parliament intended should happen. It is worth highlighting that under free-market principles, and for pub companies not bound by the Code, additional costs associated with such externalities may freely be passed onto the consumer, who, in turn, can make an informed decision on purchasing. This principle has been lost under the Code.
- 4.7. **Proposed solution:** We feel that an 'extrinsic increase' should not be considered a significant increase in price, and therefore we would welcome some alterations to these provisions to enable the POB to pass on extrinsic price increases to TPTs provided that it is not using this to increase its profit margin. We would suggest the same clauses used in the 'trigger event', clause 7(6) of the Code, can also be used in the significant increase in price clauses. The 'comparison period' also requires review to ensure that annual price increases can be made every 52 weeks rather than 56 weeks.

### ***Ability to serve MRO notice where no rent review concluded within 5 years***

- 4.8. **The issue:** We have seen some instances where a TPT has not served a MRO notice within the required timeframe following receipt of a rent assessment, and so has, with their advisor, protracted the tied rent negotiations in order to claim that a rent review has not been concluded within 5 years. This has led to the tied tenant requesting a further rent assessment, which has the effect of providing the TPT with a second chance to request the MRO option within a relatively short space of time, which is a loop-hole in the regulations and seems unfair and not what was intended and can be construed as 'gaming the system'.

- 4.9. **Proposed solution:** We recommend that where the rent review process has been commenced and a rent assessment has been served in accordance with the Pubs Code, no MRO notice can be served based on the 5 year rule until the process has been completed.

### ***Qualified investment MRO exception***

- 4.10. **The issue:** An MRO exception is applied where a “qualifying investment” is made by the POB. A qualifying investment is defined as one where it would be reasonably expected to change the trading environment, the nature or capacity of the pub, increase the trade and profit of the pub and not include any costs that are the duty of the POB. The current level of investment has to be equal to or greater than twice the annual rent. A POB doesn’t necessarily need to spend twice the annual rent to deliver a change in the trading environment, the nature or capacity and to increase the trade and profit of the pub, and so we believe that this is operating as a disincentive to invest in a pub, despite clear benefits to both parties. If the investment doesn’t meet the qualifying investment criteria, the POBs risk the MRO option, which would curtail the ability to obtain a return on their investment.
- 4.11. **Proposed solution:** We suggest that the qualifying investment threshold level is reviewed to allow for lower levels of investment rather than no investment at all.

### ***PCA referral timelines***

- 4.12. **The issue:** The Pubs Code specifies very tight timescales for steps to be taken where there is a referral and there is no ability for the parties to extend these deadlines by agreement between themselves. This differs, for example, from the procedure for business lease renewals under the Landlord and Tenant Act 1954 where the parties are free to agree time extensions to issue a Court application. The result is that there is insufficient time for a tenant to take legal advice and conduct negotiations following receipt of an MRO Full Response. The issue arises where a TPT or their advisor is submitting a referral for arbitration with the PCA within the 14 day deadline in an attempt to artificially extend the negotiating timelines. The present work around is for the PCA's office to grant a stay but this still incurs cost for the TPT in paying the fee and for the PCA (and the POBs through the levy) in having to employ staff to administer these cases. This is not an effective use of resource.
- 4.13. **Proposed solution:** We welcome the decision by the PCA to introduce a trial on introducing a stay of proceedings for three months while parties continue to negotiate following receipt of a MRO Full Response and a subsequent referral to the PCA, and would suggest that following the outcome of the PCA’s trial, this element would be a welcome enhancement to the Pubs Code.

### ***MRO-compliant agreements***

- 4.14. **The issue:** As mentioned earlier, referrals made to the PCA primarily stem from the MRO process, and in particular the terms and conditions of the MRO-compliant agreement. There has been much consternation about what is deemed common and reasonable terms in an MRO agreement.
- 4.15. **Proposed solution:** We would support the consideration of accrediting the POBs MRO agreement, which would provide greater clarity and certainty to both those tied tenants wishing to invoke their rights, and the POBs in knowing that their agreement is compliant.

### ***Professional advisors***

- 4.16. **The issue:** It is vitally important that any TPT takes independent advice from appropriately and professionally qualified advisors, which we are seeing when a new TPT is entering a pub. However, for existing TPTs already in pub, who may instruct an advisor to assist them with the MRO process, we are concerned that advice is coming from unregulated advisors and that the advice can be misleading and not necessarily in the best interests of the TPT. This may damage long-term relationships between TPTs and their POBs.
- 4.17. **Proposed solution:** Currently Greene King refers TPTs to the British Institute of Innkeeping (BII) for details on professional advisors. However, we would suggest that the PCA formalise an advice note for TPTs in this area. This advice note should set out what a TPT should look for when seeking to instruct an independent professional advisor, such as the types of professional credentials an advisor should hold, whether they are regulated by any professional bodies and whether they hold public indemnity insurance in the event that a TPT suffers from any detriment as a result of the advice received.

### ***Publication of awards***

- 4.18. **The issue:** In certain areas, the Code is unclear as to its meaning. The most obvious area is MRO, in particular what constitutes a reasonable and common term. Because arbitration awards are private the decisions made by the PCA, DPCA or another arbitrator are not visible to those who would wish to understand whether what has been issued to them by the POB is MRO compliant. That may needlessly cause the TPT to refer a dispute to the PCA. In addition, because the PCA is now appointing third parties to act as arbitrators, those arbitrators also need to understand how the PCA and the DPCA have interpreted and applied provisions in the Code.
- 4.19. **Proposed solution:** The legislation should provide a mechanism so that the awards made in relation to MRO-related matters are publishable on such terms as the parties agree or the PCA considers appropriate. Other awards in relation to complaints and where the PCA acts as an arbitrator under a dispute resolution clause need not be affected by this.
- 4.20. Secondly, the PCA should issue some form of “golden threads” to draw together the themes and outcomes of referral awards. The reason for this is that the PCA should not expect TPTs, their advisors and members of the public to pore through very detailed legal documents to deduce the outcomes and how they might be relevant to them. We see that this is especially important for external arbitrators, where these “golden threads” will help to provide consistency.

## **PART B: The Pubs Code Adjudicator**

5. **How effective do you think that the Pubs Code Adjudicator has been between 2 May 2016 and 31 March 2019 in enforcing the Code? Please comment in particular on:**
- (a) Whether the PCA has sufficient and proper powers to enforce the Code effectively.**
- 5.1. Yes. There are a range of appropriate powers.

**(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.**

- 5.2. The approach taken by the PCA to regulation is generally appropriate seeking to use his powers only where necessary and after consultation with those concerned. However, the boundaries of the Pubs Code and in legal parlance the jurisdiction of the PCA are unclear. Is anything in the relationship between landlord and tenant beyond his remit? This has seen some "mission creep" and the PCA has chosen to focus attention on some issues which appear to be of questionable importance.
- 5.3. For example, the statutory guidance issued by the PCA in relation to information on beer duty and sediment allowance, is confusing and it is not obvious that this is a significant issue for anyone in the industry. Indeed, in our survey of BDMs, only 2 out of all of our BDMs had been asked by a tenant about beer duty sediment. Moreover, by potentially imposing sanctions on those that could not comply with his recommendations because he included within his requirements information relating to products supplied by small independent brewers, the PCA risked and continues to place at risk the arrangements whereby those small brewers can continue to supply beers to TPTs directly. This was, we believe, not anticipated by the PCA.

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

**Giving advice and guidance**

- 5.4. The 2015 Act empowers the PCA to issue both advice and statutory guidance. However, it is unclear how the PCA chooses between the two. Statutory guidance has the clear advantage of requiring prior consultation which we would always welcome, while advice does not. This was the subject of a judicial review which Greene King [Redacted] commenced but which did not proceed.
- 5.5. The PCA has chosen to issue advice in relation to matters which we consider to be controversial and not correct in law. This is unfortunate because it can provide an incorrect picture to TPTs and suggests that where a POB decides not to follow the advice it appears to be acting unreasonably. In practice many of the matters that are covered in this advice will in due course have to be settled by the Courts.
- 5.6. In addition to this, we remain of the view that the PCA should issue some form of "golden threads" to draw together the themes and outcomes of referral awards. The reason for this is that the PCA should not expect TPTs, their advisors and members of the public to pore through very detailed legal documents to deduce the outcomes and how they might be relevant to them. We see that this is especially important for external arbitrators, where these "golden threads" will help to provide consistency.

**Investigating non-compliance with the Code**

- 5.7. We are aware of one investigation that has recently been launched by the PCA.

**Where non-compliance is found, requiring publication of information, imposing financial penalties or making enforceable recommendations**

- 5.8. We are not aware of any such actions.

## **Arbitrating disputes under the Code**

- 5.9. Initially the PCA tried to arbitrate all disputes, most of which were MRO related. This proved to be too big a task and resulted in a significant backlog of cases. The Deputy PCA was then appointed and this did help to move those cases along and to free up the PCA for other tasks. However, even then case progress was slow.
- 5.10. The case management undertaken by the PCA and DPCA and the quality of the final awards made by the PCA and the DPCA has generally been high and the correct legal principles have been applied, whatever might have been expressed in the Advice Note published by the PCA.
- 5.11. Moving forward it is intended that more awards will be made by a panel of arbitrators appointed by the PCA. We see the sense of this but care needs to be taken to ensure that those on the panel have sufficient knowledge of tied agreements and we are concerned as to the consistency of approach when considering whether terms are "reasonable" and "common" given the potentially differing views of arbitrators on what these might mean.

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

- 6.1. No.

## **PART C: Pubs Code Regulations**

7. **There are two sets of regulations that relate to the Pubs Code: The Pubs Code etc. Regulations 2016 and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016. You may have commented on some of these provisions in response to questions in parts A and B of this consultation, 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.**

- 7.1. Please see answer to question 4 and question 9.

## **PART D: Impact Assessment and other information**

8. **The review will consider the key assumptions made in the Impact Assessments 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.**

- 8.1. We refer you to the Europe Economics report, available on the BBPA website<sup>5</sup>, which seeks to set out the rationale for the Pubs Code, the details of the tied model and the impact the Code is having. This report also includes a number of recommendations and identifies where further analysis is required, see section 8 of the report.
- 8.2. However, we would mention that TPTs have faced a range of much more pressing issues than the Code. Based on our survey of tenants, 87% say that cost inflation is the biggest external pressure, followed by 80% saying tax burdens, such as business rates, 77% saying employment costs, 73% saying access to the right workforce, and 67% saying changing customer demands. In addition we feel that the below are material in the current climate:
- Increased competition in the casual dining sector and changing consumer trends, which has seen significant rates of business failures from many prominent high street names;
  - A rapidly changing retail sector and huge challenges on the high street by the rise of online retailing, that have had knock on consequences for pubs, both positive and negative;
  - Competition from non-licensed premises such as coffee shops;
  - Challenges to rural pubs from changing customer behaviour;
  - Trading volatility, e.g. fluctuations in the supply and price of food ingredients and products, bad weather, heat waves – all matters beyond the control of TPTs;
  - Rising costs, pressure to implement the National Living Wage;
  - Access to workers and the potential impact of Brexit; and,
  - The constant introduction of new regulations which businesses must deal with – GDPR being a good example.

This must be seen against a backdrop of some substantial regulatory changes in the last two decades, such as changes to licensing law and the smoking ban.

## **PART E: Other comments**

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

- 9.1. The cost of having a regulator is met by the POBs. There is a lack of transparency as to how the levy is calculated. It is very difficult to see the basis on which the various costs are assessed. While the PCA is funded through the levy it is nevertheless public money and we would recommend that further detail is provided. The rationale for the apportionment is also vague. It gives the PCA a considerable degree of latitude in how he divides up the cost between the (currently six) POBs. He has chosen to base half the costs on the number of tied pubs in England and Wales each POB operates and the other half on the number of referrals from each of the POBs. In practice, using referrals as a basis for apportionment of half the cost may not be the most appropriate methodology, given that most referrals have been on MRO and awards have been mostly consensual. We are also concerned that the levy is imposed without prior consultation with the POBs.

The following table sets out how the levy has increased over the years, which has been taken from the correspondence we received from the PCA.

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<sup>5</sup> <https://beerandpub.com/policies/property-and-planning/statutory-code-and-pca/>



2016 – 2017	2017 - 2018	2018 – 2019	2019 – 2020
£1.5m	£1.73m	£2.55m	Pending

- 9.2. Greene King has worked closely with the PCA and DPCA and has responded fully to requests for information and clarification on compliance with the Code. On occasions it has taken many months for the PCA/DPCA to respond. Whilst we understand the pressures on them and their office, as stakeholders, Greene King has a legitimate expectation that they will engage in the same way as is expected of us. Therefore, it would make sense for there to be agreement with the POBs as to what service standards they can expect from their regulator, backed up by an appropriate set of key performance indicators.