



Pubs Code and Pubs Code Adjudicator: statutory review

Response form

The consultation is available at: www.gov.uk/government/consultations/pubs-code-and-pubs-code-adjudicator-statutory-review

The closing date for responses is 22 July 2019.

Please return completed forms to:

Pubs Code Review Team
Department for Business, Energy and Industrial Strategy
1st Floor, Orchard 3, 1 Victoria Street, London SW1H 0ET

Email: PCAreview@beis.gov.uk

Personal / Confidential information

Please be aware that we intend to publish all responses to this consultation.

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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.](#)

About You

[Redacted]

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

Questions

Part A: The Pubs Code

Question 1

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

Comments: Since its late introduction in 2016, the Pubs Code has failed to meet the objectives set out in the Small Business, Enterprise and Employment Act 2015. The enormity of this failure can be measured by the continued demise of the tied pub sector, the poor uptake in MRO offers (11 pubs between 21 July 2016 and 30 April 2017 - approximately 2%), and the failure of the adjudicator's office to level a playing field that would ordinarily have allowed a fairer transfer of the pub's profits to the occupying tied tenant.

The Pubs Code is poorly drafted, its content confusing, Parliamentary intent has clearly been mismanaged, and fairness and the principle where a tied tenant should not be worse off than if they were not subject to any product or service tie, has not been achieved. If anything, the overarching principles of fairness and the tied tenant being no worse off than if they were free of tie, seem to have been completely ignored, or at best, undermined by a poorly drafted code and an entirely ineffective Pub's Adjudicator.

Parliament should be under no illusion; the code and its regulators were commissioned to establish a fairer marketplace through the introduction of an MRO option. This simple concept, had it been supervised correctly, would have allowed tenants to change their tied lease to an agreement that allowed them to trade free of beer and service ties and have their rent set by an independent assessor on a free of tie basis. Three years after the introduction of the code we have yet to see a true MRO rent that reflects the principle in its purest sense, instead we have a code that fails at every level to deliver the intent and principles of the legislation [Redacted].

Tenants do not have access to a genuine MRO. The adjudicator may allude to a high consent award success rate, having finalised numerous awards, the majority of these awards are purely consent awards, (ie confirming that the adjudicator was not required to make a decision award, [Redacted]. The PCA has little or no regard to the 'tied tenant no worse off principle', or indeed, the actual rent level that is set at the end of the tied rent process. It is clear, a high percentage of consent awards are signed off by Paul Newby and Fiona Dickie and passed off as successful, outcomes, when in reality, they are awards whereby the tenant has simply given up on the PCA process and compromised on a deal where there is no measure or check by the PCA to ensure it complies with the 'no worse off' principle. In all cases, the adjudicator never sees the rent, and is therefore unable to determine whether the POB has complied with the principles of the legislation.

The MRO process is slow, often taking in excess of two years to complete. The resulting rent – if agreed – is usually settled after years of intimidation by the POBs, claiming huge dilapidation costs,* buying ‘out of tie’ fines, and Section 25 Notices where the tenant is threatened with eviction because the POBs claim they want to avoid MRO legislation. Put simply, tied tenants that have sought to action their rights have been stonewalled by the pub owning businesses and have had obstacles and onerous lease conditions placed in their way in order to subvert the MRO process. Aggressive business practices coupled with high costs and procedural delays are the fundamental reasons for low MRO uptake and the high number of tenants that have simply given up and thrown in the towel. As the numbers of failed attempts become more widely publicised, interest in the MRO option will diminish – which is the clear objective of the POBs who ultimately seek revocation of MRO on Code review. Should a MRO offer be agreed between the parties, it is usually at a level that ignores the principle of fair and lawful dealing and ensures the newly free of tie tenant is actually NO BETTER OFF THAN IF THEY HAD REMAINED TIED.

The Code has clearly failed, and the will of Parliamentary to initiate fairness in a much skewed and entirely anticompetitive marketplace, remains a distant pipe dream.

* <https://www.morningadvertiser.co.uk/Article/2019/07/16/Ei-Group-248k-dilapidations-bill-accusations>

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 Code, as currently drafted, is flawed and will not deliver on the principle of fair and lawful dealing. The complexity of code content seeks only to cover areas that can already be obtained by readily available means and does little to stop tenant abuse and tied product overcharging with no clear time limited process to lead to a fairer split of the pub profits. Only a few tenants who have sought to initiate a MRO option have managed to achieve marginally better terms than they were originally offered. This amounts to two things, the tenants who have managed to achieve improved circumstances, have done so at great expense, time and effort simply to arrive at a MRO which is unfair, or remain tied on marginally better terms than they were before.

Pub owning businesses are required to ensure their agreements are fair and any tenant requests for MRO are considered fairly and in a timely manner – nothing could be further from the truth. POB's are not willing participants in the process and do not want MRO to work. To ensure industry status quo and exclude tenants from obtaining a fair deal, POBs are seeking to resist the process in any way they can. MRO should always have been a simple variation to the existing tied lease agreement, severing the tied related terms (this is already an option, available only to the POB's, written into all tied leases). Instead, faced with a tied tenant requesting a MRO option, the POB insist the agreement can only be processed by an entirely new agreement, which is costly, complex and offers them ample opportunity to implant new more onerous lease terms, thus avoiding the legislative intent.

Sadly, the adjudicators office has remained silent on this issue, and a simple lease 'Deed of Variation' or even a side letter, that would ordinarily cost the tenant a few hundred pounds, has

turned into an exercise of obfuscation and delay, all at a huge cost to the tied tenant.

The Adjudicator's recent clarification on this issue seems to indicate that there is no set way to deliver MRO (DOV or new agreement), only that it must satisfy Code regulations. This ultimately leaves the dominant negotiating partner an opportunity to avoid offering MRO by reasonable means and demand the most unattractive route – ensuring a simple profit rebalance remains unobtainable for the tied tenant.

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: There are no provisions within the Code enabling any verification, or remedy, should a tied tenant consider they are worse off than if they were free of tie. The problem now and always has been, is that the POB's, whether instructed legally or otherwise, cannot apply the principal that the tied tenant should be no worse off than if they were free of product or service tie. POB's actions – even under the eyes of a Government appointed Adjudicator - are little different to those that led over many years to the failure of the tied pub sector, the closure of thousands of pubs and the devastation and hardship forced on tied tenants through pub business failure. (Pub tenant churn figures that are never released to inquiries by the POBS). The fundamental purpose of the Code and the primary role of the PCA, is to ensure that tied pub tenants should not be worse off than they would be if they were not subject to any product or service ties. After three years of code implementation, there remains absolutely no mechanism in the Code for this principle to be tested. Without a Parallel Rent Assessment (PRA) – a simple one page document whereby the tenant can judge for themselves if the tied rent offer is fair and the achievable profit is comparable to a free of tie pub – the PCA has no means to check if the tied rent observes the prime principle.

The tied POB business model, as currently operated, may be a huge success to private equity firms and shareholders, has proved to have failed time and time again, by the massive tenant failure rate and derisory income levels of tied tenants. The POB's have continued to behave in a manner that can only be described as [Redacted], with clear and obvious efforts to subvert current legislative intent.

POB's do not want their tenants to access MRO easily. The Code and existing legislation have left loopholes and grey areas that allow POB's to exploit and deny meaningful MRO options. The imbalance between the bargaining positions of the parties remains lopsided and heavily in the POB's favour, this coupled with complex and confusing Code content, allows the POBs sufficient opportunity to run circles round the PCA, game legislation and make a complete mockery of Parliamentary intent.

What is even more surprising is that the PCA has failed to accept that he has little in his armoury to judge whether or not the tied tenant, having already submitted a MRO complaint to his office, has established a rent deal with his POB that satisfies 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. The PCA has no mechanism to check the principle, and to date, has yet to undertake a single

investigation that confirms the POB are acting in a fit and proper manner and applying the principle fairly.

I have seen no evidence that a single tied tenant has achieved a genuine MRO outcome that embraces the 'tied tenant – no worse off principle' in its entirety. The PCA, by his own admission, is arbitrating on breaches of the code that do not include areas of MRO and do not include effective mechanisms to stop rent and tied product over charging. The PCA allows POBs to negotiate rents on a MRO basis, but does not have the power to set, access or investigate tied rents, or establish if the level agreed meets the test established by the prime principle. An agreed rent between the tenant and the POB becomes a completed PCA consent award and is used by his office as a misleading measure of the Code and his own performance.

A consent award - established between POB and tenants, has only the slenderest PCA involvement – is not, and never can be, the mechanism in which the 'No worse off principle' applies. Nor will it ever allow for the shift in the balance of power between the dominant negotiating partner, or transfer a fairer proportion of the pubs profit to the tenant in order to make the pub business viable.

This is not, and never can be, about making the tenant slightly better off than they were before applying for MRO status. This may be the aim of the PCA, but it is not what was intended by the legislation, nor is it enough to stop POB abuse or establish a level playing field. **The law is clear, the tied tenant should be no worse off than if they were free of tie.** MRO, as currently applied and overseen, **will not** achieve this. There remains no mechanism in which to test the principle nor is there the will from the PCA to ensure its success.

MRO, on its own, can never be achieved. There needs to be a simple test by which the tenant can check if MRO on offer establishes the 'no worse off principle'. That can only be achieved by reintroducing a Parallel Rent Assessment. (PRA). PRA, was removed from the current in legislation in 2016 when the BBPA convinced Baroness Neville-Rolfe that the process was complicated and expensive*. It is neither. A PRA is a simple process that allows the tenant the opportunity to check whether the POB MRO offer is fair and embraces the 'no worse off principle'. It is in effect a simple side by side, one-page calculation that makes comparisons on costs and profit etc, allowing the tenant to make an informed decision on whether to take up their MRO offer or remain tied. Because the comparison is based on the same pub, (costs, turnover etc), it prevents the POB from distorting the figures in order to promote a higher rent offer as rent is the only accounting variable that need be changed.

* <https://publications.parliament.uk/pa/ld201516/ldhansrd/text/151104-gc0001.htm>

Question 4

What, if anything, do you think needs to change to make the Pubs Code operate more effectively and/or better support the principles?

Comments: The Code is far too complex and badly drafted. The average pub tenant, looking to initiate MRO, is faced with complicated code conditions, rigorous and complex timing issues and procedural problems that could take years to resolve. A process that should have been quick and cost efficient to the ill-resourced and underfunded tied tenant is largely out of reach unless they instruct lawyers or professional advisors, which ultimately are usually expensive. This simple fact

alone gives the well-resourced POBs the upper hand.

MRO remains the fundamental ask of the tied pub sector, the rest of the Code seeks to resolve issues that are largely 'low hanging' in nature. These issues are focusing the PCA's time and energy, clogging up the process so that MRO takes much longer than it should.

The tied pub sector is sorely in need of a genuine MRO. The Code does not deliver MRO, nor does it allow tied pub tenants to establish a genuine free of tie offer and pay a fair rent. A tied rent proposal can only be considered in conjunction with a genuine and fair MRO offer which can only be achieved by the inclusion of a Parallel Rent Assessment (PRA).

The Code must include a rent assessment statement providing Parallel Rent Assessments of tied v free of tie, not only ahead of initial rent setting but also rent review and lease renewal. This will equip the lessee with the information required to enter into a genuine commercial negotiation and to assess the fairness and full implications of the deal being offered.

The MRO must be available on demand (not only at rent review, lease renewal etc) and **MUST** include a PRA.

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: The PCA is in urgent need of additional powers in order to test and / or investigate whether or not a tied tenant is no worse off than if they were not subject to any product or service tie. There is currently no test to establish if this law has been applied.

The PCA currently boasts many successful arbitration awards where Code issues, rent or otherwise , have been settled by the parties, yet has no involvement or knowledge of the actual outcomes or if the concluded arrangement adheres to the 'tenant no worse off' principle.

The Code MUST include an automatic mechanism to check if the agreed outcomes between parties meets the required level of fairness. Once a referral is made to the PCA, the parties should be required to disclose the outcome go the PCA.

Given the PCA has done no investigation during the three years of tenure, an annual cross check investigation to establish if the Code two prime principles should be a priority. In August 2017, Government commissioned an independent report to verify stakeholder's concerns about how MRO was working. The focus of the verification was to gather detailed evidence from tied pub tenants about their experience of pursuing MRO under the CODE. Whilst the exercise was at the early stage of CODE implementation, it clearly shows there are some basic and fundamental errors contained within the legislation. *

The report found that:

A low uptake in MRO

A low MRO conversion rate

POBs are not acting within the spirit of the Code.

POBs are still described as 'intimidatory', 'bullying' and 'antagonistic'.

POBs do not want to offer MRO, and when they do, they seek to make the process as difficult and as unobtainable as possible.

MRO is expensive

*https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639282/PCA_MRO_Verification_Exercise_Final_Report_August_2017.pdf

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: [Redacted]

The PCA acts under the Arbitration Act 1996. He is not an Adjudicator. The role of PCA should come under the jurisdiction of the Adjudication process.

[Redacted]. In the eyes of the tenant, this alone will be seen as the PCA prevaricating or 'muddying the water' on important issues rather than making the clear decisions his role requires.

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: The PCA's advice is slow to materialise and when there are awards and guidance, they are sometimes incorrect. As an example, the PCA removed an advice note; Tied Rent Contractual Dispute Resolution Clauses and Calderbank leaving tenants none the wiser to the important information it contained or appropriate advice. *

There has been NO investigation into POB conduct.

The PCA has taken far too long to arbitrate over code disputes, resulting in many tenants giving up long before the process has ended and fuelling an artificial level of tied rent levels, and MRO terms, later used against other tenants at rent review. This failure to resolve the issues at hand

ends up being a completed arbitrator's award – another success for the PCA.

* <https://www.gov.uk/government/publications/tied-rent-contractual-dispute-resolution-clauses-and-calderbank-offer-letters>

Question 6

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

Comments: There have been no published fines/ fees to POB so I cannot pass comment.

Part C: Pubs Code Regulations

Question 7

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

You may have commented on some of these provisions in response to questions in parts A and B of this consultation³, but please provide any additional views on the regulations. If you think changes are needed to the regulations, please explain why and how you think they should be changed.

Comments: Refer to my previous answers

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

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

³ 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 Assessments⁴ which were published alongside the legislation and regulations. This will include wider impacts, non-monetised impacts or unintended consequences of the changes made. Specifically, we plan to consider any related impact on:

- **costs to businesses and potential pub closures;**
- **redistribution of income from pub companies to tenants;**
- **changes in industry structure or ownership status; and**
- **wider industry trends such as employment and investment.**

We welcome any evidence to support the analysis of these areas, or if there are any other elements of the Impact Assessments you think we should consider revisiting as part of this review.

Comments: The application of MRO comes at a significant cost to the tenant. Taken in context, the POBs are well resourced and have access to the best advisors - tied tenants do not have the finances or energy to endure long unnecessary code complaint delays. They usually give up and leave the pub or agree terms that are not aligned to the Code or legislation.

It is clear that the increases in product prices in the tied sector, combined with high levels of rent is leading to the failure of many more tied pub businesses.

Whilst it is difficult to ascertain the exact number of closures, Tied pubs will continue to close at a faster rate than free of tie. The British Beer & Pub Association (BBPA) may claim that this is not the case but they will fail to disclose the true definition of a closure. The tied sector is still littered with business failures, bankruptcies and pubs changing hands at an ever-increasing rate, only to be run by management companies or by a short-term tenant on an insecure tenancy at will. The Pubs Code and the PCA have failed to halt pub closures.

POB's highly leveraged business model is based on securitization. There is around £20 billion of debt in the sector and the large POBs continue to struggle to service their debt. Both [Redacted] and [Redacted] need over £[Redacted] million a year to meet their debt obligations – they therefore need to maintain current levels of income to meet their obligations and to stop their business model collapsing. It is important to remember that over 70% of the POB's income is derived from the beer tie alone. It is difficult to see how there can be a genuine transfer of profit

⁴ <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>

back to their tenants.

POBs are unwilling to introduce transparency into their business because in reality it seems that the benefits of the tied relationship are few and the costs very significant. There is no evidence to support POB's claim that there has been redistribution of the pubs profits, but again, it is an investigation I would expect a competent PCA to have undertaken.

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: Tied tenants remain concerned that this review seen by some as an opportunity only to provide such 'sticking plasters' as they consider necessary to avert further regulatory change. The pub sector continues to suffer anti-competitive exploitation to its detriment and to that of the consumer. MRO remains the issue at large. Since the Beer Orders tied agreements have been exploited outrageously with more and more products being supplied at rapidly increasing prices. The POB's continue to raise prices ahead of inflation. This year when duty was 0.1p, [Redacted] raised their prices by 7%. RPI is around 2.5%. Vertical agreements such as the tie lead to anti-competitive behaviour, price-fixing, the predominance of a [Redacted] and foreclosure of markets. The pub sector remains an inefficient market badly regulated by Government .

No doubt, the POBs and the BBPA will continue to lobby for acceptance of the Code as it is currently drafted, with attempts to standardise the 'awkward' elements into a rigid format that is essentially designed by them. MRO is elusive and costly to tied tenants. A genuine MRO opportunity should be a simple procedure whereby the tenant can sever tied lease terms by Deed of variation or a simple side letter. All tied leases include contractual provisions which allow the POB to sever tied terms at any time - this provision is not available to tied tenants.

Both the tenant and POB should be able to sever tied terms at any time and initiate MRO.

The Code – should it not include MRO and a PRA – will remain carefully twisted in favour of tenanted pub owning companies.

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

Please use this space for any general comments that you may have, comments on the layout of this consultation would also be welcomed.