



BII

BRITISH INSTITUTE OF INNKEEPING

BRITISH INSTITUTE OF INNKEEPING

**STATUTORY REVIEW
PUBS CODE AND
PUBS CODE ADJUDICATOR**

19th July 2019

Introduction

The BII (British Institute of Innkeeping) is a membership organisation for individuals working in the licensed retail sector, with circa 8,000 individual members running premises across the UK - predominantly tenanted, leased, managed and freehold pubs.

The organisation provides free helplines, online business support, and guidance on key industry issues, face-to-face networking opportunities and savings on a range of supply deals for its members. It is the only organisation of its kind to represent the individuals working at the front line of licensed retail.

Our helplines and contract builder were used over 6000 times in 2018. Since the introduction of the Pubs Code we have taken nearly 1300 calls to the licensee's helpline, with circa 1000 coming from licensees of the six companies covered by the Code.

As an organisation we welcomed the establishment of the Pubs Code Adjudicator's office.

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?

The Pubs Code was introduced in July 2016 having been, in our opinion, rushed through Parliament without sufficient consultation into its contents.

The Code introduced a number of areas Pub Operating Bodies were to comply with, including a Market Rent Only (MRO) option for tenants, which was intended to allow them should they so wish to trigger an MRO request. The MRO request could be triggered by several methods, the most common being the end of a Landlord and Tenant protected agreement or at a rent review of the premises. If successful, a tenant would then be able to purchase all their tied products from parties other than their pub owning company, should they so wish.

The speed the new code was introduced is, we believe, partly at the root of the criticisms of the way the code is working and the take up rate. There was no transition period introduced and this resulted in the industry trying to interpret a complicated piece of legislation with little time or guidance. Even experts from the pub industry sat discussing individual clauses of the Code often ending up with each of them interpreting the clause in a different way.

The BII together with the ALMR (now UK Hospitality) and the FLVA put a question and answer sheet together and we at the BII set up a helpline for members to give advice on the MRO application process. Since its inception we have taken just under 1300 helpline calls, ranging from fifteen minutes to over an hour in duration. Of the 1300, just over 1000 were received in relation to companies covered by the Pubs Code.

The BII is a charity and we made the decision to only give advice on the process. This decision was centred around the fact that we would not be insured to give advice on rent or tenure. We therefore help and advise our members on how to apply for an MRO option if they so wish. The BII then set up a panel of independent professional experts where members could obtain rental and legal advice regarding any type of agreement on offer and how to proceed if they wish to complete either the

tied or MRO process. These experts were Chartered Surveyors who had been accredited by the Pub Governing Body.

Question 2 & 3

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?

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?

As we have said earlier in this document, we have taken circa 1300 calls via our helplines, many connected with the Pubs Code and MRO offers. Whilst we only give advice on process, many of our members have given us their views on the offers they have received. The main points raised by our members have centred around deeds of variation and rent.

We believe that the Pubs Code did set out to meet the principle of a tied tenant being “no worse off” by being able to apply for an MRO-option. This provided a way for a tenant to decide whether they believe they are no worse off with a tied or free of tie agreement.

It was important therefore that when making an MRO offer POB’s made it reasonably simple to take up any of their options. We have however had a number of members who have reported:

- a. A request that dilapidations to be carried out earlier than would otherwise be required under their existing lease.
- b. A request for an increase in rental deposits.
- c. A change in payment terms from in some cases, one weeks’ rent in advance to three months.
- d. Additional solicitor and stamp duty fees.

The rent proposals themselves whether tied or free of tie are not independently produced but are the Fair Maintainable view of the POB’s. To test these proposals a tenant can, if they so wish, go to either PIRRS(Tied) or Independent Assessment (MRO) to have them independently vetted. We therefore recommend to our members that they take professional advice from our published Chartered Surveyor’s list who are all RICS qualified. Our list was compiled from the Pub Governing Body’s Chartered Surveyors that have been approved by them.

The BII administers PIRRS from the Farnborough offices and the following table shows that since the six companies subject to the Pubs Code allowed tied rents to be taken to PIRRS the numbers applying are increasing albeit fairly slowly.

Dates	Applications	Withdrawn	Settled	Open Cases
01/01/2017-31/07/2017	11	3	8	0
01/08/2017-31/07/2018	12	7	5	0
01/08/2018-30/06/2019	18	6	6	6

The open cases in 2018/2019 are those that have been received recently and are still to be settled. All of the open cases are for pubs owned by the companies covered by the Statutory Code. We believe this low-cost option to settle the tied rent should be given more publicity by the PCA and should be part of their “Taking the MRO option” – Tied rent considerations advice note issued in June 2019.

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?

We have welcomed the number of fact sheets and guidance notes issued by the PCA’s office but to the individual tenant many are still regarded as complicated and difficult to understand. We would like to see guidance notes written in plain English so that tenants can easily understand how they can access the rights the Pubs Code has granted them.

In March 2018, the Pubs Code Adjudicator’s office carried out a survey of pub tenants which found that:

- 72% of tenants were aware of the Pubs Code.
- 63% of tenants were aware of the right to request Market Rent Only agreement at certain trigger points.
- 69% of tenants said they felt they had all of the information required about their pub owning company Business Development Manager.
- 64% of newer pub tenants surveyed stated that they would definitely want to remain as a tenant for at least five years.

We are concerned that although the PCA’s office have tried to make sure tied tenants understand their rights, looking at their own survey, over a third were unaware or didn’t understand their rights. We are concerned therefore that tenants may have missed the opportunity of an MRO agreement during the first three years and remind all concerned that as most agreements/rent cycles are five yearly we are only three years into a 5 year cycle and there are many more yet to have the opportunity to apply for an MRO option.

In addition, we believe that a panel of professionally vetted, qualified experts who hold professional indemnity insurance should be made available to all tenants and not confined to our members. These experts would include Chartered Surveyors, Building Surveyors, Solicitors and Accountants. As we already have expert panels with indemnity insurance available to our members, we would be happy to discuss extending this to all tenants.

Finally, timings are very short and many of our members have missed the opportunity to apply for an MRO assessment because they have not applied in time or adhered to other time limits. We believe timings should be considered during this review and believe it would be helpful if once an MRO rent assessment has been sent to the tenant, that assessment sets out when the 56 day negotiating period starts and finishes and the date that independent assessment of the rent can be applied for after the initial 28 days.

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.**
- 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.**
- 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.

We believe the PCA's office has generally performed in a satisfactory manner. We share other trade bodies frustration that disputes, and arbitrations referred to the PCA have taken far too long to be answered and have resulted in high costs to the parties concerned. There are some very old cases still outstanding. That said, we are not party to the detail within individual cases and are aware that they can be held up by tenants, their advisors and the PCA. Since the appointment of a Deputy Adjudicator it does appear that the process of making decisions has speeded up and the backlog of outstanding matters are reducing in number. The recent publication of arbitration awards does allow members to understand the Adjudicator's decisions which can help with queries or objections they may have.

Question 6

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

We have no comments to make under this section other than the cost of the PCA office seems to have escalated way beyond that which was predicted at the introduction of the Code.

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 and the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016¹.

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

First, we hope that no major changes will be made to the Pubs Code. The BII however was worried when the Pubs Code was introduced that it would not offer tenants the services provided by PICA-Service.

The Pubs Independent Conciliation and Arbitration Service (PICA-Service) operated under the jurisdiction of the PGB offered an accessible, independent, low cost dispute resolution service, to the licensed industry which allowed tenants/lessees and Pub Companies/Breweries to resolve disputes in a fair and timely manner.

We believe that the Pubs Code Adjudicator is generally only able to advise on disputes when there has either been a major complaint, or they have received a number of complaints of a similar nature. This means that day to day disputes are being left unanswered. A proportion of the calls to our helpline concern matters like this and in fact, the PCA themselves have often told tenants that have complained to them to phone the BII. Whilst we will always try to help and liaise with POB's and often solve these queries and problems, we have no jurisdiction over the pubs code companies. Therefore, a tenant that in the past would have taken their case to PICA-Service now has nowhere to go.

The main complaints we receive centre around:-

- a. Dilapidations
- b. Inventory purchases and sale back
- c. Deposit returns

We believe that even if the PCA did have some jurisdiction over complaints, they do not have the day-to-day pub experience to deal with them. A best practice guide to each of the above topics would assist and we also suggest that an external PICA-Service type service should be introduced. This should however be part of the existing PCA budget (not an additional cost to Pub Companies).

Part D: Impact Assessment and other information

Question 8

The review will consider the key assumptions made in the Impact Assessments² 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.

The BII were one of the groups that were worried that the introduction of a Pubs Code would alter the strategy of those POB's that were subject to the Code.

We believed it would speed up the sale of properties at the lower end of estates, increase the number moved to direct management, continue the reduction of the number of lease properties to be replaced by shorter length agreements contracted out of the Landlord and Tenant Act.

We know from the figures provided to the PCA that the majority of open market lettings are now for short 5-year terms and in the main are excluded from the Landlord and Tenant Act. Although we believe the leased market was in decline in July 2016 there is no doubt in our mind, the introduction of the pubs code has speeded up the process of moving from long term leased properties to shorter term contracted out tenancies.

Of the 10,099 agreements reported in the 2018 compliance reports (as at 31st March 2018) the number of contracted in agreements for the six Pubs Code companies was 4766, which is less than 50% of their estates. In comparison, in the Pub Governing Bodies report (as at 31st July 2018) covering the circa 3,000 pubs for companies governed by the Under 500 Codes in England and Wales, the number with Landlord and Tenant protection was 82%.

The number of pubs owned by the six companies at the commencement of the Pubs Code was reported to be approximately 12,000 (PCA figures July 2016). In the compliance reports to the PCA (Period ending 31st March 2018) this number had dropped to 10,099 which can only mean nearly 2000 pubs or 17% of the POB's estates have either been sold or transferred to their managed estates.

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.

We welcome the paper on sediment and waste produced by the PCA's office, which we hope will conclude an area that has caused concern to our members and tenants in general.

One of the aims of the Pubs Code was to re-balance the bargaining powers between tenant and pub company. We have had many members report they have used their option to apply for an MRO rent assessment as a way to re-negotiate their tied rent and have been happy with the outcome. It can be seen from the compliance reports for the six companies that this is borne out by the number of MRO applications that result in new tied rents being agreed and believe therefore that the principal behind the code is working.

As members of the Pub Governing Body we would also bring your attention to the submission made by them regarding the pubs not covered by the Pubs Code.

Lastly, we are concerned about the number of times we are told POB employees mention that a pub could be transferred to their managed divisions. We accept that under the Landlord and Tenant Act this is perfectly acceptable, and it would be wrong of the POB not to mention it providing that they do intend to transfer the house and secondly it is within a reasonably short time prior to the end of the agreement.

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

We urge Government to make any proposals they may have following the consultation as quickly as possible.