



# 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](http://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  
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Email: [PCAreview@beis.gov.uk](mailto: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.](#)

[Redacted]

## About You

[Redacted]

Fair Pint Campaign

[Redacted]

	<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 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 checked="" 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:

Overall the Pubs Code has not operated well. Despite being told by the Minister, Anna Soubry, that the PCA office would be ready day one it took several months before the department was operational, due primarily to being under resourced, particularly staff levels. Even after the Department became fully staffed the experience of tied tenants (TPT's) has been that the Code is largely based upon the failed self regulatory Code, dealing with fairly peripheral issues, the only breakthrough being the MRO option. MRO was supposed to have offered the opportunity for TPT's to effectively police their own agreements, the idea being if the TPT felt their tied agreement was leaving them worse off than if they were in an agreement that was not subject to tied terms, or they were being treated unfairly, they could consider paying a market rent only and not being obliged to purchase products or services from their POB.

The timings, lack of knowledge of existence, and complexity of wording, of the Code, and therefore opportunity for contrary interpretations, combined with the failure of the PCA to clarify issues and the massive delays in PCA arbitrations rendered MRO is out of reach to all but a very lucky few. These issues remain and to some degree have become magnified.

**Fair Pint** have advised and assisted many tied tenants, members and non members alike. Our experience is that there is little interest in the majority of the Code regulations, which were considered low hanging fruit and token give aways by the POB's in order to avoid the introduction of statutory regulation. MRO and fair rent assessment proposals (RAP's) were the basis of most Code inquiries and ultimately complaint referrals to the PCA. After initial attempts to work with the Code most TPT's, already hampered by high rents and tied product prices, found they simply did not have the financial resources to see the PCA referrals to their conclusion - some having been active referrals for as much as two or three years, with no arbitrated conclusion [Redacted]

The PCA has in the past (2017) issued figures relating to referral 'types', i.e. reasons for complaint (most of which were related to MRO or RAP complaints) and MRO figures (showing that applications are diminishing and TPT's achieving MRO status are very few). We are advised that new findings are due to be published but, unhelpfully, are unavailable at the time of writing, presumably to prevent any contributors commenting on the findings for the purposes of this review. It has however been confirmed that the conclusions are unremarkably very similar to previous findings - most referrals relate to RAP or MRO, fewer MRO applications and proportionally few TPT's reaching MRO status.

The PCA has issued evidence of referral applications and those that have been concluded by awards. The implication of this is that the PCA have a certain 'success rate' processing and concluding referrals. In fact the PCA have not to our knowledge issued data outlining how many referrals they have actually concluded with an arbitrated award as opposed to a 'consent' award. Essentially, **Fair Pint's** experience is that most TPT's making a referral run out of funds and energy long before the PCA make a decision and resort to compromising on the best tied deal they can achieve rather than risk the further financial exposure to the

PCA delays. On completion of such a last resort they inform the PCA who then issues a consent award - meaning the referral is effectively terminated, the tenant having surrendered and struck a tied deal in the absence of PCA decision.

## **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 PCA when arbitrating MRO referrals, on the grounds that terms proposed by POB's are not common or reasonable, have given some decisions which have led to the POB being required to deliver to the TPT a revised MRO proposal. The POB's MRO proposal and revised MRO proposal is almost always in the form of a new agreement, rather than a simple side letter or deed of variation to the lease which would deliver the same effect at considerably less cost and time. **Fair Pint** believe this to be fundamentally unfair and a simple loophole the POB's have recognised and utilised which makes MRO next to impossible to achieve.

The POB's argued that a MRO agreement delivered by simple side letter would create a hybrid free of tie (FOT) agreement, implying all FOT agreements were the same. There is no such thing as a 'standard' commercial agreement, there are dozens of variations. A tied lease is essentially a 'normal' commercial lease with purchasing obligations (tied terms). These terms are easily severed from the lease leaving the overall agreement in place, provisions that were written in to tied agreements by the POB's to overcome potential legislative requirements should tied agreements be deemed anti competitive. Instead of undertaking a simple exercise, the POB's have grasped the opportunity to deliver to a TPT a new and complex agreement increasing costs at every opportunity and making MRO as unattractive as possible in an attempt to make their tied agreements more 'saleable'.

Unfair contract terms, in the main, only apply to consumer contracts. Unfair contract terms in commercial contracts have much more limited control. HOWEVER, the SBEE Act 2015 and Pubs Code 2016 put into place legal statutory instruments which Government claim were 'designed' to be consistent with the principle of "**fair**" and lawful dealing by pub-owning businesses in relation to their tied pub tenants.

**Fair Pint** believe that effectively the SBEE Act has introduced provisions that effectively mean the controls imposed by Unfair Contract Terms (UCT) legislation should now also apply to tied agreements between POB's and TPT's. That is to say that agreement provisions considered unfair by the Office of Fair Trading in consumer tenancies should be considered equally as unfair in tied pub tenancies.

We believe at present contract terms are not what would be considered fair as defined by the UCT's legislation. The idea of the 'fair dealing' principle is no doubt well meant but extremely difficult to deliver as it is so vague. A definitive statement within the Pubs legislation that TPT's should have the same rights as POB's would render this a binary issue capable of swift arbitration should referral be necessary, (e.g.'s of such terms : unequal cancellation rights, rights to vary terms generally, rights of final decision, binding a party while allowing the other to provide no service).

POB's have a universal right in tied agreements to sever the tied terms in exchange for a rent review to full rental value at any time, essentially this would be a simple document

which would be cost and time efficient to prepare. This is effectively a POB right to cancel the tie, or vary its terms, that is not shared by their TPT. Simply giving both parties the same rights would almost clear the desk of the PCA in one fell swoop.

### **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:

One measure of the success of the Code would be to justify that the principle that tied tenants are no worse off than they would be if they were not subject to any product or service ties has been achieved. Sadly it has not. The PCA has no mechanism in place to cross check if this primary principle of the Act has been achieved. Most TPT referrals relate to MRO applications and most TPT's settle for a compromise tied deal well before the PCA reach a decision on their complaint. On compromise, the PCA issue a consent award, basically confirming they did nothing and the TPT withdrew the referral but 'sold' as a successful outcome, and the matter is forgotten. There is no check by the PCA to establish if the compromise reached actually satisfies the principle of fairness or that the TPT remaining tied is 'no worse off than if they were free of product and service ties'.

It appears that [Redacted] have succeeded in persuading the PCA, Government officials and many other parliamentarians, that if TPT's are 'better off' than they were before then this is a justifiable measure of the success of the Code. This is entirely wrong.

There is a considerable difference between a TPT being slightly better off than they were before and no worse off than if they were free of product and service ties. The two outcomes are entirely different.

To put it simply, let us assume Parliament were to introduce a principle into legislation that employees should not be physically beaten by their employers. If employers then reduced beatings from 7 days a week to 5 days a week, it would be a fact that the employees are 'better off' but this would not be delivery of the Parliamentary intent.

Some of those TPT's who have sought to use the Code, whilst giving up on the PCA, have managed to negotiate marginally better deals than were first proposed in the tied rent assessment proposal (RAP) but we believe are by no means 'no worse off than if they were free of product and service ties', simply better off than they would have been.

A parallel rent assessment (PRA) was deleted from the proposed legislation as it was argued by the POB representatives that it was too costly and that TPT's would be able to conduct the exercise of comparing the respective positions of being tied and free of tie themselves with the benefit of MRO proposals and RAP's. The absence of realistic RAP and MRO proposals has denied TPT's the opportunity of conducting a parallel rent assessment of their own and enabled the POB's to continue to maintain their behaviour, of making extortionate rent proposals with no justification, [Redacted].

Referrals to the PCA are considered confidential however IA submissions and outcomes are not to our knowledge confidential. [Redacted]. Had the TPT not had the resources to challenge the POB proposal they would have undoubtedly been put off pursuing the MRO option and would have compromised on a tied deal like the majority of other tenants faced

with the same circumstances. Presence of a PRA would have demonstrated, given the independently assessed MRO rent, a realistic tied rent.

The example above, accompanied by the introduction of more onerous terms into MRO agreements have effectively been attempts to bastardise the 'no worse off principle' into delivering a MRO which will leave tenants no better off than they would have been had they stayed tied.

**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 has not been achieved in any way.**

#### **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?***

**Simplicity is key.**

#### **Timing**

The Codes timing of requests, notices and responses has been a large area of dispute and resulted in some TPT's missing their MRO opportunity. Section 43(5) of the SBEE Act outlines certain circumstances in which a POB must offer their TPT's a MRO. These circumstances are not exhaustive and the Act has been written in such a way to enable the addition of other MRO initiation opportunities to be outlined in the Code. Offering TPT's a MRO option, effectively emulating the same rights as their POB's to initiate FOT under the terms of the lease, would eliminate the possibility of TPT's being 'timed out' of their MRO rights. This MRO at any time opportunity would also ensure that POB 'fairness' behaviour is kept under constant check by the TPT as they would not have to wait 5 years to initiate a MRO request.

The POB's, [Redacted], will be proposing alterations to the timing schedules outlined in the Code. These proposed alterations should be considered in the context that after almost three years of asking the question, the PCA have finally confirmed that the POB's can not claim any increased tied rent from the tied rent review date to the MRO being accepted. This is one of the few welcome decisions from the PCA and whilst commendable was almost three years over due. Effectively this decision means that the POB's will now be pressing to have a MRO timetable that can be completed before a tied rent review date as they can not backdate tied rent increases for the period between rent review and MRO being agreed.

#### **Wording and procedures**

The Code and its procedures are far too complex. We understand that this is one area the POB's and TPT's will agree although both will propose very different approaches to resolution.

The POB's have already made it clear that their preferred option is to have a standard MRO agreement - essentially something that is expensive, complex, costly to TPT's and ultimately unattractive allowing such a request would finally kill the MRO process rendering the statutory code effectively as sterile and useless as the self regulatory Code before it (which of course would seem the POB's idea all along, a weak code and enforcement giving the impression of self regulation).

TPT's, not just Fair Pint members, who have been deeply involved in the lead up to MRO being required in the legislation and the Pubs Code consultation process itself, have experienced huge delays in PCA process and complex legal arguments and disputes. A few TPT's, with the benefit of some with comparatively little financial resources (as compared with the POB's) and a far greater knowledge (than the average TPT) on the issues, have participated in PCA arbitrations in which inevitably they were heavily outgunned by the POB's financial resources and retained professional legal and property experts.

The outcome of the few arbitration referrals that have come to a conclusion by actual PCA decision awards (as opposed to consent awards) have come at a great cost and are, in the opinion of Fair Pint, far from delivering on the legislative principles.

Sections 43(3) & (5) of the SBEE Act enables the secondary legislation (the Code) to effectively define how MRO is to be delivered. There appears to be no section within Act restraining the Code from containing Regulations allowing TPT's similar rights to POB's existing contractual rights to terminate tied terms. Such a right would massively simplify the MRO process.

Simple rights such as those outlined above were proposed during the original consultation but were considered inappropriate at that time as it was argued by the POB's representatives that they would open a flood gate of MRO applications that neither the POB's or PCA would be able to handle. The simple fact is that such rights would need little if any PCA involvement and be so simplified that the POB's need only issue a simple side letter or deed of variation to the existing lease, which has been done by other companies who have acquired tied pubs and decided to release the tenant from the tie burden. The latter would deliver fairness and circumstances in which a TPT can assess for themselves whether they are indeed no worse off than being free of product and service ties, thus potentially delivering the two primary principles of the legislation.

## **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:

In short, Fair Pint consider the PCA should have increased powers, however, the powers that are available to the PCA to have been hardly used, e.g. no investigations and therefore no penalties to POB's.

Fair Pint consider the PCA has not been effective during the period. The PCA department was not ready 'day one', as promised by Anna Soubry, and subsequently took several months to get into any kind of shape. Following a significant personnel increase administration improved but processing remained appalling.

The PCA, Mr Newby, had a number of arbitration referrals in the initial stages [Redacted]. Delays of over a year became common place, in some instances much longer [Redacted] In itself these delays, caused by the PCA, seem to be a direct breach with the Arbitration Act 1996, s33(1)(b), which requires an arbitrator to avoid unnecessary delay or expense, demonstrating how inappropriate the appointment of Mr Newby really was.

[Redacted]. Inevitably, with no apparent light at the end of the tunnel, many TPT's gave up and sought to strike a deal with their POB. This pattern, of TPT's agreeing tied deals rather than wait for the MRO outcome, is now being presented by the POB's as indicative that their tied deals are more attractive than MRO and by the PCA as indicative of the Code 'working' which is little more than propoganda.

The PCA has powers to clarify issues these powers have not been used effectively, or accurately in some cases, and, after almost three years, confusion still reigns supreme which plays into the POB's hands. The issue of whether a MRO proposal could be a simple side letter/deed of variation or new agreement went on for far too long and still rages. The POB's claimed the legislation did not permit them to issue a MRO proposal in any other form than new agreement - this later proved to be completely wrong but the PCA did nothing to clear the matter up in the early stages of dispute. Whilst now verifies by the PCA that MRO need not be in any particular form the POB still has the stronger position and is able to dictate the terms.

**It has always been Fair Pints view that unless the parties agree to the contrary MRO should be delivered by the simplest cheapest method possible - a deed or side letter severing tie related terms. Fair Pint representatives, who are not lawyers, have demonstrated that a document can be delivered, satisfying the Code and take only a few hours to prepare therefore costing relatively little. MRO by simple mean of course is abhorrent to the POB's.**

The PCA have powers to investigate. Issues have been reported from the early days of the Codes inception, e.g. dilapidations, POB behaviour on MRO proposals, POB attempts to circumvent MRO by effectively 'trapping' TPT's into agreeing a tied rent, POB's threatening third party referral of tied rents increasing intimidation and threatening unnecessary costs upon the TPT. None have been investigated.

We do consider increased powers should be available to the PCA however an effective and efficient PCA is needed to enforce them. In the absence of exercising existing powers it is difficult to see the necessary extent of new 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.***

Comments:

It is no secret Fair Pint have always thought Mr Newby was the wrong man for the job. The Royal Institution of Chartered Surveyors confirmed in their submissions to the original consultation that any surveyor would more than likely be placed in a conflicted position if they were selected for the PCA role.

We maintain that [Redacted].

Moving away from the conflict issues, the challenges of the Act and Code are legal issues and need a legal mind to consider. [Redacted]

The Code requires the rules of the Chartered Institute of Arbitrators are followed. **Fair Pint** remain concerned that Mr Newby, despite being a member, will not abide by his own professions decisions and we are informed Ms Dickie is not a member.

Issues of MRO rent assessment are ordinarily not dealt with by the PCA, an Independent Assessor is appointed in such cases. In very few cases, if any, has the PCA needed to preside over an issue of rent assessment [Redacted]

***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:

Advice and guidance have been slow coming out of the PCA office and sometimes inaccurate (the withdrawal of Advice note "Tied Rent Contractual Dispute Resolution Clauses and Calderbank Offer Letters" dated July 2017, being a perfect example.

It appears to **Fair Pint** and other associated tenant groups that much of [Redacted].

**There have been no investigations in to POB behaviour so no one is in a position to comment on investigation of non compliance issues.**

In the absence of any investigations we are not aware of any instances where non-compliance has been found. The outcomes of PCA arbitration referrals have in the early stages been kept confidential (which in fairness was not in the PCA's gift to give). The PCA have sought to persuade the POB's to agree to the publication of arbitration awards which to a limited degree has now started to occur, award contents being redacted to a point where potentially their publication loses its usefulness or permission denied outright where the outcome is unfavourable to the POB.

We are not aware of any 'enforceable recommendations', only recommendations many of which are challenged by the POB's by, e.g. judicial review.

Arbitrating disputes under the Code has been a long and painful process for many tenants. The delays of process of arbitration has led to many tenants giving up on the Code and settling for a tied 'horse deal' (now being spun by the POB's as indicative of their tied agreements being preferred to MRO). The simple fact is the tied deal is not much better or worse than the POB's new MRO agreements. **Fair Pint** consider these agreements have been specifically designed to be unattractive and unnecessarily costly.

### **Question 6**

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

Comments:

As far as we know the regulations in this regard have never been used or tested.

The regulations relating to costs and fees we consider are adequate but should be kept under review.

In the absence of any investigations, unsurprisingly no POB has been subjected to financial penalty.

## **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<sup>1</sup> and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016<sup>2</sup>.***

***You may have commented on some of these provisions in response to questions in parts A and B of this consultation<sup>3</sup>, 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:

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

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

<sup>3</sup> 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.

## Part D: Impact Assessment and other information

### Question 8

***The review will consider the key assumptions made in the Impact Assessments<sup>4</sup> 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:

- ***costs to businesses and potential pub closures;***

**Fair Pint** have no doubt a considerable amount of funds have been committed by the POB's to administrating the new legislation essentially to circumvent the effect of MRO and, to a lesser degree, other Code issues.

All the POB's will have taken steps to make MRO a less likely possibility in the first instance, e.g. as the majority of MRO opportunities come about through the cycle of five yearly rent reviews and lease renewals, [Redacted] Shorter agreements without renewal rights offer less security and should, if the RICS rent assessment guidance is followed correctly, result in lower rents in the longer term lowering [Redacted] rental income. For this reason we consider the current efforts to circumvent the Code are a relatively short term attempt to 'weather the storm' until they are able to negate the effects of the legislation entirely by rendering it unusable.

Let us not forget the POB's derive the majority of their income, and profits, from sale of tied products. [Redacted] had a revenue of £[Redacted] from drinks revenue alone amounting to [Redacted] of total revenue (2018 Annual Report). Sensitivity analysis would reveal that it is clearly better to take a nominal 'hit' on rent levels than lose the opportunity to force inflated tied prices upon their tenants in exchange for a nominal rent increase that may occur if all tenants were to choose MRO.

Both the POB's and TPT's have experienced significant costs when seeking to deal with the Code, although the costs are comparatively higher when taken in context, bearing in mind the POB's huge financial resources and wealth of experienced

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<sup>4</sup> <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>

professional advisers. **Fair Pint** consider the POB's costs have largely been committed to making MRO as painful as possible for TPT's, e.g. insisting on MRO by the most complex and expensive means possible, which leads to an inevitable delay if the TPT has the wherewithal to refer the matter to the PCA and judicial challenges of PCA decisions. For TPT's the expense of making a referral or initiating any Code related complaint is so comparatively prohibitive they generally give up before they begin. The costs of PCA itself and IA's is not prohibitive, it is the associated costs of seeking professional advice (solicitors and surveyors) as MRO was made considerably more complicated than it needed to be.

### ***closures***

Those POB's who are brewers were seeking market dominance and blanket distribution of their product and also adopted the pubco model of inflating tied product prices over wholesale prices (which was almost unheard of before the Beer Orders). Unsurprisingly, the brewers ownership of pubs dropped from a peak of around 43,500 to around 10,000 following the Beer Orders in 1989 (over a period of around 10 years). with the revocation of the Beer Orders the number of pubs in brewery ownership is back on the increase and we consider we will be faced with the same competition issues all over again in a few years time.

The pattern of pubco ownership is a mirror image of the brewers. As brewers disposed pubcos acquired, growing from around 12,700 in 1991 to 32,500 in 2003. The pubco business plan appears plain to see. An opportunity arose to purchase vast estates of property with varying latent value opportunities, so the pubcos essentially 'land banked' and embarked on a path of trickle liquidation of assets. Pubs were gradually disposed of from 2003. The pubco ownership having almost halved, from 32,500 in 2003 to 14,700 in 2017, most pubs have closed some have been sold back to brewers. Unsurprisingly the beginning of the decline of pubco ownership in pubs and increase in brewery ownership coincides with the revocation of the Beer Orders.

The number of free of tie pubs in ownership has barely changed in over 25 years but is now around 10% higher than in 1990, at around 22,650. The total number of pubs closed is now estimated at just over 15,000 (as at 2017). Whilst some pubs may have been tied and become free of tie it is fairly obvious that the majority of closures have been tied pubs despite the spin the POB's try to put on the figures.

(Ownership figures by BBPA).

**Fair Pint** is under no doubt that the tied model is essentially a mechanism to oblige TPT's to fund the POB's optimistic purchase prices allowing the POB the time to capitalise on the assets they acquire by releasing latent value e.g. identifying redevelopment opportunities at the expense of the tied tenants. It comes as no surprise to **Fair Pint** that the disposals of pubs by POB's also coincides with the select committee inquiries and publication of the legislation.

- ***redistribution of income from pub companies to tenants;***

There has been little evidence of redistribution of income overall. Comparatively few individual cases exist where a TPT is now MRO and a distribution of sorts has occurred. In these cases some TPT's have simply accepted the first MRO terms that were offered (and in other cases determined as unreasonable) and the initial over inflated MRO rent simply to get out of the tie. As the POB's initially sought to capitalise all their revenue from an individual pub into one rental payment (leaving some MRO TPT's over rented).

Most cases we are aware of, where a TPT has sought MRO, have ended with the TPT giving up due to depleting funds and delays by the PCA. In some cases the TPT has secured a tied deal which is better than the one initially offered and are arguably marginally better off than they were before embarking on the MRO trail. Fair Pint do not consider TPT's such as those outlined above are 'no worse off than if they were free of product and service ties'.

TPT's not in a position to use the MRO have seen no change in circumstances as far as we are aware.

- ***changes in industry structure or ownership status; and***

Clearly the basic overall plan by pubco POB's is to sell and/or render their remaining estate properties immune from the Code, particularly MRO. [Redacted] Brewer POB's, not being restrained by the Beer Orders, are buying pubs back as even MRO does not pose as great a threat, the Code containing a stocking requirement to TPT's who go down the MRO route.

We would predict continued pubco sales, for redevelopment, or to brewers in the forthcoming few years.

- ***wider industry trends such as employment and investment.***

Essentially for a TPT selling tied products is almost breakeven, profits are made on non tied products. The trend in tied pub operations will be to seek to maximise profits, which will mean selling anything but beer. 'On sales' of beer are in decline nationally which comes as no surprise as there is little incentive to sell it in any pub that is tied, i.e. almost half the pubs in the country.

Fair Pint see no reason to expect beer sales to improve in the short to medium term given the amount of pubs that can make little if any profit from it. We would expect a simple MRO would reverse the decline in beer sales. Pubs with food and accommodation (which are not tied products and services) have grown in number and continue to see growth in revenue and profits.

Direct payroll costs is increasing, with minimum wage and pension enrolment and with Brexit there is a possibility that the 'pool' of potential staff will diminish which may have the effect of increasing wages. In pubs already close to the financial edge it is likely these increasing staff costs will result in lower employment and a poorer quality of service to consumers. To a degree this may be outweighed by the increase in food and accommodation offer which is considered more labour intensive.

Business rates are likely to increase as are utility costs.

Whilst investment in vast pub estate acquisitions and free of tie and managed operations a false impression of pub investment is being portrayed. The underlying pubco model remains, low investment in tied pubs and systematic disposal leading to pub closure. TPT's have little in the way of resources to commit to investment and improvements and investment remains at a level effectively fire fighting issues as they arise in many cases - i.e. funds committed to repair and maintenance. Where capital can be found a certain amount of effort will be put to first impressions and seeking to entice customers. It is clear that managed operations have had considerable investment. [Redacted], and other POB's, are committed to converting as many tied pubs as possible to in-house managed rather than allow the TPT to choose the MRO option at lease renewal (another way round the legislation).

At a corporate level we expect to see a continuation of the transactions already witnessed pubco sales to brewers, [Redacted]



## 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:

As far as **Fair Pint** are concerned the main benefit of the legislation should have been the birth of MRO. A genuine MRO opportunity would practically result in a self policing relationship between the POB's and TPT's significantly diminishing the PCA's workload as referrals would plummet to more minor issues.

As has been already seen over the last 3 years, no investigations or penalties have taken place. The thought of PCA penalties is not an effective threat to encourage better behaviour, the thought of a TPT simply being able to terminate their tie obligations at will is.

**Timing and complexity are the main stumbling blocks and have rendered MRO, and therefore the rest of the Code ineffective.**

#### Timing

The vast majority of referrals relating to the Code are related to MRO either directly or indirectly. Indirectly RAP referrals are connected to MRO as RAP's are the most common events that initiate MRO (RAP's being mostly served at rent review). Some TPT's have missed their MRO opportunity as they have not appreciated that documents, which were not titled "Rent Assessment Proposal" sent to them by POB's were in fact RAP's and they have failed to act within the timescales.

**An effort needs to be made to avoid TPT's missing their MRO opportunity.**

During the Pubs Code drafting consultation period [Redacted] and POB's made representations that allowing TPT's a MRO at any time (a right that effectively already exists under tied leases for POB's but not TPT's) would cause an unmanageable flood of MRO applications.

The PCA, [Redacted] and POB's will all confirm now that there has been nominal take up of MRO.

**The Code review is an opportunity to vary the regulations allowing TPT's to elect to make a MRO request at any time - the same right that currently exists to POB's.**

#### Complexity

Tied agreements have a clause allowing POB's to terminate tied terms in exchange for a rent review to reflect the variation in terms. This exercise would typically be done by a simple side letter or deed of variation and does not give either party the opportunity to vary any of the other terms of the lease (but does not restrain them

negotiating further changes if appropriate by mutual agreement) (Appendix 2 example of lease terms permitting POB to terminate tied terms).

MRO has been left sufficiently vague in Code wording to allow the POB's to seek to alter the existing lease terms to such a degree that they are demanding TPT's surrender their existing lease and accept a new agreement. Any terms that can be altered to become more onerous are being incorporated by POB's into these new agreements making MRO as unattractive as possible. The time that has elapsed in getting the legislation active and accompanied by the delays in PCA process have allowed the POB's to create a raft of new FOT agreements within their estate which they now present as evidence that these agreements are the norm' and MRO should be the same. Even now under the Code, MRO is about having terms common in FOT agreements. It should not be an exercise in finding the *most* common agreement and making this agreement the only way to achieve MRO. If the terms in existing tied agreements (obviously with the exception of tied terms) can be found in FOT agreements there should be no necessity to alter them unless both parties agree to the amendment.

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

The issue of rental proposals remains of great concern. Rent Assessment Proposals are covered by the Code, requiring certain information is disclosed to the TPT along with the proposal. The POB's do not consider comparable evidence justifying their tied rent proposal to be a required disclosure. This is like being accused of a crime and being denied sight of the evidence. The Code requires that RICS valuation guidance and regulations are followed in RAP's i.e. tied rent proposals but not in MRO rent proposals. The latter enables the POB to make wild MRO rent demands scaremongering the TPT into avoiding the MRO opportunity.

**All rent proposals should be justified when submitted to a TPT, RAP and MRO, and RICS guidance and regulations complied with at all times.**

Clearly one of the main issues for TPT's is the amount of time referrals take - the PCA is simply not in a position to process complaints efficiently and therefore diminishing complications within the regulations by terminating timing issues for MRO applications will reduce the PCA workload.

POB's are seeking to have the PCA approve a standard MRO agreement this would tie TPT's seeking MRO to an inflexible agreement which would set in stone the POB's policy of making MRO as difficult as possible to obtain by surrender of existing terms in exchange for an entirely new agreement. This should be resisted at all costs.

Whilst **Fair Pint** agree MRO should be a less complex process and document, why stop at the POB's choice of a standard agreement ? Why not simply allow tenants fair contract terms and the same rights to tie release as those currently enjoyed by the POB's ?

The POB's are maintaining that little MRO take up is indicative of TPT's satisfaction that their tied agreements are preferable to MRO (to a degree this is correct as they have created a 'monster' MRO option).

**A simple, quick and cost effective MRO would be the true test of TPT's satisfaction of tied agreements.**

