



## **British Pub Confederation**

# **Report into the operation of the Pubs Code & the Pubs Code Adjudicator**

*In the first six months of the operation of the statutory Pubs Code, it is not working as intended and is being routinely thwarted and flouted. Pub owning companies are denying tenants' their legal right to the Market Rent Only option and discriminating against tenants who seek it. The [Redacted] Pubs Code Adjudicator is completely failing to deal with this and is failing to uphold the Code and therefore failing to perform his duty as a statutory quasi-judicial Adjudicator.*

*January 2017*

## Executive Summary

**The Pubs Code came into force in July 2016 yet it is clear six months on that the six tied pubcos, which are subject to the Pubs Code, are denying tenants their clear legal rights laid down in the Code and thwarting the will of Parliament and Government.**

### Roundtable and Licensee Complaints

The British Pub Confederation held a roundtable meeting, on the 25th October 2016, of its licensee representing membership organisations to pool case studies to show the clear trends of the way pubcos are thwarting and ignoring the Code, and have also been receiving complaints from licensees. The British Pub Confederation has identified clear patterns of behaviour, all seeking to deny tenants their legal right to an independent assessment to determine their market rent or to make the terms of doing so onerous and unaffordable that no tenant could possibly take it – in direct contravention of the Pubs Code.

### Regulation 50

Regulation 50 of the Pubs Code states that, *“A pub-owning business must not subject a tied pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under these Regulations.”* **This is being routinely ignored by the large pub companies.**

### Key ways the Pubs Code is being thwarted

- Pubcos are refusing to allow deeds of variation to leases, forcing tenants wanting to pursue the Market Rent Only option to agree a new lease on unfavourable and clearly detrimental terms despite using the Deed of variation route on a regular basis for more complicated lease amendments.
- Tenants seeking the Market Rent Only option are being presented with unreasonable charges and terms by pubcos which make it unviable to pursue or take the MRO option.
- Fees being proposed for Independent Assessors are unreasonably high which is making it prohibitively expensive for tenants to pursue Market Rent Only option.
- Pubcos are also confusing and misleading tenants so they fail to understand their right to trigger the Market Rent Only option and miss the narrow window of opportunity to do so.
- Some pubcos are also refusing to provide the information to tenants which is required by the Code to avoid showing how their tied leases compare with any free of tie leases they might offer (before a tenant decides whether to pursue an independent rent assessment of their market rent).

### The failure of the Pubs Code Adjudicator

This report will cover the actions of Paul Newby, the Pubs Code Adjudicator, who has been rejecting complaints about his own clear conflicts of interest (which he [Redacted] when he applied for the role and who has now instead written his own conflict of interest guidance!). Mr Newby is also failing to give adequate guidance in relation to the Pubs Code, is failing to give directions, and is not progressing the cases before him. He seems [Redacted] of reaching decisions and [Redacted] Pub Owning Companies to abuse the code. [Redacted]. This is despite the fact that

RICS made it clear that these rent setting guidelines enshrine this principle, and have done since 2009.

### **Conclusion & Recommendations**

In the first 6 months of the operation of the Pubs Code it is clear that pubcos are thwarting it and flouting Regulation 50, making it, in effect, impossible for tenants to pursue the MRO option.

- The Government must intervene and ensure that the Pubs Code works as they (and Parliament) intended and ensure that the office of the Pubs Code Adjudicator is upholding and enforcing the Code.
- The Secretary of State must accept the recommendation of the Business, Energy and Industrial Strategy Select Committee and remove Paul Newby and appoint a new Pubs Code Adjudicator who will properly carry out the role.

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# **1. Introduction**

## **(a) The British Pub Confederation**

The British Pub Confederation consists of fourteen pub sector organisations across the pub sector, giving pubs, publicans and pub campaigners a strong, unified voice. The British Pub Confederation includes nine tenant representing groups, thus representing more tied tenants than any other organisation.

## **(b) Background**

### **(i) The Pubs Code and Pubs Code Adjudicator**

The Pubs Code and the Pubs Code Adjudicator were introduced by the Small Business, Enterprise and Employment Act 2015.

The Code came into force on 21 July 2016 and applies to all businesses owning 500 or more tied pubs in England and Wales. It governs their relationships with tied pubs but not with their managed houses or free-of-tie pub tenants. The 2 principles of the code are:

- Fair and lawful dealing by pub-owning businesses in relation to their tied tenants
- Tied pub tenants should be no worse off than if they were not subject to any tie

The code is supposed to ensure that tied pub tenants:

- receive the information they need to make informed decisions about taking on a pub or new terms and conditions
- have their rent reassessed if they haven't had a review for 5 years
- can request a market rent only option to go free of tie and pay only a market rent in specific circumstances, including at a rent review or renewal of tenancy

This is set out here: <https://www.gov.uk/government/publications/pubs-code-and-adjudicator/pubs-code-and-adjudicator>

The Pubs Code Adjudicator is a position created to ensure that the Pubs Code is properly implemented and to act as a neutral and impartial arbiter when disputes arise between large pub companies and tenants. Pub sector surveyor, Paul Newby, a Director of Fleurets (a licensed trade property valuation and advisory agency) at the time of appointment was appointed to the role of Pubs Code Adjudicator in March 2016.

### **(ii) Roundtable and licensee complaints**

The British pub Confederation brought together a roundtable of members and licensees on 25<sup>th</sup> October 2016 to share their experiences of the current situation in the pub industry. Evidence was

gathered from across the country as to the current practices of the large pub companies and the tactics they are using to subvert the Pubs Code.

The British Pubs Confederation have further been contacted directly by licensees from across the country who have provided evidence of poor practice and have spoken of the despair being felt throughout the industry. It is clear from this that the problem is widespread. Members of the British Pub Confederation are involved with casework on an almost daily basis as tenants seek further guidance and support against the tactics of the big pub owning companies and who feel that the Pubs Code Adjudicator is not doing his job.

### **(iii) Regulation 50 of the Pubs Code and Section 47 of the Small Business, Enterprise and Employment Act 2015**

Regulation 50 states, *“A pub-owning business must not subject a tied pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under these Regulations.”*

#### **Tied pub tenant not to suffer detriment**

**50.** A pub-owning business must not subject a tied pub tenant to any detriment on the ground that the tenant exercises, or attempts to exercise, any right under these Regulations.

In addition to this, section 47 of the primary legislation, the Small Business, Enterprise and Employment Act 2015, allows the Secretary of State to intervene where it is found that agreements are being struck and/or altered which are inconsistent with the letter or the spirit of the Pubs Code.

## **2. The Report**

### **(a) The Pubs Code**

The large pub owning companies regulated by the statutory Pubs Code are attempting to avoid offering tenants their right to the Market Rent Only option in the Small Business Enterprise and Employment Act 2015 and the Pubs Code.

Information from tied pubco tenants and their representatives, collated by the British Pub Confederation has revealed the following tactics and actions and patterns of behaviour:

#### **(i) Pubcos refusing to agree to allow deeds of variation, and insisting on new leases on less favourable terms, for tenants seeking the Market Rent Only option**

Pubcos are refusing to allow deeds of variation to leases, forcing tenants wanting to pursue the Market Rent Only option to agree a new lease on unfavourable and clearly detrimental terms. ***This clearly is in breach of Regulation 50.***

In insisting that a Market Rent Only agreement must be a new lease, rather than a Deed of Variation, enables pubcos to insist on onerous, unnecessary and clearly detrimental costs and terms which make the MRO offer untenable and in reality will stop tenants from pursuing their legal right to the independent assessment of their rent. These costs and terms include:

- Insisting on 6 months' rent in advance, in one case £[Redacted] with no interest payable. Whilst in other cases quarterly rent payments are insisted upon. In either case, this is not affordable
- Upwards only rent reviews (which the pubcos had, in 2009, promised to the Business, Innovation and Skills Committee they would no longer enforce)
- Very large dilapidation charges, which combined with other costs are unaffordable for most tenants.

Pubcos are also insisting that all legal costs in drawing up the new leases, or overly complicated legal amendments are the responsibility of the tenant.

The Pubs Code makes no requirement for the Market Rent Only option to be achieved only by the surrender of the current lease and imposition of a new lease and this is being done cynically, to invoke unfavourable and detrimental terms and often a shorter term (usually 5 years). A tenant with a tied lease may renew for a maximum of the length of the term, or 15 years, whichever is the shorter period. If however, a tenant is forced to accept a 5 year term for choosing the Market Rent Only option, they not only lose the remainder of their existing lease term but also can then only in future renew for 5 year periods.

**The tenant has had their rights under the Landlord and Tenant Act 1954 diminished if they choose to take the Market Rent Only option, which *is clear detriment and discrimination, and breaches Regulation 50 of the Pubs Code.***

A recent example was sent to the British Pub Confederation in which a pubco had sent a document to a tenant stating that a tied agreement was by far the best option for them, using carefully chosen phrases which were deliberately misleading. The pubco even went to the trouble of presenting the tied option in green and the Market Rent Only option in red, in a clear bid to make it less attractive. This is shown in Appendix 1).

Many pubco leases already contain a simple provision for tied terms to be removed from the lease when necessary, and in virtually all situations where some of the terms of an existing lease need to be changed this is done by a simple deed of variation. The pubcos are trying to use the imposition of an entirely new lease as a way to frighten tenants with very large upfront costs and onerous terms as a way of deterring them from exercising their rights in the Pubs Code to pursue and take the Market Rent Only option.

The British Pub Confederation recently became aware of a situation in which a large pubco had very easily altered a tenant's agreement from a free of tie agreement to a tied agreement. This was done with a simple, quick and cost effective Deed of Variation.

## **Denying tenants the right to trigger the MRO Process**

[Redacted] are flatly denying the opportunity for a Rent Review Proposal under section 19 (1) (b) of the Pubs Code, despite every other pubco accepting that this is a valid request. This forces the tenant to pay £200 to make the PCA office intervene, further putting tenants off exercising their Market Rent Only option rights and causing referrals that are not necessary. This costs the tenant money and delays the process.

In another case, [Redacted] issued a rental assessment prior to the Pubs Code coming in to force, knowing that it was likely to be rejected. The same assessment was then issued again after the Pubs Code came in to force but the tenant was not informed (until it was too late), that the new Code gave them the right to ask for a Market Rent Only option or that this right only exists for a limited amount of time.

## **Pubcos are confusing and misleading tenants so they fail to understand their right to trigger the Market Rent Only option and miss the narrow window of opportunity to do so.**

Tenants are being misled by Pubcos prior to trigger points in order to deprive them of rights afforded by the code. Deliberate non-compliance to the code by pubcos and withholding information explicitly required, prevent tenants accurately comparing offers that would enable them to exercise their rights afforded to them under the code.

One of the companies regulated by the Code, [Redacted], has informed the Pubs Advisory Service and the Pubs Code Adjudicator, in August 2016, that they will not be abiding by the Code's requirements to provide tenants with part or all the information they are legally required to by the Pubs Code under schedule 2 (specifically sections 1 and 5 (see below)).

This means they have admitted that they have no intention of abiding by the legislation passed by Parliament.

The requirements are shown below:



1. A summary of the methods which must be used under the tenancy or licence to calculate the initial or revised rent or the new rent including—

- (a) the information which will be used to support those calculations;
- (b) the justification for the use of such information.

2. An outline of the procedure to be followed during negotiations of the initial or revised rent or the new rent between the pub-owning business and the tied pub tenant.

3. A list of the matters which will be considered to be relevant and irrelevant in such negotiations.

4. Information in respect of the cost of service charges relating to the tied pub during the last 3 years.

5. A forecast profit and loss statement for the tied pub for the period of 12 months beginning with the day on which the initial or revised rent or the new rent is payable (“the forecast period”) and the figures and other information which have been relied on to formulate that statement, including—

- (a) the volume of alcohol, including the number of barrels of alcohol, purchased during the last 3 years from the pub-owning business or its agents;
- (b) the percentage of the tied pub’s turnover during the last 3 years which the sale of this volume of alcohol represents;
- (c) if different from the figure in (a), the volume of alcohol in respect of which duty was paid during the last 3 years;
- (d) a figure for the total estimated sales and gross profit margins of the tied pub for the forecast period, with a breakdown showing separate figures for the estimated sales, gross profit margins, for—
  - (i) draught ales;
  - (ii) draught lagers;
  - (iii) packaged beers;
  - (iv) draught ciders;
  - (v) packaged ciders;
  - (vi) wines;
  - (vii) spirits;
  - (viii) flavoured alcoholic beverages; and
  - (ix) soft drinks;

### **Excessive fees for the independent assessment of the market rent**

Fees being proposed for Independent Assessors are unreasonably high which is making it prohibitively expensive for tenants to pursue Market Rent Only option. To date, the Pubs Code Adjudicator’s office has not given any guidance as to suitable fee levels. A considerable amount of MRO applications have stalled on the basis that in certain cases, as much as £5,000 has been demanded, up front, by the assessor. The Pubs Code (36(5)) states that, “The pub-owning company business and the tied pub tenant must pay, in equal shares, the fees charged by the independent assessor in connection with the determination of the market rent.” The Code does not make a provision for a fee limit. The British Pub Confederation feel that this is an important omission, which should be revisited. In the meantime, the Pubs Code Adjudicator should make a clear determination of suitable fee levels.

Previously, during the self-regulatory regime, the Pubs Independent Rent Review Scheme (PIRRS) stipulated a cap of £2,000 per party. It is evident that Mr. Newby is reluctant to approach this issue [Redacted].

**The British Pub Confederation representatives have raised this as being disgraceful behaviour by all those involved and have demanded an urgent ruling that fees cannot be so high and should be capped as envisaged by the British Pub Confederation and licensees.**

### **Pubcos FOT offers**

It seems evident that when pubcos are purporting to engage in the MRO process, there is no evidence of proper calculations, as are required by the Pubs Code. It seems as though, a general figure is given without any obvious reasoning.

Every free of tie offer so far made is without any justification for the figure and appears to be around a simple doubling of the rent. It is clear that the pubco is simply offering an increased rent to compensate them for the loss of the mark-up on pricing from the tie, which rather than offering a fairer split of pub profits, actually ensures they continue to take more than is fair from pub profits – *rectifying this was the whole purpose of the intervention by the Government!*

Pubcos are cynically telling the media that no-one is taking up “market rent only” deals, when in actual fact it is people not being able to do so.

**So far not one tenant, due to the pubcos thwarting the Code and MRO process has managed to take the Market Rent Only option, indeed none have properly triggered the independent assessment of the market rent.**

### **Intimidation tactics**

Pubcos are intimidating tenants and thus dissuading them from pursuing the Market Rent Only option. Pubcos are informing tenants that they intend to take the pub back for their own management, even where the pub’s turnover figures show that a managed tenancy is unviable. Pubcos then simultaneously offer the tenants a short lease with no right of renewal, through their area manager, meaning that in the future they cannot choose the Market Rent Only option at rent review of lease renewal and are signing away their rights to this. This pressures tenants into taking the short lease if they wish to stay in the pub, losing out on their new legal protections under the Code

## **(b) The Pubs Code Adjudicator (PCA)**

This report has so far laid out the routine ways in which pubcos are thwarting and flouting the statutory Pubs Code.

What is extraordinary, is that all of these above things are being done and clearly being done systematically by pubcos, with little or no response from the PCA’s office despite them being made aware that these issues are occurring in case after case.

The statutory quasi-judicial Pubs Code Adjudicator is in place to uphold and enforce the Pubs Code, and to ensure it works as intended by the Government. [Redacted].

## **The Ways in Which the Pubs Code Adjudicator is failing to uphold and enforce the code and operate as a quasi-judicial adjudicator**

The Pubs Code Adjudicator is failing to uphold the code in a number of ways and most seriously of all, is failing to operate in the role as intended, as a quasi-judicial Adjudicator.

### **A failure to understand the Adjudicator's role, and a failure to Adjudicate**

[Redacted] consultation on how to approach breaches of the Code shows a fundamental misunderstanding (or a [Redacted] distortion and watering down) of the role of the quasi-judicial Pubs Code Adjudicator.

On the Government's own website (<https://www.gov.uk/government/organisations/pubs-code-adjudicator/about>) it is stated clearly that the Adjudicator is responsible for, "*enforcing the statutory Pubs Code*". Further, it states that, "*The code imposes information and transparency obligations on the pub companies.*" There is no ambiguity in the wording here and little is left open to interpretation. The regulations are clearly set out in the Pubs Code and are expected to be enforced fully. Any failure to do this would amount to a profound failure of the office holder to perform the role and duties of the Pubs Code Adjudicator – **yet that is exactly what is happening.**

Rather than Adjudicating and enforcing the Code, Mr. Newby is seeking to turn the role into a being merely an arbitrator, which is of course was a part of his work in his previous job; and no doubt where he is comfortable. However, whilst the role at times does necessitate him arbitrating on issues of disputes over some specific matters, he is instead seeking to arbitrate on disagreements over the interpretation of the Code instead of making a ruling on what the position should be. [Redacted].

It is clear that Mr. Newby is reluctant to make a decision which he knows will affect many thousands of cases to follow. Mr. Newby should be able to outline his own interpretation on law and legislation, to guide the parties, and avoid dispute - just as a judge must assume at the outset of a criminal trial that the accused is innocent until proven guilty.

### **Refusal to clarify general principles of the Code**

There are a number of key issues, many related directly to pubcos' systematic flouting of the Code, that the Adjudicator has been asked to rule on or clarify. He has systematically failed or refused to do so and instead, despite their being a clear need for a ruling or clarification, has claimed he will look at such key issues on a case to case basis, ignoring key principles of the Code, and preventing clarify on its operation. These issues are:

## **Non-Compliant Rental Assessment**

Since the inception of the Code we know of no Rental Assessment Proposal that has been provided in a complete fashion, every one missing key information required by Schedule 2 (e.g. justification for assumptions like estimated sales in rent assessments). Apart from a general statement reiterating the Code provisions, Mr. Newby has taken no action and done nothing to clarify what is required.

## **New Agreement or Deed of Variation**

Every MRO offer has been drawn up as an entirely new contract with associated costs designed to put off the Tenant and thereby avoid any tenant taking the MRO option. Whilst the PCA office has finally confirmed to us that MRO agreements could be delivered by a Deed Of Variation, Mr. Newby has remained silent on the issue. A statement could save tenants having to pay £200 to have an individual referral each time, which is what is happening now, or being scared off the MRO option altogether.

## **Stocking Requirement**

[Redacted] appear to accept that there is no stocking requirement in the regulations. [Redacted] and [Redacted] do not and these tenants are facing a legal challenge. This issue could be simply overcome by Mr. Newby by confirming that there is, or is not, a stocking requirement contained within the legislation. Again this would stop individual cases having to be put to the PCA, and the requirement for cases to set precedents.

## **The Office of the Pubs Code Adjudicator is failing to handle the work**

The PCA's office is also failing to deal with the workload it has. By their own admission, Mr. Newby's office have failed to provide a proper service to tenants. In December 2016, after just four months in the role, Mr. Newby was forced to admit that he could give no indication as to how long disputes would take to resolve. This is leaving tenants in uncertain situations whilst the large pub companies are free to employ the aggressive tactics set out above. There is no protection or advice being offered by Mr. Newby's office, at a time when tenants are desperate for these services, as the PCA office seems to sink beneath an ever increasing workload. By January 2017, not one MRO referral has been completed. There have been vague indications from the PCA that the first may be complete by March / April 2017.

## **Inappropriate delegation and sub appointment**

The PCA is also seeking to delegate jobs out and has asked RICS to appoint Independent Assessors. The British Pub Confederation believe that Mr Newby [Redacted], he has sub contracted his official duties in relation to the appointment of Independent Assessors. Mr Newby has engaged a third party to take on his statutory functions, in this case the Royal Institute of Chartered Surveyors Dispute Resolution Scheme (RICS DRS).

Most worryingly, Paul Newby has appointed an alternative arbitrator, [Redacted].

### 3. Other Concerns about the Pubs Code Adjudicator

There are other concerns about the Pubs Code Adjudicator, [Redacted].

#### The Adjudicator's Self-Written Conflict of Interest Policy

Astonishingly, Mr Newby has been responsible for the setting up of the Conflicts of Interest Policy which covers his own job. The policy he has created has been heavily criticised by the British Pub Confederation for falling well below what are widely regarded as industry standards over conflicts of interest and wholly unacceptable for a statutory quasi-judicial Adjudicator. Mr. Newby has clearly [Redacted] his own conflict guidance management document, which far from guaranteeing that conflicts of interest are disclosed and avoided, [Redacted].

Whereas the Royal Institute of Chartered Surveyors suggests that an Adjudicator should inform those involved in a dispute if they (the Adjudicator) have advised either party in the last 5 years, Mr. Newby has decided to reduce this to 2 years [Redacted]. Furthermore, Mr. Newby has determined that only connections with individuals in the last 2 years, such as with a former client, need to be disclosed and not dealings with the pub companies he is supposed to be regulating, [Redacted]. This means that connections with organisations, but not a particular individual, will be left unreported and such conflicts ignored.

The Conflicts of Interest Policy as written by Mr. Newby, and available at the link below, states that:

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/539113/pubs-code-adjudicator-register-of-interests.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/539113/pubs-code-adjudicator-register-of-interests.pdf)

***This policy states that the Adjudicator will disclose to the parties in respect of a dispute where he: (British Pub Confederation commentary is shown in blue)***

1. Has directly advised either party in the last 2 years in relation to the individual property to which the matter relates; ***Meaning if, for example, [Redacted] had 5000 pubs Mr Newby could have hypothetically acted on 4999 but not the subject property and he need not even disclose this involvement to the pub tenant! Clearly this is absurd as well as unacceptable.***
2. Has had a professional connection in the last 2 years with an individual who is, or is representing, a party to a dispute, for example a direct former client or a former Fleurets colleague; ***the pubcos are not individuals so are exempt!***
3. Has had a personal connection with an individual who is, or is representing, a party to a dispute for example a direct family member, friend or neighbour. ***See above, this exempts personal connections with companies.***
4. The role of the Adjudicator is to uphold the Code to ensure fair and lawful dealing by pub companies with their tied tenants. Paul Newby has already proven he is capable of standing up for tenants. In the past he has acted for and been successful in cases when

representing tenants. Therefore, he is well aware of the issues faced by tenants of the regulated pub companies in the current market. *Yet RICS (the Royal Institute of Chartered Surveyors) have confirmed that their guidance includes the principle of a "tied tenant being no worse off..." no known example of Mr Newby applying this principle in his entire career as a surveyor or arbitrator has been discovered – and a recent request from the Pubs Advisory Service to provide any examples was ignored!*

The RICS's guidelines on Conflict are comprehensive (Appendix 2) and based upon the same guidelines prepared by the International Bar of Arbitrators.

Mr Newby appears to have watered down his own conflict policy considerably.

The legal test for perception of bias, outlined in *Porter v Maghill*, works on the assumption that the fair-minded observer is supplied with all the facts in order for them to make an informed decision. Mr. Newby has [Redacted] his own conflict guidance management document, which [Redacted]. In addition, it appears that Mr. Newby has mistakenly applied the legal test; it is not for him to decide whether there is a perception of bias or conflict, or to be selective on the information he discloses. [Redacted], as revealed in *Cofley v Bingham*, made the same mistake but fortunately for the RICS the case was not especially prominent. This is not the case with Mr. Newby. Should a party challenge any of Mr. Newby's decision, possibly by judicial review, in all probability they would win.

On every occasion that a tenant or tenant representative body has objected to Mr Newby on the grounds that he has not declared his involvements (possible conflicts of interest) correctly, Mr Newby has decided to ignore the objection and stated that he will hear the case anyway. In the case of [Redacted], the conflict is made worse by the fact that [Redacted] gave evidence to a Select Committee in July 2016 specifically about the [Redacted].

#### **(x) No record of implementing the long-standing “no worse off” principle**

A further area of concern is Mr. Newby's [Redacted] to apply simple principles. Since 2009, the Royal Institute of Chartered Surveyors has stated that a proper interpretation of its guidance would mean recognising the principle of a tied pub tenant being no worse off than a tenant of a non-tied pub:

#### **4. Valuation Guidance**

The content of Valuation Information Paper No.2 (*The capital and rental valuation of restaurants, bars, public houses and nightclubs in England and Wales*) was the subject of much debate during the Forum hearings. It is clear that the guidance within the paper is relied upon within the industry in calculating rents. The Forum heard that there was some confusion in the interpretation of the guidance with the paper. For example in the treatment of the valuation of the *wet rent*, where it is clear to us that most lease agreements require a valuation largely on the terms of the lease. This follows the principle of the tied tenant being no worse off than the non tied tenant; a position which is arrived at with a correct interpretation of RICS guidance.

Mr. Newby has been unable to provide any evidence of having experience in applying this principle in his previous role, or indeed, to apply it in his current role. Moreover, Mr. Newby's office has stated on his behalf that he did not recognise this principle in his prior role as a RICS surveyor. The lack of proper application of such a fundamental principle (set by his own profession's regulatory body) [Redacted].

### **Associating himself and advising tenants to consult with conflicted organisations**

Mr Newby and his office are directing tenants for advice to organisations that are compromised by their relationship with the Pubcos and who it seems have no clear understanding of the Pubs Code or how it is working.

Mr Newby has been keen to present organisations as 'supporting' him. Indeed, Iain Wright MP, Chairman of the Commons' Business, Innovation and Skills committee, commented that Mr. Newby enjoys a, "longstanding relationship with pub companies". When questioned about his impartiality, Mr. Newby and to justify this claim, cited that he had the support of the Association of Licensed Multiple Retailers (ALMR). The ALMR's [Redacted] has praised Mr. Newby for his, "experience working in the licensed hospitality industry". It is worrying that the ALMP, set up to represent tenants, would praise Mr. Newby in this way [Redacted].

Mr. Newby has undertaken a number of road shows in conjunction with the [Redacted].

[Redacted] at their road shows about Regulation 19 (2)(a) which states that a tied tenant can choose to go through the MRO process if they have failed to complete a rent review in the last 5 years – this regulation was not widely understood and has proven to be critical - especially for those who missed the opportunity because of the Government delay in implementing the Code. [Redacted] omitted to cover this point on their website, and despite being made aware of the omission by The Pubs Advisory Service, have made no effort to rectify this issue or brief members attending their roadshows.

Despite attending at least 2 road shows himself, Mr. Newby failed to mention this omission. In the [Redacted] Parallel Rent Assessment calculator, issued in 2016, the divisible balance was suggested at 60:40 in favour of the large pub companies rather than the normal 50:50 recommended by the Royal Institute of Chartered Surveyors.

[Redacted].

[Redacted]

**[Redacted]**

[Redacted]

See below from the RICS Guidelines on Conflict:



## 4 The overriding principle

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**4.1** The overriding principle of this guidance note is that every dispute resolver should be, and be seen to be, impartial at the time of accepting an appointment and remain so during the entire proceedings until the final decision has been given or the dispute has otherwise finally terminated.

**4.2** It is a fundamental principle of justice that each of the parties is treated equally and fairly and that the parties perceive this to be the case.

**4.3** The authorities on the subject show that the courts regard two types of partiality (or bias) as obstructive to justice, because they create a possible conflict between the interest of the dispute resolver and the interest of the parties to the dispute.

**4.4** The first is where the dispute resolver would have a direct (usually pecuniary) interest in the case, which would realistically be affected by its outcome. In such a case, the existence of bias is presumed (with the result that this category is usually called 'actual bias'), and gives rise to automatic disqualification. A very minor pecuniary interest (for example, a negligible shareholding), will not usually count.

**4.5** The second is usually referred to as presumed or unconscious or apparent bias arising from an involvement, and is found where the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the dispute resolver was biased.

Schedule 1 (The Pubs Code Adjudicator), in section 10 of the Small Business, enterprise and Employment Act 2015 sets out the below:

### *Conflicts of interest*

- 10 (1) The Adjudicator must make procedural arrangements for dealing with any conflict of interest affecting –
  - (a) the Adjudicator,
  - (b) the Deputy Adjudicator, or
  - (c) staff working for the Adjudicator.
- (2) The Adjudicator must consult the Secretary of State before making or revising the arrangements.

Secretary of the British Pub Confederation, [Redacted] wrote to Government under a Freedom of Information request asking if Mr. Newby had consulted with the Secretary of State regarding his Conflict Policy. (Appendix 5)

It would appear that BEIS officials are unable to answer this simple question and have requested more time, leading us to believe that Mr. Newby did not in fact make the SoS aware of the Conflict policy (Appendix 6), or that the SoS approved it without proper consideration of its implications.

[Redacted]

Tenants and the Pubs Advisory Service (PAS) have asked the PCA for clarity [Redacted], but so far no detail has been given – moreover in several cases he has said it is already in

the “public domain” which of course it isn’t as there are no figures on which an average tenant can apply Porter v Maghill.

In short we have no confirmation of any of the figures involved just estimates and if true  
[Redacted]

The Pubs Code will, if applied correctly, transfer a much greater proportion of the profit of a tied Pub from the pubco to the tenant. [Redacted]

#### **[Redacted] evidence/answers given to the Select Committee**

In July 2016, then Chair of the Business, Innovation and Skills Select Committee, Iain Wright MP wrote to the Secretary of State, Greg Clark MP, to give the committee’s view that Paul Newby was not a suitable candidate for the role of Pubs Code Adjudicator and that the appointment process should be reopened.

This followed Mr. Newby giving evidence to the Committee. The British Pub Confederation also wrote to Mr. Clark [Redacted] in Mr. Newby’s answers. The letter stated that,

[Redacted]

## **4. Conclusion & Recommendations**

In the first six months of the operation of the Pubs Code it is clear that pubcos are thwarting and flouting Regulation 50, making it in effect impossible for tenants to pursue the Market Rent Only option. Tenants are being denied their legal rights and are being treated disgracefully.

The Pubs Code Adjudicator has shown himself to be [Redacted] to perform this hugely important quasi-judicial role. He clearly doesn’t understand the role of Adjudicator (or is deliberately operating simply as an arbitrator). He is failing to uphold the Pubs Code, which is failing tenants, failing the Government and Parliament who introduced the Code, but also failing

basic fairness and justice. This cannot be allowed and he must be removed, with someone appointed who will operate as a quasi-judicial adjudicator and properly uphold and enforce the Pubs Code – and ensure it works as intended in the Small Business, Enterprise and Employment Act (2015) and Code, and associated guidance from civil servants.

**The British Pub Confederation therefore call for the following action to be taken:**

- The Government must intervene and ensure that the Pubs Code works as they (and Parliament) intended and ensure that the office of the Pubs Code Adjudicator is upholding and enforcing the Code.
- The Secretary of State must accept the recommendation of the Business, Energy and Industrial Strategy Select Committee and remove Paul Newby and appoint a new Pubs Code Adjudicator who [Redacted] has the confidence of tenants.

**British Pub Confederation**

January 2017

# Appendices

## Appendix 1

[Redacted]



## 4 The overriding principle

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**4.1** The overriding principle of this guidance note is that every dispute resolver should be, and be seen to be, impartial at the time of accepting an appointment and remain so during the entire proceedings until the final decision has been given or the dispute has otherwise finally terminated.

**4.2** It is a fundamental principle of justice that each of the parties is treated equally and fairly and that the parties perceive this to be the case.

**4.3** The authorities on the subject show that the courts regard two types of partiality (or bias) as obstructive to justice, because they create a possible conflict between the interest of the dispute resolver and the interest of the parties to the dispute.

**4.4** The first is where the dispute resolver would have a direct (usually pecuniary) interest in the case, which would realistically be affected by its outcome. In such a case, the existence of bias is presumed (with the result that this category is usually called 'actual bias'), and gives rise to automatic disqualification. A very minor pecuniary interest (for example, a negligible shareholding), will not usually count.

**4.5** The second is usually referred to as presumed or unconscious or apparent bias arising from an involvement, and is found where the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the dispute resolver was biased.

## Appendix 3

[Redacted]





## Appendix 4

[Redacted]







## Appendix 5

[Redacted]

## Appendix 6

[Redacted]