



The Pubs Code Adjudicator's Response to:

The Department for Business, Energy & Industrial Strategy's invitation to contribute views and evidence to the statutory review of the Pubs Code and the Pubs Code Adjudicator

For the period from 1 April 2019 to 31 March 2022

Submitted: August 2022

Review questions

Part A: The Pubs Code

Question 1

How well do you think the Pubs Code has operated between 1 April 2019 and 31 March 2022? Please provide any evidence you have to support your view.

Comments:

Introduction

The period of the statutory review has seen the embedding of the Code into everyday business practices to deliver better understanding of Code rights, improved experiences in the use of the Market Rent Only (MRO) process and reduction in disputes referred to arbitration (including during one of the most challenging episodes for the pubs trade while in lock-down as a result of the COVID-19 pandemic). There is of course more to do, however, the PCA's tenant survey provides important data demonstrating increased tenant awareness of the Code and tenants' rights. Tenant understanding of their rights is the foundation for ensuring the Code delivers against the two core code principles that it was set up to support.

Over the review period there has been a significant drop in arbitration disputes, with increased understanding in how to deliver a compliant MRO offer following the compliance checklist devised by the PCA, and better understanding of the law around what constitutes compliant MRO terms. This coupled with arbitrator standards and the appointment of alternative arbitrators, has seen a significant reduction in arbitration case numbers. The Independent Assessor process continues to work well with positive outcomes for tenants in establishing a market rent for their MRO option.

Government made changes to the Code designed to provide better negotiation space within the MRO process. These came into force on 1 April 2022, and it is too early to know how those changes have bedded in.

During the review period work has begun to improve the position and profile of the code compliance officer (CCO) role within the regulated pub-owning businesses (POBs), including as a result of the PCA's first investigation which took place in the review period.

Following the opening up of the industry after the lockdowns during the COVID-19 pandemic the PCA has taken a more public approach with in-person events, as well as connecting virtually, to engage those involved in the industry and increase Code understanding. This work is supported by the PCA's social media presence and monthly article in the trade press.

The Code forms only one part of the broad economic picture for tenants with multiple pressures on the trade, particularly since March 2020 and with more uncertainty ahead with the cost of living increases. The PCA has, and continues to seek, to support progress in the tied relationship as it responds to the complex economic landscape. The PCA's recently published strategy identifies the regulator is ready to support the industry in its continuing journey.

Landlord and Tenant Act 1954 interaction

The PCA has during the period under review collected data in the POB compliance reports to inform understanding of the operation of the Code and which may to a degree assist in understanding the market response to it. The PCA is aware of a range of views as to any such market response, and whether it is likely to impact on the effectiveness of the Code. These views include in relation to the use of the landlord's right to seek possession of premises let under a lease protected by the Landlord and Tenant Act 1954 on specified grounds, including that the landlord intends to occupy the property.

The PCA may be able to assist the Secretary of State and the wider industry given the range of data collected. However, since the PCA does not collect comparative data in the compliance reports which relates to activity concerning the operation by the regulated POBs of business agreements which are not covered by the Code, in the unregulated tied trade or the wider pub industry, it is not possible for the PCA on this evidence to suggest conclusions as to the existence of any link between the operation of the Code and these market behaviours. The latest compliance reporting data for the period April 2021-March 2022 has only recently been received by the PCA and analysis of this is not yet complete. What follows is what the PCA understands to date.

The PCA is aware that some commentators consider that it may be open to POBs to use their rights as landlord to oppose renewal under the 1954 Act as a commercial response to the exercise of Pubs Code rights by tenants, in particular MRO rights. Over the last three years, data required by the PCA from the POBs in their annual compliance reports, in conjunction with additional data requests, show that seeking to take back tied pubs with LTA 1954 Act protection has been relatively low across the regulated sector as a whole.

	Section 25 Notices Opposing a New Tenancy			Section 26 Notices Opposed			Objections under s30(1)(g)		
	2019-20	2020-21	2021-22	2019-20	2020-21	2021-22	2019-20	2020-21	2021-22
Admiral	0	0	0	0	0	0	Not held by PCA	0	0
Greene King	1	1	0	0	1	0	Not held by PCA	2	0
Marston's	1	2	7	0	1	0	1	2	0
Punch	1	1	15	0	1	4	Not held by PCA	1	Not held by PCA
Star	1	1	0	0	0	0	1	1	2
Stonegate (Ei)	18	4	15	3	11	14	19	9	12
Total	22	9	37	3	14	18	21	15	14

While the decision to take back one pub as a result of the attempted exercise of any Code right would be one too many, and a breach of the detriment protections under the Code, the PCA understands that tenant confidence to use Code rights is important. In particular, the PCA can see that the interaction of the MRO process with the statutory renewal timetable may lead a tenant who receives a notice opposing their s.26 notice after they have served a MRO notice to perceive a causal link between the two. The PCA is considering appropriate guidance in order to build tenant confidence to use their Code rights. It has carried out a public consultation exercise ahead of issuing such guidance and its published response to the consultation can be found [here](#).

Once a tenant enters into a free of tie tenancy through the MRO process and is no longer tied, they are no longer covered by any provisions of the Pubs Code. The question of the treatment of MRO tenants has also been the subject of comment within the industry (for example, this includes concerns over the discretionary support given to them during COVID-19 lockdowns). The PCA understands there to be some concern expressed that confidence in the Code, and its effective operation, may be impeded in that the POB for commercial reasons may seek to repossess the MRO pub by opposing renewal on the ground that it seeks to manage the pub directly (relying on the owner occupation ground (g)).

The PCA has information from POBs as to the renewal decisions made at the end of the MRO term. Of 18 MRO leases that came to the end of their term or reached the last year of the agreed term of the tenancy in the 2021/22 reporting period, five renewals were opposed under the Landlord and Tenant Act 1954, s.30(1)(g). The sample size is small, given that very few MRO tenancies have reached the end of their term.

COVID-19 Support

In relation to discretionary COVID-19 support, the partnership arrangements under the tie operated to the benefit of regulated tenants. The PCA made it clear that the principles by which such discretionary support was given were regulated by the Pubs Code under

regulation 41, which requires that the POBs ensure that their Business Development Managers (BDMs) deal with their tied tenants in matters relating to business planning in a manner which is fair and lawful. All POBs published transparent methodologies for the allocation of discretionary support, and the PCA ensured that no arbitrary or unfair criteria could be applied (such as a prohibition on the grant of support to a tenant the POB considered to be in breach of contract, or to a tenant who refused to sign a confidentiality agreement in respect of that support).

These Code protections do not apply to free of tie tenants, including MRO tenants. Some in the industry expressed concern that MRO tenants might be treated unfairly. In respect of Pubs Code protections, comparison can be made between commercially free of tie tenants and those who are free of tie having been through the MRO process (but not as between free of tie tenants and tied tenants more generally). The PCA made a number of public statements asking for any evidence in respect of the treatment of MRO tenants being less favourable than other free of tie tenants in the pub trade in respect of the COVID-19 support they were being given. No evidence for comparison was provided.

Reduction in Landlord and Tenant Act 1954 Protection

During the statutory review period (and since the commencement of the Pubs Code) there has been a gradual reduction in the number of regulated tied tenancies across the sector as a whole which have been granted with protection under the 1954 Act.

	Total Number of Agreements Under the Pubs Code that are Protected By LTA 1954						Number of NEW Tied Tenancy Agreements Protected Under LTA 1954		
	2019-20		2020-21		2021-22		2021-22		
	Number	% of POB tied estate	Number	% of POB tied estate	Number	% of POB tied estate	Total New Agreements	Those Protected - Number	Those Protected - Percentage
Admiral	150	16.9	136	16.0	209	17.5	706	11	1.6
Greene King	367	44.3	353	43.5	327	40.7	257	11	4.3
Marston's	195	22.4	206	22.7	173	18.6	632	0	0.0
Punch	408	34.3	357	31.4	371	36.2	98	3	3.1
Star	1344	70.9	1256	68.3	1250	69.2	191	131	68.5
Stonegate (Ei)	1419	44.2	1304	41.6	1116	38.3	930	13	1.4

Note for table: The PCA started collecting information on new protected tenancies in 2020-21. The data from that year includes data on protected tenancies offered to new tenants. The data collected for 2021-22 is on new protected tied tenancy agreements, which can be offered to new or existing tenants. The data from these two years is therefore not comparable and only data for 2021/22 is provided here. In the future the PCA will continue to collect information on the new protected agreements offered.

For each POB, except Star, the percentage of new tied tenancy agreements in 2021/22 with LTA 1954 protection is significantly lower than the percentage of that POB's total tied estate that is protected.

POB New Agreements

The PCA currently has concerns about some relatively new agreement types offered by POBs since the Code came into force. The PCA is continuing its work to understand and regulate those agreements that fall within the statutory regime for tied pubs. This work is ongoing.

The PCA has perceived that over time there may have been an increasing tendency to offer shorter tied tenancies (under five years). Such reduced lengths impact on access to Code rights since the right to have a rent assessment proposal at least every five years will not arise where the total duration of the tied tenancy has been shorter. Accordingly, the related right will not arise to ask for a MRO option.

As already outlined, the PCA does not have access to comparative data in the unregulated tied sector to indicate whether these market responses are wholly or partly a response to the Pubs Code.

PCA Powers

The PCA's powers were extended to cover unfair business practice reporting (as specifically defined). A duty to report such matters to the Secretary of State arises when a practice is unfair and is designed to avoid the operation of the Code. Unlike the PCA's powers of investigation which are coupled with information gathering powers backed by criminal sanctions, the duty to report unfair business practice does not include information gathering powers for this purpose. As the duty operates on a practice designed to avoid the Code but that may have an impact on its operation, information gathering powers are considered an essential element to enable the PCA to understand whether information exists in support of such a practice.

In relation to consistency of PCA powers, the power in regulation 61 of the Code in respect of gathering information relating to MRO arbitrations is more limited in scope than the same power in respect of non-MRO arbitrations which is included in section 52 of the 2015 Act. The scope of the regulation 61 information gathering power is narrower in its reach. The PCA considers it appropriate for the arbitration information gathering powers to have the same scope whether it relates to MRO arbitrations or non-MRO arbitrations.

Four further drafting matters are referred to below for consistency. The PCA is unaware of whether these have caused unresolvable practical issues for the parties.

- It is noted that regulation 59(6) does not cater for circumstances where the failure to communicate the determination in time is disputed.
- There appears to be no right to arbitrate a failure of the Independent Assessor to communicate their market rent determination within the required 21 days in connection with a second determination (as there is with a first) – compare regulation 38(3) with regulation 37(11).

- Regulation 56(13) refers to paragraph (4)(a) which does not exist. There is a paragraph (4) but not (4)(a).
- The definition of pub-owning business can call into question who is the immediate landlord of the tied pub, and who is required to fulfil the duties imposed by the Code. However, no practical issues with enforcement have arisen for the PCA.

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? Please provide any evidence you have to support your view.

Comments:

The Code delivers on the fair and lawful principle in two key ways. Firstly, in requiring transparency in a POB's dealings with their tenants – requiring information to be provided at key points to the tenant to support the tenant in negotiations with the POB (eg at rent review) or in considering other options in their business arrangements (eg in price matching premises insurance). Secondly, these transparency requirements are underpinned by a right not to suffer detriment in the exercise, or attempted exercise, of Code rights. Where key information about current and future business plans, rents and repairs are discussed, the Code requires those conversations to be noted in writing and shared with the tenant so that a contemporaneous record of essential discussions is created. This package of rights and responsibilities is designed to ensure the POB acts fairly and lawfully in dealings with their tenants. Tenants have the opportunity to understand the POB's position through clear information and transparent dealings so they can negotiate effectively in their business arrangements.

The PCA has used its powers of advice and guidance to ensure that arbitration awards are published and require CCOs to sign off MRO proposals as compliant against a set of requirements designed to enable the parties to negotiate in a more balanced way. The PCA is further developing guidance to support those transparency rights and remove financial barriers to accessing MRO which have become apparent as the MRO process matures.

During the COVID-19 pandemic which severely impacted the pubs industry, the fact that the PCA ensured that POBs were transparent about the support they were offering to tied tenants helped secure fair and public understanding of the type and extent of support afforded to tenants during this critical time so that tenants could be assured that the support they were receiving was fair. In the PCA's annual tenant survey 2022, 76% of tenants agreed their Business Development Manager was fair in discussions with them, with all POBs receiving a rating of over 70%. The support regulated tied tenants received during the pandemic may have played a part in these results (70% were satisfied with the fairness of support according to KAM Media research).

The PCA survey field work was carried out in early 2022 during the period under review. It represented the first annual tied tenant survey since 2019 owing to the pandemic. The PCA increased participation compared to the last two surveys from 400 tenants to over 600, in order to provide more reliable data and some degree of comparability between the

results relating to the different POBs. For the first time, tenants were asked about their level of satisfaction with their POB.

There is more to do on the transparency agenda. The first period of the Code was characterised by understanding and refining the process for requesting a MRO option. There are many other Code rights, including around transparency of information that tenants need to be more aware of (for example, the right to price match premises insurance was the least understood Code right of those in the PCA's tied tenant survey). Knowledge about what these rights are and how to use them will help deliver a more balanced business relationship. So access to clear information and quality advice at the right time is key to unlocking the potential on fair and lawful dealing. The tied tenant survey gives the PCA a better understanding of whether rights are being exercised, and how effective those have been. This now enables the PCA to focus its resource on improving knowledge, access to, and appropriate outcomes of the exercise of Code rights which the survey outcomes indicate needs to improve most.

Access to quality information and advice remains key to the working arrangements of the Code. The PCA commissioned independent research with 50 tenants who had served a MRO notice from 1 April 2019 and found that those tenants who had the help of a competent advisor through the process overwhelmingly had a much more positive experience than those without.

Over a year before the COVID-19 pandemic brought the country to a near standstill the PCA had been engaging with CCOs on increasing new tenant awareness of their Code rights and considering ways to better support new tenants in those crucial early stages of the business relationship. Since then and considering the SoS guidance to the PCA to have in mind the importance of new tenants fully understanding their Code rights and how they can learn about and access their rights, the PCA has initiated discussions with the POB CCOs to review the experience of prospective and new tenants and where improvements can be made. This work is ongoing.

Property Condition

The handling of repairs and dilapidations is an area the PCA continues to focus on, including developing guidance to improve tenant experience of the MRO process by removing financial barriers to tenants accessing MRO, including through the management of dilapidations. Though results vary by POB, the PCA is aware of dissatisfaction among tied tenants with the handling of repairs and dilapidations from the recent tied tenant survey. The PCA therefore intends to seek the views and experiences of the POBs and others within the regulated pub sector to understand how POBs are applying the Code provisions surrounding the Schedule of Condition. This will help to consider how best to provide clarity to the industry over property condition Code rights.

In seeking to improve the business relationship concerning property condition obligations, the PCA considers there may be an inconsistency in the provision concerning 'Initial Works'. Paragraph 16 of Schedule 1 to the Code contains a list of information to be provided in circumstances where "initial works" are carried out. But this provision does not apply to the renewal of a protected 1954 Act tenancy. This exclusion can be contrasted with regulation 13(2) of the Code which also contains provisions for the carrying out of works prior to an agreement being entered into, but which includes the renewal of a

protected 1954 Act tenancy in its ambit. The implication of this is that where works are agreed informally or voluntarily (as would normally be the case), tied tenants may not be receiving the information set out in paragraph 16 of Schedule 1 of the Code. This could lead to uncertainty over the parties' respective obligations in relation to those works and potential disputes if works are not carried out as initially intended. The Secretary of State may wish to consider whether parity ought to be afforded to both protected and unprotected tenancies in the Code.

Gaming Machines

Regulation 47 makes provision about gaming machines. The PCA's view is that this regulation does not prohibit the installation of a gaming machine, but that it must not be required in a tied tenancy. The Code is silent on regulating the conduct of a POB contracting with a tenant who wishes to install a gaming machine. The Code therefore regulates the position where a tenant does not want a gaming machine, but no provision is made around the terms where the tenant does wish to install one. The current Code arrangements offers specific rights to tenants – a right not to have a gaming machine at all. But if a tenant does wish to have one, there is no regulation of the options available (for example there is no prohibition on a POB only offering its nominated supplier or the amount of fees to be paid). Some in the industry have highlighted the possibility to infer a difference in intent expressed by the Government during the consultation on the Code. The PCA has received information from industry stakeholders that this may be an issue although it has received no substantive information about how it has affected tenants.

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? Please provide any evidence you have to support your view.

Comments:

MRO is the key to delivery of the principle underpinning the Code that tied tenants should be no worse off than if they were free of tie. It is the means by which tied tenants have the right to compare the tied and free of tie options every time they have the right to renegotiate their tied rent under the Pubs Code. The tenant can compare the tied and free of tie offers, negotiate and choose the best option for their business. This is a very valuable right which has enabled some tenants to achieve favourable tied deals or a free of tie tenancy.

In a small scale survey of tenants who had used the MRO process between April 2019 and April 2021, 9 out of 10 who had reached the end of the process and decided to remain tied said that they had managed to negotiate a better tied deal.

It is important to understand that the right to compare the tied and free of tie deal by service of a MRO notice is not available to all tenants and is only available where a tenant has a gateway (principally rent review and renewal) which brings entitlement. Where a tenant has a short tenancy, a franchise, or a non-renewable term of no more than five years, they are not likely ever to have a right to request MRO.

The vast majority of MRO notices have been served at rent review and renewal. The POBs' annual compliance reports show that during the review period there have been no requests for a MRO option or Rent Assessment due to a Significant Increase in Price of tied products or services, and only 12 requests for a MRO option and 11 requests for a Rent Assessment due to a Trigger Event, all of which were rejected. Most of these requests were in the year 2020/21 and may therefore have been in relation to trading restrictions during the pandemic, which impacted all pubs in England and Wales (a condition of the Trigger Event being that it does not).

Where the investment exception applies under regulation 56 because the POB has made a qualifying investment, tenants will not be able to request the MRO option for up to seven years. The POBs' annual compliance reports show that for 2020/21, there were 167 qualifying investments across the regulated tied estate, although its use varies by POB.

There are therefore many tied tenants covered by the Pubs Code who have, or have had, no statutory route to determine how the no worse off principle is realised for them.

Any understanding of a tendency within the regulated industry to reduce the term of new tied tenancies to five years or less would need to be compared with the market for new tied tenancies in the unregulated trade before it could be considered whether, and if so how, the MRO was impacting the duration of terms offered by the POBs. The PCA is therefore unable to reach any conclusions as to that at this point in time.

The success of MRO in delivering on the no worse off principle cannot be solely measured by the number of tenants going free of tie. Of all outcomes reached during the review period, 32% resulted in free of tie arrangements (37% when looking only at April 2021 to March 2022). For tenants to benefit from their right to MRO, awareness must increase. Data published by the British Beer and Pub Association shows that across the review period there were 546 accepted MRO notices.

However, this does not give an accurate picture of tenant appetite for MRO as the PCA's annual tenant survey for 2022 showed that 39% of tenants surveyed were unaware of their right to request MRO in certain circumstances. The PCA continues to seek to raise tenant awareness of Code rights, including the MRO.

Additionally, the PCA considers that lack of tenant confidence to use the MRO process, and the availability of independent professional advice may play a role in suppressing demand for MRO and thus impact on the delivery of the no worse off principle. The PCA has sought to ensure that the conversation about the MRO process, including improvements to it and to the arbitration process, are up to date. However, focus from some tenant groups on historic accounts of its complexity and of arbitration delays, may discourage some tenants from exercising their MRO right and again impact on the delivery of the no worse off principle.

The PCA is of the view that the capacity in the industry of quality independent advice and representation is key to tenant access to their Code rights. The Bii advice panels are a positive step in building capacity. The PCA intends itself to support the availability of quality advice through Code training for sectoral advisers, beginning with delivery of training to arbitrators by its contracted partner CI Arb.

In seeking to increase tenant confidence to use the MRO process, and remove financial disincentives, the PCA has consulted on the issue of statutory guidance, to be issued shortly, as referenced elsewhere in this response.

The PCA's investigation into the use of stocking terms in MRO tenancies represented a significant regulatory measure to understand the compliance of such terms in proposed MRO tenancies and included wider learning for the industry.

The investigation outcomes and ongoing consideration of compliance with the recommendations issued to Star include:

- Removal of non-compliant MRO terms from the market
- Requirement to ensure fair negotiations for Star tenants still in the MRO process
- Reinforcement of the statutory requirement for the CCOs to be, and act as, the independent watchdog on Code compliance with each POB
- Ensuring that POBs learn the lessons from arbitration and reduce repetitive failed legal arguments
- Providing clarity on the need for the POB to be satisfied, and be capable of evidencing in every case, that MRO terms offered are compliant
- Ensuring proper processes to demonstrate Code compliance are in place

These outcomes and requirements are of benefit to the whole of the regulated community. The powers of investigation and follow up remain important powers for the PCA in ensuring continual Code compliance.

The regulation of stocking requirements is a statutory intervention into the free of tie arrangements and it remains unclear how the market will respond over time.

Much progress has been made to ensure MRO terms are reasonable including the MRO checklist which CCOs are required to sign in every MRO offer provided. Further work remains, in particular in considering the commonness of terms in combination (not just in and of themselves) in MRO offers. This is particularly important at present giving the ongoing concerns with cost of living issues.

Part B: The Pubs Code Adjudicator

Question 4

How effective do you think the Pubs Code Adjudicator has been between 1 April 2019 to 31 March 2022 in discharging its functions in relation to the Pubs Code? Please comment in particular on the PCA's performance in undertaking the following:

- a. giving advice and guidance;
- b. investigating non-compliance with the Pubs Code;
- c. enforcing the Code where non-compliance is found; and
- d. arbitrating disputes under the Pubs Code.

Comments:

a. giving advice and guidance

The PCA has the power to issue statutory guidance under section 61(3) of the Small Business, Enterprise and Employment Act 2015 and the power to issue statutory advice under section 60 of the Small Business, Enterprise and Employment Act 2015. The PCA has exercised those powers in the following instances between 1 April 2019 and 31 March 2022.

Statutory guidance was issued in April 2019 (effective July 2019) in relation to POBs' statutory obligations to account accurately in Pubs Code Schedule 2 forecast profit and loss statements (as part of a rent proposal under Part 3 of the Code or a rent assessment proposal under Part 4 of the Code) for: a) the volume of alcohol on which duty has been paid; and b) the volume of draught product waste which is unsaleable. In particular, the guidance sets out that POBs must account for sediment and operational waste separately. This guidance also included the provision of appropriate training and support.

A new chapter on MRO proposals was published in November 2019 as part of the Regulatory Compliance Handbook (which is statutory advice). This chapter ensures that a POB provides its tied tenant with full information about how it justifies its MRO proposal as compliant. The MRO proposals chapter, and the first three chapters of the Handbook dealing with POBs' communications with tenants, BDMs and MRO communications and process originally published in December 2017, were reissued with revisions and in a single document in September 2020 to include the specific learnings from arbitration awards. This included making it explicit that when preparing a MRO offer, the POB must complete a Compliance Checklist and Declaration not only to record the decisions they have made in each case about compliance, but also to explain why they have made those decisions.

In June 2019, the PCA issued statutory advice for dealing with the tied rent during and at the conclusion of the MRO process. Further to this in April 2020, statutory advice was issued addressing the use of a contractual dispute resolution clause during the MRO procedure to identify the tied rent upon a rent review where it cannot be agreed. This replaced statutory advice issued by the PCA in June 2017 and subsequently withdrawn.

In August 2021, the PCA issued statutory advice on the law applying to non-MRO referrals for arbitration under section 48 of the Small Business, Enterprise and Employment Act 2015 (2015 Act). This followed a number of arbitration awards dealing with a preliminary issue about whether a tied pub tenant made a non-MRO referral for arbitration in time. The arbitrator's decision on the time limit determined whether the dispute about the POB's compliance with the Code could be arbitrated. The PCA noted there were differing interpretations of the law in relation to this time limit and while recognising that each arbitration will depend on the facts of the case, differing interpretations of the time limit across published awards may cause further uncertainty for the industry.

The PCA consulted in October 2021 on the exercise of its powers to issue statutory guidance about the application of the MRO provisions of the Pubs Code, and the steps that POBs need to take in order to comply with them. The aim of issuing such guidance is to ensure that POBs take a consistent and fair approach to the application of the Pubs

Code and to give tied tenants greater clarity and consistency about what they can expect to happen in the MRO process, to reduce apparent disincentives and barriers to them using the process, and to limit the scope for disputes which need to be resolved through arbitration. The PCA is in the process of finalising this guidance. Further details of the full consultation on this guidance and the PCA's response to the consultation can be read [here](#).

Although not forming statutory advice or guidance, the PCA further supports tenants with a suite of factsheets available on its website explaining the Pubs Code and its processes. These factsheets have replaced previous technical guides published, providing information in a simpler and more straightforward manner to make it more accessible to tenants. Awareness of the Pubs Code has increased over the review period with the PCA's annual tenant survey 2022 showing 79% were aware of the Pubs Code, up from 68% in 2019.

To raise awareness of Code rights and the PCA's activities, the PCA has launched three social media profiles on Twitter, Facebook and LinkedIn. The PCA also writes a monthly column in the Morning Advertiser. Improvements have been made to the website within the website constraints, to make it easier to navigate to key information from the home page and to navigate published arbitration awards and High Court judgments. The PCA's annual tenant survey 2022 shows 72% agreed the website was easy to navigate and use, although 67% had not visited the website in the last two years so the PCA is keen to improve its appeal to tenants.

b. investigating non-compliance with the Pubs Code

The PCA announced a statutory investigation into the conduct of a POB in July 2019. This was the PCA's first formal investigation under section 53(1)(a) of the 2015 Act, which gives the PCA the power to carry out an investigation if it has reasonable grounds to suspect that a POB has failed to comply with the Pubs Code. The investigation concluded and a detailed report setting out the PCA's findings was published in October 2020. The report is published [here](#).

The PCA found that the POB committed 12 breaches of the Pubs Code in respect of various aspects of its approach to the inclusion of stocking terms in its MRO proposals between July 2016 and July 2019. The PCA found that, in addition to the impact on any individual tenants who received terms that breached the Code, the policies and practices adopted by the POB would have acted as a deterrent to tenants seeking to access their Pubs Code rights to go free of tie. The PCA also found a fundamental failure of culture and oversight in respect of Code duties, including not ensuring the CCO's role could be properly effective.

As a result of the breaches, the PCA made 8 recommendations under s.56 of the 2015 Act in respect of action to be taken by the POB. This included that the POB must:

- offer Code compliant stocking requirements to classes of tenants specified in the investigation report. Any actions taken to remove or vary tenancy terms (should tenants agree to this), must be without cost to tenants.
- when issuing a MRO proposal, have evidenced grounds for the reasonableness of any stocking requirement, which must be in line with all guidance by the PCA. The

evidence supporting that the requirement is reasonable should be made available to the tenant to ensure transparency in negotiations.

- ensure that any conflict between the statutory responsibilities of the CCO, and objectives relating to the profitmaking functions of the POB, is managed appropriately, and that the CCO is able to properly challenge decisions within the business that may be non-compliant with the Code.
- formalise its monitoring of Code compliance to enable independent monitoring of its Code compliance approach, the recommendation of further opportunities for improvement and the creation of a framework where evidence-based assurance can be demonstrated.
- ensure its administrative and record-keeping systems support and evidence Code compliance.

Following this investigation, the PCA has worked with the POB to ensure that all recommendations are implemented.

The PCA also imposed a fine on the POB of £2 million. The grounds for the imposition of the fine are set out in a Financial Penalty Notice published on 15 October 2020 (published [here](#)).

There is an ongoing appeal in the High Court under s.58(3) of the 2015 Act against the imposition of the Financial Penalty Notice. As part of these proceedings the POB applied for disclosure of intelligence provided to the PCA by tenants and interested third parties about the POB's conduct. The PCA resisted the POB's application on grounds which included a concern that a requirement to show a POB intelligence received during an investigation, where the PCA asserted that intelligence was not directly relied upon to reach the PCA's findings, may mean that tenants are less willing to come forward to the regulator with information in future investigations. The court ordered that the information should be disclosed to specified persons acting for the POB only, being certain of the POB's internal and external lawyers.

It is of paramount importance that tied pub tenants have the confidence to bring concerns and information to the regulator about their POB in order to enable the PCA to effectively promote the core Code principle that POBs should deal with their tied pub tenants in a fair and lawful manner. The implementation of the Pubs Code followed long-standing concerns about the relationship between large pub companies and their tied tenants, with perceived problems occurring due to inequalities of bargaining power in these business arrangements. The PCA is concerned that tied pub tenant confidence in approaching the regulator must be protected and in the context of the POB/tied pub tenant there is the potential for it to be impacted if there is uncertainty around the confidentiality of information provided.

c. enforcing the Code where non-compliance is found

Since February 2021, amongst steps taken to improve transparency, where possible the PCA has published Pubs Code Action Stories on its website to help the industry understand Pubs Code issues and be transparent about action the PCA has taken or is taking. This can help tenants and others to identify if they have relevant information to share with the PCA, or for affected tenants to contact their CCO. It also lets the industry know of any changes a POB has made and promotes best practice across POBs. The

PCA cannot, however, always communicate publicly and contemporaneously about action it is taking to enforce the Code, where doing so may prejudice such action, or future enforcement action it may need to take.

The PCA identifies non-compliance through intelligence and self-reports by POBs, such as within their annual compliance reports which is a requirement under regulation 43 of the Code. The format of the annual compliance report was improved for 2020/21 to provide greater clarity and detail on Code breaches.

The PCA has had instances of self-reporting of breaches and has brought public attention to positive examples of this, encouraged and approved of this practice. It is representative of effective operation of the CCO within the business to verify compliance and identify any impact on tenants caused by breaches of the Code. The PCA wishes to support and formalise processes for use by the POBs for the self-reporting of breaches, making clear expectations and for compliance verification and mitigation, and ensuring appropriate transparency with tenants.

The PCA is in the process of this formalisation of the self-reporting process for breaches identified by CCOs within the compliance reporting year, requiring them to satisfy the PCA of mitigating action taken to reduce the risk of repeat breaches and steps taken to identify and remedy any detriment caused to tenants.

d. arbitrating disputes under the Pubs Code

The PCA has made a number of improvements to the arbitration process and referral service between 1 April 2019 and 31 March 2022, as well as exercising powers of advice and guidance to reduce disputes requiring arbitration as outlined in 4(a). Open arbitration cases have halved over the review period, reducing from 85 on 1 April 2019 to 43 on 31 March 2022 (and are down to 26 on 31 July 2022). The current number of open arbitrations is significantly reduced compared to the highest number the PCA reported during the first statutory review period in June 2018 of 118. The arbitration backlog which characterised the early days of the Code has been effectively managed by the PCA as described below.

COVID Declarations

During the national lockdowns imposed as a result of the COVID-19 pandemic, the PCA played a pivotal role in devising, collaborating with stakeholders and overseeing the implementation of three Declarations by the regulated POBs to protect tenants' rights during those periods. This innovative and novel approach ensured that tenants' rights under the Code were respected in a consistent manner by all POBs, understanding the practicalities faced by both tenants and POBs that made trade and business management all but impossible during those periods. As a result of this approach tenants were treated in a transparent and fair manner and there was no increase in demand for arbitration and no backlog built up over the period where staff were furloughed and compliance could have created significant issues for the industry.

Alternative Arbitrators

The PCA (and Deputy PCA when in post) have continued to exercise their power to appoint alternative arbitrators to promote delivery of an effective service and natural justice through the resolution of disputes within a reasonable time. This has allowed the PCA to focus resources on its regulatory priorities while retaining oversight of the arbitration process.

In view of the appointment of alternative arbitrators, Pubs Code arbitrator service standards were introduced in April 2021 to promote timeliness, quality, and consistency in Pubs Code arbitrations. The standards cover, amongst other things, expectations for how the arbitrator will communicate with the parties, case progression and timescales and the use of the PCA's powers as regulator to require information about the arbitration. They provide parties with a clear understanding of the standard of service they can expect and provide the PCA with a benchmark which supports quality service delivery and enables monitoring of arbitrator adherence where parties raise concerns.

Initial Stay

The offer of an optional initial three-month stay for MRO full response referrals was introduced in November 2018 (on special terms to incentivise early settlement). This initiative by the PCA was in response to stakeholder concerns about the short mandatory timescale for referral of a MRO dispute to arbitration. It demonstrated a transparent step by the PCA to seek to make the MRO process easier for the parties and to make litigation, which given its cost and risk presented a significant disincentive to tenants exercising their MRO rights, less likely. Under these arrangements, parties could agree to a stay of up to three months, on terms that if the case settled within that time, there would be no arbitrator costs to pay, £150 of the referral fee would be returned to the paying party and it would not be treated as an accepted case when calculating the levy (where the methodology is, in whole or in part, calculated by reference to the number of accepted arbitration cases involving that POB).

There was moderate success for this measure with a settlement rate of approximately 25%. The measure was supported by the POBs, though not all representatives sought to make tactical use of it.

The government on 12 July 2021 issued a consultation on amendments to the Pubs Code which included options for additional time in the MRO process to allow the parties to negotiate.

Management of the number of MRO arbitration referrals in respect of which an initial stay was agreed required additional administration by the PCA. The PCA decided to withdraw the initial stay option in September 2021. The option formed the basis of some comments made in the statutory consultation.

The government ultimately on 1 April 2022 introduced amendments to the Pubs Code to introduce a 3-month maximum resolution period before time to refer the dispute to arbitration began to run.

Arbitration Management Service Contract

The delivery of a substantial dispute resolution service has since the commencement of the Code represented a significant ongoing focus for the PCA's resources. The PCA perceived the opportunity to release internal resource for regulatory work by external delivery of the case management function. In December 2021, after a procurement exercise, the PCA contracted with the Chartered Institute of Arbitrators (CIArb) to manage the administration of the arbitration service from referral to case closure. This includes the recommendation of suitable CIArb-accredited arbitrators to the PCA for appointment, where the PCA exercises her statutory power to appoint an alternative arbitrator. CIArb is also monitoring adherence to the arbitrator standards, to support the PCA in the appropriate exercise of her powers of appointment.

The arbitration management contract includes a requirement on CIArb to develop and deliver training for arbitrators. This training was in development at the period under review and the first session is planned for September 2022. It will be followed by an assessment to ensure all arbitrators demonstrate a minimum standard of knowledge and understanding of Pubs Code arbitrations. It is intended that the training can then form the basis for modules which can be made more widely available to professionals offering expert independent advice to tied tenants.

Performance Measures

Coinciding with the introduction of performance standards, the PCA also introduced performance measures for the first time. These covered core PCA functions (enquiry and correspondence handling) as well as management of the arbitration service where the PCA appointed alternative arbitrators. The intention was to provide clear expectations to service users against which internal processes could be managed and monitored. Those performance measures for arbitrations were that in 90% of cases the PCA seeks an arbitrator recommendation from a suitable appointing body within 10 working days of accepting a referral and receiving all relevant information from the parties and then appoints an arbitrator within 10 working days of receiving an appropriate recommendation. Performance against these measures will be published in the PCA's annual report.

The PCA amended its performance measures in light of the contract to in 90% of cases the PCA will appoint an arbitrator within 25 working days of accepting the referral and receiving all relevant information from the parties. The PCA has also worked with CIArb to publish a new Pubs Code arbitration quarterly report to offer more meaningful insights for the industry on Pubs Code arbitrations by POB.

Publication of Awards and Case Summaries

The PCA began publishing arbitration awards at the end of the last review period to improve transparency in relation to Pubs Code arbitration processes and the determinations being made and to give parties an equal understanding of how the Pubs Code is being applied. In this review period the PCA has continued to seek consent to publish awards in full and has introduced anonymised award summaries to ensure there remains transparency in arbitration findings where consent to publication has not been given by both parties. PCA resource is required to manage the process for seeking consent to publication, redact awards to protect commercially sensitive information and

produce summaries, though external legal support is used and the PCA has met timescales for publication as set out in its performance measures. The PCA has also taken steps to make published arbitration awards and High Court judgments easier to find and access on its website, including by indexing them so the principal issues dealt with can be readily identified.

Bespoke Arbitration Rules

As arbitrations are confidential under CI Arb's arbitration rules (which usually apply to Pubs Code arbitrations unless the arbitrator decides otherwise), tailored Pubs Code dispute resolution rules with no requirement for confidentiality could remove the need for consent to publication and reduce resource burdens on the PCA, although consent to publish personal data would still be required under data protection legislation. Bespoke rules might also help to address some of the practical difficulties in managing behavioural disputes in arbitration under the Code.

Appeals

There have been four appeals to the High Court of arbitration awards within the review period. All have been brought by POBs and it remains the case that this may be due to the accessibility of the current appeal route to tenants, particularly where they are not legally represented. The imbalance of arms between many tied tenants and the well-resourced and professionally represented POBs means that the current dispute resolution process remains a disincentive to tenants, who risk costs, complexity and delay. Furthermore, the resources and risk required to bring an appeal to the High Court, which may include seeking binding clarification as to the correct interpretation of the law, may discourage a tenant from bringing an appeal, even where grounds exist. This may impact on the issues and arguments considered and determined by the court, and thus materially impact on the interpretation of the Pubs Code in ways that may be to the benefit of the POBs.

Part C: Pubs Code (Fees, Costs and Financial Penalties) Regulations

Question 5

Do you think the regulations relating to costs, fees and financial penalties remain appropriate or should these be adjusted? Please give the reason(s) for your answer and, if you believe these regulations should be amended, please set out how.

Comments:

Out of 65 costs awards issued during the review period, only eight included a requirement for the tenant to pay towards the POB's costs under regulation 3(4) for MRO disputes and regulation 4(3) for non-MRO disputes. In six cases the tenant was ordered to pay the maximum £2,000, and in two cases this was £500. The PCA considers these regulations remain appropriate in ensuring the tenant's liability for costs is capped to minimise costs being a barrier to arbitration but also recognising this can act as a deterrent to claims being brought without merit.

There has been one case in the review period where a tenant's referral was found to be vexatious, and they were ordered to pay the arbitrator's costs under section 51(6) of the 2015 Act and the POB's reasonable costs under Regulation 4 of the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016. There have been no other instances of the tenant being ordered to pay the full costs of the arbitration due to either a vexatious referral or conduct resulting in an unreasonable increase in costs. The PCA wants to ensure the risk of paying costs does not deter tenants from using arbitration while recognising the impact that vexatious referrals could have on a POB. The PCA considers that the regulations remain appropriate for this purpose. The availability of quality advice is nevertheless important to minimise a tenant's exposure to costs.

The PCA has seen no evidence to indicate the £200 referral fee is not appropriate or has been a barrier to tenants accessing arbitration (97% of referrals over the review period have been made by the tenant). The referral fee forms the costs of the arbitration, and the tenant can therefore seek to recover the referral fee from the POB as part of any claim for costs.

The PCA imposed a financial penalty on a POB as a result of its statutory investigation. There is an ongoing appeal in the High Court under s.58(3) of the 2015 Act against the imposition of the financial penalty. As part of this appeal the court will for the first time be required to interpret the legislation in this area.