



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:.

About You

[Redacted]
Federation of Licensed Victuallers Associations
[Redacted]

	Respondent type
<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 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 checked="" 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
<input type="checkbox"/>	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:

1. The Code had a very slow start, organised tenants events were in the main poorly attended once the code had been published. This is in contrast to well attended pre code events which showed an interest and an eager anticipation of what was to come.
2. By definition the code has to be very precise and be cross referenced with the SBEE act 2015 but a tenant who is a lay person can very easily be deterred by the complexity of the document. Along with other trade organisations we published Q & A's at a simplified bullet point level to try to provide clarification and maintain interest.
3. The statistics shown on the BBPA website (to 30th April 2019) show that the vast majority of MRO claims were accepted as being valid over the full period (95%) and also shows an improving picture on recent claims. This may reflect a better understanding of the codes principles or perhaps an increased usage by tenants of trade resources who can better advise.
4. The eventual number of FOT agreements reached represents only circa 9% of claims made which is very low and I believe is a deterrent to tenants who may still see the process as an expensive and complicated route to take. This is alongside a belief that taking this action may anger their landlord and may result, in the often quoted "advice" from POB's Business Development Managers (BDM), that the Pub Operating Business (POB) may well require the business back to management, even when the property has little value in a managed estate and is highly unlikely to make that transition.
5. On a more positive note some 45% of MRO claims have resulted in new tied arrangements being entered into. In our experience this involves several potential routes to bring about this conclusion, in the main these being some or all of the following small capital works, the introduction of higher discounts into the tied agreement, and a recalculation and balancing of rents.
6. On first impressions this may well be a mutually good result, improving the lot of the tied tenant whilst retaining the tie for the POB. We would challenge the fact that this is purely a direct result of the code. In our experience whilst discounts have undoubtedly risen, in some cases dramatically, the rent has had a smaller, or no increase, in comparison. This in effect shows that the initial rent that was being reviewed was in reality incorrect.

7. Without the “voluntary” introduction of increased discounts the act of Arbitration or referral to the Pubs Independent Rent Review Scheme,(PIRRS) to settle the review, we would assume that either of these courses of action would have resulted in a reduction of the passing rent, as neither body has the power to amend the lease terms. So the question to be asked is would these discounts have been introduced by the POB’s as tied negotiations continued, to bolster Tenants profitability in order to protect the POB’s passing rent role?

8. A global effect of the code has been a changing of the market place. Far fewer protected agreements have been available on the market from the large POB’s and the formation of managed and quasi managed estates has taken place, taking away, in the main, the value built into successful operators businesses. At the other end of the scale the less profitable sites have been let on “contracted out” agreements which all but removes the possibility of an MRO claim being made by the Tenant, due to the removal of agreement renewals and rent reviews, both being subsumed by a new let, which leaves the sitting tenant with little or no option. This practice of Contracting out is we believe not replicated in the estates of the Sub 500 POB’s

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:

9. The code undoubtedly tries to bring about a fair and lawful dealing by the POB’s towards their tenants. We have no .experience of any POB acting unlawfully, but the question of fairness is to be questioned.

10. We believe that wherever possible the POB’s have stretched the boundaries and tried to circumvent the regulations and in so doing we believe have acted unfairly and against the intended spirit of the code. Examples of this that have been reported to us and have in the main seen evidence of are outlined below.

11. The service of rent assessment documents via an internal company communication channel with no electronic or hard copy communication made directly with the tenant. The result of which may mean that potential MRO claims are timed out under the regulations

12. The practice of loading the purported financial requirements of entering into a Free of Tie (FOT) agreement at the point of making the full response to an MRO claim. Principal ones being the imposition terminal dilapidations and the settlement of the tied rent review on the old lease before a new lease could be entered into when the regulations does not necessarily require a new lease be granted (see comments in part B)

13. The “advice” surrounding the potential termination of the lease of the POB potentially requiring the property for its own use in a managed estate.

14. The introduction of voluntary “new proposals” pre rent review/renewal dates, purportedly offering a further period of tenure, often 5 years, on the same of better terms and conditions as the current lease. The fact that the formal offer of the new deal includes the removal of Landlord and Tenant Act protection (L&T) which would all but removed the possibility of making an MRO claim in the future as well as introducing insecurity of tenure at the conclusion of the new term, both being detailed above in our response to question 1. This crucial point being hidden amongst several other pertinent facts relating to the proposed new agreement, and coming very low down in the ranked variations and importantly no mention of its consequences.

15. The provision of increased discounts being introduced by side letter with the implications that the deal offered is only binding between the current landlord and the current tenant. In addition the substantial, and deal essential, discounts detailed could be removed with 7 days notice by the POB if or any reason they were aware of, or even suspected, a breach of the lease. The removal of these discounts would have had severe financial implications for the tenant and even if the tenant had not been or suspected as having been, in breach of the lease when discounts were withdrawn they very shortly would have been. A self fulfilling prophecy!

16. The service of a letter from the POB, in advance of the expiry date of the lease, offering new terms and agreements, rather than the service of a non hostile section 25 L&T notice. Resulting in a tenants MRO request being rejected. This can be superseded by service of L&T notices by the tenant but only if they are fully aware of the procedures.

17. The imposition of non disclosure agreements by POB’s on all parties involved in the conclusion of an agreement. This has the effect of stifling the positive effect that the regulations have brought, about and leaves the wider market unaware of the potential of a betterment of their agreement. Leaving only the bare statistics on the BBPA web site. This assumes that the tenant knows of the BBPA and its role and can then subsequently find the statistics on the website.

18. The service of Calderbank letters relating to tied reviews, whilst MRO options were being negotiated and the referral to arbitration under the same circumstances.

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:

19. This Phrase was widely used before the regulations came into effect and in many publicans eyes this was taken as meaning the tie would be lifted and the rent and all else would remain the same. A scenario that in all but extreme situations would not occur.

20. A difficult phrase to quantify as no worse off means many different things to different operators. Does the FOT tenant make more bottom line profit, one would hope so, does this mean that the Tied tenant is worse off? Is there any safety net for a FOT tenant if social demographics alter, with upward only rent reviews with a "hostile" POB who would wish to reintroduce the tie or a pure property landlord who presumably would wish realise the asset. Does this mean that the Tied Tenant is better off?

21. Is the tied tenant or FOT tenant now more vulnerable to repossession of the property into a managed estate? The large multiple operator sites are I would suggest very vulnerable with the value built into them over many years of trading and investment by the tenant now all but gone.

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:

22. Comments made earlier with regard to the change in the market in respect of L&T protection or longer term agreements having all but disappeared from the market leaves most new tenants without any recourse to the MRO and with the passage of time the regulations will become all but redundant. A situation which must not arise.

23. Encompassing "re-grants" of tied contracted out agreements to existing tenants should be drawn under and into the remit of the code The market has moved towards short term contracted out agreements but we believe this is mainly as a consequence of the introduction of the code itself as a means of side stepping the regulations. If "re-grants" of agreements were to be brought within the scope of the code it could well have the effect of reintroducing contracted in tenancies giving security of tenure to tenants and a safe guard of a "balanced" deal at renewal or rent review, as we have described at Para 5 – 7. POB's should not be unduly concerned, because if the outcome of the now granted MRO option results in the same results as the BBPA stats suggest then the only outcome should be one of a retained tied outlet with a fair market rent.

24. With the guidelines set on "significant increase in price" on products and services other than beer being generous to the POB's it is highly unlikely that these triggers will be utilised to give the option of MRO and therefore an opportunity to balance the rent. A more industry related, segmented, benchmark should be sought to keep these potential increases in check.

25. There is an incentive for the POB's to string out the conclusion of negotiations and whether the resultant agreement is FOT or an improvement on the current tied agreement all the time the pub remains tied on its current terms the POB is enjoying enhanced profits to the detriment of the tenant. Some form of restitution to the tenant should be introduced for lost discounts and profitability. This would need to be calculated in relation to the

resultant negotiated FOT or Tied rent also. Perhaps the restitution of discounts to the tenants could be based on the same formula as the “damages” charged by POB’s when charges are made for tenants who have bought outside the tie.

26. An unintended consequence of the introduction of the regulations brought about the demise of both PIRRS (now voluntarily reinstated by POB’s who are subject to the code) and the Pubs Independent Conciliation and Arbitration Service (PICAS) which has left a void for tenants who have a grievance against the POB resulting an unfair balance of power between the POB’s and their tenants. A general imbalance that Pubs Code Adjudicator (PCA) refers to and tries to redress when commenting on the negotiations between landlord and tenant in negotiations about MRO compliant agreements...The PICAS cases and grievances’ would not have any bearing upon the tie or rents and may be to do with items such as poorly executed capital works causing problems to the tenant, poor representation, unfulfilled agreements. The POB’s should be encouraged or required to reinstate such a service. One which is still available to tenants of POB’s and brewers with sub 500 outlets, and is operating successfully.

27. Current regulations require that the POB’s offer of an MRO compliant agreement should be for a term of at least as long as the remaining term of the existing tenancy. In some instances where penultimate day rent reviews exist this results in an offer from the POB of an agreement of 1 day. This creates an unnecessary hurdle and the required term under the code should be for a period of at least as long as the remaining portion of the existing agreement or 10 years whichever is the longer.

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:

28. The code was never specific about how the MRO compliant agreement should be brought about, be that by new lease or Deed of Variation (DOV) to an existing lease. This has been exploited by the POB’s by raising various hurdles and expenses that a tenant wishing to take a FOT agreement has purportedly had to surmount. The more recent advice notes from the PCA (Dec ’18) go a long way to clarifying this position but a layman reading those advice notes would be confused to say the least. We still maintain that a tied agreement that provides for the release of the tie within its current terms, which by definition means that the landlord company anticipated that such an event may take place,

should be varied and made FOT and code complaint by the simple act of invoking the relevant clause(s) within the current tied lease. A simple and understandable procedure provided for by an already negotiated, and entered into by both parties, agreement. Because the code does not provide for this the PCA does not have the power to require that it happens and an over complicated and expensive arbitration has to take place, The PCA should be given the power to require that unless no such tie release provision exists within the current lease then the MRO compliant agreement is brought about by the simple enactment of a current clause within the lease.

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:

29. The PCA has brought about several “improvements” to the code by discussions with the POB’s which are welcome. These agreed practices have brought about the cessation of some of the practices we mention in our answer to question 2. The main ones being those mentioned in Para’s 12 (partially, at the conclusion of the review period, but more fully post 31st March 2019) and 18.

30. Non disclosure agreements (NDA’s), whilst not encompassed in any way under the code, should be tackled using PCA “soft powers” and hopefully resolved in the manner as mentioned above. We believe that this practice by the POB’s has a stifling effect on the positive effects of the code, their removal and publication of resultant benefits, brought about by the tenant making an MRO claim, could reinvigorate the process resulting in the betterment of the tied tenants deal.

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;**

31. As mentioned previously the advice given can be complicated and is by definition difficult for a layperson to understand and to comprehend the resultant effect upon compliant full responses made by POB’s. The arbitrations thus far concluded, and published, would appear to have had a beneficial effect by the removal of the POB’s imposed obligation of terminal dilapidations on the tenant within the POB’s full response. This is a positive result but a layperson reading the documents may still be very confused and conclude that, correctly, that MRO compliant agreements can be brought about by new leases or DOV’s. Meaning that POB’s will continue with the requirement of new leases, which seems to be supported by the BBPA statistics, and heavy dilapidation claims. The tenant therefore feels there is little point in pursuing a claim. This confused position is brought about by the fact that the code is not precise in its requirement of a varied lease.

○ **investigating non-compliance with the Code;**

32. We are not aware of any absolute non compliance issues but feel we are continually identifying “side stepping issues as previously mentioned

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

Comments:

33. The recent introduction of “stays” within the procedure is a welcome development. The prescriptive timescales within the code, post PCA referral of a full response, which are designed to bring about a conclusion within a period prior to agreement expiry, whilst appearing to be achievable are extremely tight. The final parts of any negotiation can be very time consuming and rely upon documents flowing to and fro between parties to bring about precisely the package sought and offered. This process should be allowed to come to a conclusion without the pressure of arbitration being triggered.

Question 6

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

Comments:

34. There is no regulation in respect of “delayed”. deals but undoubtedly this can cost the tenant through lost discounts and some form of restitution should be available see Para 25. Advice does now exist regarding tied rents but this has been introduced post review cut off date.

Part C: Pubs Code Regulations

Question 7

There are two sets of regulations that relate to the Pubs Code: The Pubs Code etc Regulations 2016¹ and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016².

You may have commented on some of these provisions in response to questions in parts A and B of this consultation³, 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.

¹<https://www.legislation.gov.uk/ukxi/2016/790/contents/made>

²<https://www.legislation.gov.uk/ukxi/2016/802/contents/made>

³Some 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.

Comments:

Part D: Impact Assessment and other information

Question 8

The review will consider the key assumptions made in the Impact Assessments⁴ 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:

35. Throughout our previous responses to the reviews questions we have highlighted what we believe the impact the regulations have had upon the industry. We would like to reiterate in brief what we believe are the main points

- (a) The insecurity to tenants brought about by the widespread use of contracted out agreements Para 8
- (b) The “slow death” of the regulations brought about by contracting out Para 22
- (c) Imbalance of power and profitability on “re-grants” Para 23
- (c) The introduction of Managed and quasi managed estates removing value from high end leases and as a consequence what must surely be a cessation of investment by tenants in these outlets Para’s 8 & 21
- (d) The removal of significant grievance procedures Para 26
- (e) The redistribution of income from POB’s to tenants Para’s 6, 7, & 25

- (f) The effect of practices of some of the POB's outlined in Para's 9 – 18 have destroyed trust in the POB for many existing tenants and this must surely be reflected in the attitude of potential incoming licensees, It might be summarised by the phrase that we have gone from handshakes with our trading partners to playing poker with them.

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:

We would like to make the point that all of the foregoing comments do not apply to all of the POB's encompassed within the regulations. There are thankfully exceptions and the industry would be far better served if a less confrontational .approach was adopted by all.

The code has provided opportunities for some tenants but as a direct consequence of its introduction benefits fought for by industry bodies over many years have been removed for all tenants of POB's captured by the code. Lawful perhaps but fair?

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 ☒