



Department for
Business & Trade

Statutory Review of the Pubs Code and the Pubs Code Adjudicator: 2019-2022

Presented to Parliament pursuant to sections 46(4) and 65(6) of
the Small Business, Enterprise and Employment Act 2015

October 2023



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Ministerial foreword



I am pleased to publish this report on the second statutory review of the Pubs Code (the “Code”) and the Pubs Code Adjudicator (the “PCA”). The review considered the Code’s operation and the PCA’s performance over the 3-year period from 1 April 2019 to 31 March 2022. The Government invited interested parties to help inform the review and I am grateful to the 22 respondents who submitted their views. The second review has also considered publicly available data, in particular the contribution of the 600-or so tenants who responded to the PCA’s 2022 Tied Tenant Survey.

The Government recognises pubs as vital community assets which operate at the heart of our communities, providing jobs and contributing to local economies and our national prosperity. We understand the challenges pubs are facing. The Government is supporting pubs with business rates relief, the Brexit Pubs Guarantee, and help with energy costs and staff shortages. As part of the Government’s Growth and Investment agenda, we are working across Government to identify opportunities to ease regulatory and licensing burdens. We continue to work with businesses, including members of the Hospitality Sector Council, to deliver our 2021 Hospitality Strategy, which aims to support the sector’s recovery from COVID-19 and improve longer term resilience.

The Code itself applies to over 8,000 tied pubs, which is around 21% of all pubs, in England and Wales, to ensure the fair and lawful treatment of tied pub tenants. The first statutory review committed the Government to keep the scope of the Code, which applies to businesses which own 500 or more tied pubs in England and Wales, under review. I have seen no robust evidence to support changing the Code as a result of this second review, including changing its threshold or extending its scope to other pub operating models.

I consider the availability of accurate advice and information to be paramount in enabling tenants to make the best decisions for themselves and help them run their business and there are signs the Code has significantly improved the position in this regard. I particularly welcome the results of the PCA’s 2023 Tied Tenant Survey which, while out of scope of this review period, nonetheless confirms key findings of the PCA’s 2022 Survey, showing that most tied tenants are satisfied with their experiences and that the provisions introduced by the Code are generally useful.

Fiona Dickie took over as PCA from Paul Newby in May 2020 when the Covid-19 pandemic was causing a significant impact on the hospitality sector. A positive highlight during these unparalleled times was the support offered by the pub-owning businesses to their tied pub tenants by deferring and cancelling rent and providing other important backing, demonstrating the partnership nature of the tied pub model. The PCA played an important role in working closely with the regulated businesses to ensure transparency in this discretionary support for their tied tenants and in safeguarding tenants’ Code rights. During the period under review, the PCA cleared a backlog of arbitration cases and her focus on her regulatory priorities has contributed to higher levels of compliance and a lower number of formal disputes. A notable highlight was the first formal investigation which found the regulated business in breach of the Code and resulted in important reparation for the tied tenants affected by this. However, some stakeholders said the PCA has previously adopted an overly formal approach to engagement. I therefore welcome the PCA’s recent efforts to make more use of the softer tools of enforcement by having resurrected the regular, more informal engagement with the Code’s stakeholders to work collaboratively towards solutions and encourage the PCA’s more direct engagement with tied tenants.

The Government is required to review the Code and the PCA every three years. By itself, this is a short period to assess the operation of any legislation, however consecutive reviews are helping to build a pattern on how the Code is evolving over time. The next and third review will occur after nearly 10 years of the Code and will also better allow for amendments to the Market Rent Only process, introduced by the Government following the first statutory review, to be assessed. These came into effect in April 2022 and, while out of scope of this review, a number of respondents welcomed the longer period allowing for negotiation which they said had already begun to tackle premature referrals to the PCA and help to reduce the number of arbitration referrals.

Finally, I would like to thank Paul Newby, Fiona Dickie and their staff for all their hard work and effort during this period under review.

A handwritten signature in black ink, reading "Kevin Hollinrake". The signature is written in a cursive, flowing style.

KEVIN HOLLINRAKE
Minister for Enterprise, Markets and Small Business

Government's review

1. The Pubs Code (the "Code") and the Pubs Code Adjudicator (the "PCA") were established under Part 4 of and Schedule 1 to the Small Business, Enterprise and Employment Act 2015 (the "Act") to regulate the relationship between large pub-owning businesses who own 500 or more tied pubs in England and Wales, and their tied tenants.
2. This report sets out the Government's conclusions from the second statutory review covering the period from 1 April 2019 – 31 March 2022. As part of the review, the Government launched an invitation on 26 May 2022 for stakeholders to share their views about the operation of the Code and the performance of the PCA, receiving 22 responses from a range of stakeholders. The review also drew on published evidence such as the PCA's Annual Reports, published arbitration data and the PCA's Annual Tied Tenant Survey 2022 ("PCA's 2022 Survey") among others (see Annex A).

Executive summary

The Pubs Code

3. The Code is underpinned by two core principles, as enshrined in the Act: the fair and lawful dealing by pub-owning businesses ("POBs") in relation to their tied pub tenants, and that tied tenants should be no worse off than they would be if they were not subject to any product or service tie. The Code creates certain protections and rights for tenants who agreed to be tied into supply agreements which restrict them from negotiating prices on the open market. Many of the issues raised by respondents to the review were also mentioned in response to the first statutory review. Others have taken on more prominence from respondents, including calls to expand the scope of the Code, for example to include conversions of tied pubs to alternative operating models to seeking a lighter-touch approach to reduce the regulatory costs in recognition of the low number of arbitration cases during the period under review. A lower number of disputes is likely due to a variety of reasons including increased awareness of the Code, familiarisation with its processes, the PCA's guidance and advice and improved clarity about what constitutes compliance. While the Government has committed to keep the Code's scope under review, it does not consider there to be a compelling case to extend this to other operating models due to a lack of robust evidence showing harm. The Government notes little evidence of unfair treatment was submitted in relation to matters which led Parliament to introduce a statutory Code and the Government welcomes this as a positive sign the Code is working to address such harmful treatment as intended.
4. As with the first review, respondents attached significant importance to tenants' right, under certain circumstances, to change from a tied tenancy to a free-of-tie tenancy (a "Market Rent Only" or "MRO" agreement). The number of MRO notices received each year is indicative of tenants wishing to negotiate better tied arrangements or go free-of-tie, and this data is collated by the British Beer & Pub Association (BBPA). For the period under review, the number of MRO notices received¹ remained relatively stable, averaging 217 per year². Of these, 84% of MRO notices received were accepted over the same period³. While some respondents considered this to be low, the level of take-up of the MRO right is not in itself a measure of the success of the Code and may be due to a number of reasons, including the Code's information requirements

¹ The total number of MRO notices that were either accepted or rejected, and excluding those that were withdrawn.

² The total number of notices received from 2016-2022 was 1588, which is consistent with the annual average from 2019-2022, the period under review. MRO statistics from BBPA.

³ 546 accepted out of 650 notices received.

for prospective tied tenants improving awareness among tenants and resulting in better informed decisions about agreeing a tied tenancy. This, combined with the important support from Business Development Managers⁴, may have made the option to change to a free-of-tie tenancy less significant for some tied tenants. This is borne out by the results of the PCA's 2022 Survey showing high awareness of tenants' rights under the Code⁵. In addition, 61% of all tied tenants were satisfied with the type of agreement that they chose for their pub, and satisfaction was higher among newer tied tenants at 74% (those that had started their agreement in the past 2 years). However, levels of take-up of the MRO right may also be due to POBs having taken steps to mitigate MRO related risks to their business operations by managing the circumstances where the right to request an MRO proposal might occur.

5. Since its introduction in 2016, as the Code's processes have bedded down, the longer term effect of the MRO right on the tied sector was noted by respondents. Some suggested that it had led to conversions to operating models out of scope of the Code, shorter tenancies to mitigate the potential risk of a tied tenant using their MRO right and lower levels of investment due to lack of certainty of returns. A number of respondents questioned the impact of these changes on tied tenants with no interest in pursuing a free-of-tie tenancy and proposed the creation of an MRO "opt-out" in return for a longer tied tenancy and/or investment to develop their business, potentially achieving longer term contractual security for both parties. The Government considers this concept of an additional choice for an experienced tied tenant to opt out of the MRO right worth exploring further, particularly at the renewal stages of a tenancy. While POBs said the majority of their tied tenants supported an MRO opt-out, the Government will work with the regulated sector to better understand the level of tied tenants' interest and, importantly, identify tenants' concerns. Should there be a clear appetite among tied tenants for an MRO opt-out, the Government will consider pursuing this further and invite the input of the wider tied pub sector and its stakeholders. The Government is further interested to learn whether longer leases and greater investment are a feature in the un-regulated tied sector where there is no MRO right.
6. Given the changes in the tied sector, the regulated businesses suggested an implementation review of the Code and the PCA. The Government considers the 3-yearly statutory reviews to allow for such considerations and will work with the POBs' representative organisation, the BBPA, on the type of new data that could be usefully considered as part of the next statutory review.
7. Following the first statutory review, the Government said it would consider the creation of tailored dispute resolution rules to improve transparency and further consider amending the appeal route for arbitration awards from the High Court. However, since then, where consent to publish arbitration awards is withheld, the PCA has published summaries of awards, considered to be more useful to tied tenants. Furthermore, given the lower number of disputes referred to the PCA for arbitration⁶, changing the appeal route would have little notable impact. The Government has therefore concluded it will not bring forward further proposals in this area.

⁴ In 2022, the majority of tied tenants agreed that their BDM supplied business planning support they need on an ongoing basis, and that their BDM provided them with the information and advice needed about the Code. Newer tenants were more aware of the support provided by BDMs.

⁵ In 2022, 79% of tied tenants were very aware or quite aware of the Pubs Code, which represents an increase in net awareness relative to previous years. In addition, in 2022, 61% of tied tenants said that they were familiar with their right to request a market rent only option to go free-of-tie in certain circumstances.

⁶ The number of accepted referrals for arbitration has decreased during the review period from an average of 117 accepted referrals per year from 2016 to 2019, to an average of 85 accepted referrals from 2019-2022. This has fallen significantly further in the year following the review period.

8. A number of points submitted to the first review were repeated for this review. Where no further evidence was submitted for the Government to reconsider its position⁷ in the report to the first review, these points have not been repeated in this report. Examples include the requirement for publication of tied price lists, the legal vehicle used to effect a change from a tied- to a free-of-tie tenancy (a matter settled in the High Court⁸) where the Act is silent on whether such a change should be achieved by deed of variation of the existing tenancy or a new agreement, amendments to the Code's provisions on Significant Price Increases and a right to MRO on demand.
9. In addition to stakeholder responses, the Government considered publicly available evidence, including data on the frequency and outcome of MRO notices, and data published by the PCA summarising the number of arbitration referrals. The Government commissioned updated data analysing changes in the pub sector (see page 9) which have shown a decline in the total number of pubs, but comparable trends across parts of the sector covered by the Code and parts not. This report further takes account of the results of the PCA's 2022 Survey, conducted by Ipsos, which interviewed over 600 tied pub tenants within the scope of the Code.

PCA performance

10. Overall, the Government considers the PCA has been effective in enforcing the Code over the review period, with particular success in reducing arbitration cases and successfully completing the first investigation under the Code. However, stakeholders were clear in their views they would welcome more regular, informal face-to-face engagement with the PCA to discuss and resolve issues in the first instance without having to resort to more expensive legal means. While outside the period under review, the Government has recognised and welcomes the PCA's efforts to resurrect and improve such engagement with the sector. This should help with addressing and resolving issues at an earlier stage, resulting in greater clarity for all the parties involved and avoid more costly formal dispute resolution.

Conclusion

11. In conclusion, given the overall improvements, the Government considers the Code to be operating consistently with the two overarching principles⁹ as set out in the Act. With improvements in the professionalisation of the support available to tied tenants, the overall positive results of the PCA's 2022 Survey, the lower number of arbitration referrals and the lower number of open arbitration cases¹⁰ during the period under review, the Government does not consider further amendments to the Code necessary. However it will undertake further work, as detailed below, to ensure the Code's operation remains effective. In accordance with its conclusions, the Government:
 - will not amend the Code
 - will undertake further work with the regulated businesses in respect of an MRO "opt-out" to determine:
 - the level of interest and concerns from tied tenants
 - whether increased investment and longer leases are a feature in the unregulated tied sector
 - will work with the BBPA on data for consideration under the third statutory review
 - will not further pursue an alternative appeal route or tailored arbitration rules;

⁷ www.gov.uk/government/publications/pubs-code-and-pubs-code-adjudicator-statutory-review-2016-to-2019

⁸ www.bailii.org/ew/cases/EWHC/Ch/2020/1858.html June 2020

⁹ The principles of "fair and lawful dealing by POBs in relation to their tied pub tenants" and "tied tenants should not be worse off than they would be if they were not subject to any product or service tie".

¹⁰ The number of open arbitration cases fell from 105 during the 18 month period from July 2016 to Dec 2017 to an average of 46 over the three-year period under review. This has continued to fall since the review period as the number of open cases was significantly lower in 2022 to 2023

- considers the PCA's powers appropriate to fulfil its statutory function; and
- notes the Statutory Guidance¹¹, issued to the PCA as an outcome of the first statutory review, remains in place.

¹¹www.gov.uk/government/publications/pubs-code-and-pubs-code-adjudicator-statutory-review-2016-to-2019

Pubs market structure

12. The pubs market has faced industry level external challenges both prior to and since the introduction of the Code in 2016. Industry statistics show a declining trend of beer sales by volume across the UK since 2000, though this stabilised between 2012 to 2019¹². In addition, consumer preferences changed over time, and the structure of the market has moved in line with more demand for food serving establishments.

Types of pub

13. As of the end of December 2021, there were 8,828 tied pubs in England and Wales in scope of the Code, but there is no strong comparable data available on the size of the total tied estate as the figures for pub numbers do not clearly distinguish between pubs by business model or arrangement.

14. Instead, the data is split by ownership and tenure. Industry data commissioned by the Government shows the split by ownership and tenure type between pubs of three different types: Non-managed pubs, which includes tied pubs, managed pubs, and free trade pubs. Updated data is shown in Table 1, is consistent with pubs market structure data included as part of the 2015 Impact Assessment¹³.

Table 1: Proportion of pubs in England and Wales by ownership and tenure type

Type of Pub	Description	Proportion of pubs in England and Wales – March 2015	Proportion of pubs in England and Wales – March 2022
Managed	- Managed arrangement where the manager acts as an employee or agent for the pub company - Franchise and retail agreements.	19%	24%
Non-Managed	- All tied tenancies - All tied leased agreements - Tenanted or leased agreements where the pub is owned by a group or pub company but the agreement is offered 'free of tie'	47%	40%
Free Trade	- All freeholders - Some small independents owned by a group but run independently	35%	37%

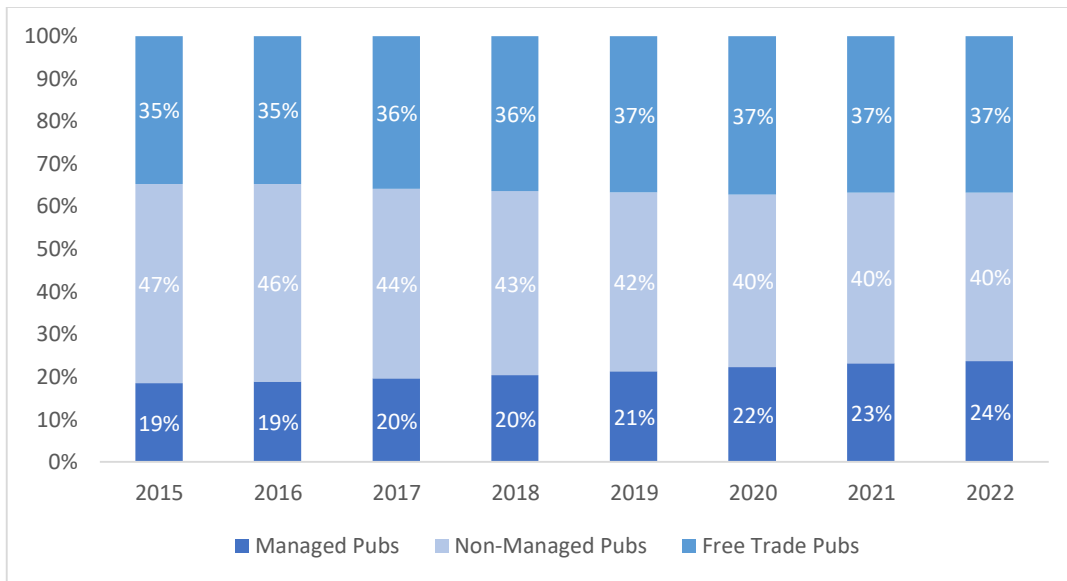
15. Figure 1 below shows how the proportion of pubs in England and Wales by each ownership and tenure type has changed since 2015, with non-managed pubs accounting for a lower proportion of total pubs than in previous years, but still representing the largest type in England and Wales.

¹² BPPA Statistical Digital Handbook 2021

¹³ See pg3, Table 1

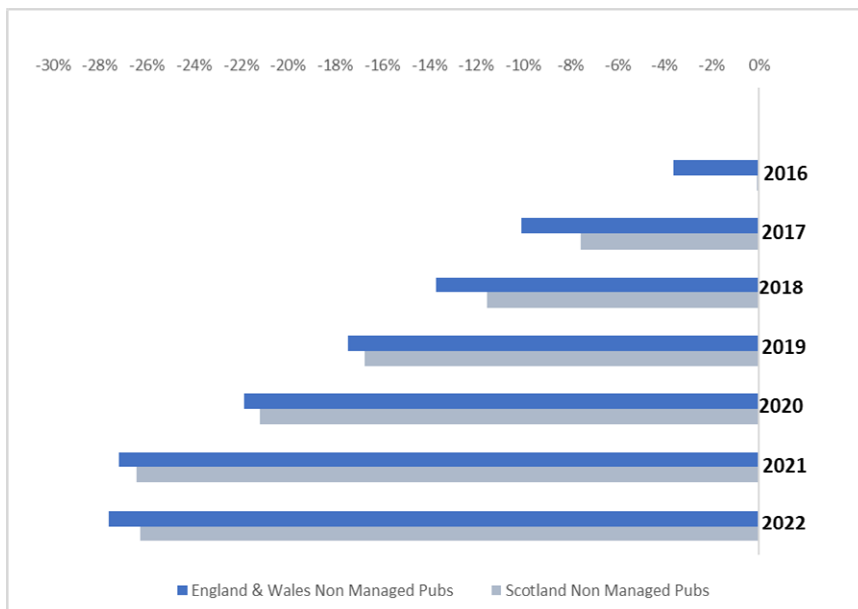
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408449/bis-15-64-pubs-statutory-code-and-adjudicator-final-stage-impact-assessment.pdf. 2015 data does not distinguish between the England and Wales and the UK as a whole.

Figure 1: Proportion of Pubs in England and Wales 2015 to 2022¹⁴



16. The change in the number of pubs of specific types can be explained by closures but also transfers from one type of pub to another. Closures in the non-managed pubs sector averaged around 885 pubs per year from 2012 to 2022, with some openings and transfers out of the sector. The trend in the number of closures has continued over the period since the Code was introduced, and over the 3-year review period. The number of closures observed in the free trade sector averaged around 1026 pubs per year over the same period, signalling wider challenges in the sector¹⁵.

Figure 2: Cumulative change in the number of non-managed pubs in England & Wales and in Scotland, since 2015¹⁶



¹⁴ Source: CGA Strategy industry data

¹⁵ However, there were more new openings in the free trade sector, slowing the net decrease of free trade pubs compared to non-managed pubs.

¹⁶ Source: CGA Strategy industry data

17. In England and Wales, non-managed pubs have declined the most over the period since before the Code was introduced, falling by 28% since 2015. There was also a decline in the number of free trade pubs over this period by 9%, but an increase in the number of managed pubs by 9%. The decline in the number of non-managed pubs in England and Wales is not evidence that the Code is a significant factor in driving closures of non-managed pubs. Comparing to the structure of the market in Scotland, which does not have the same Code, there is a similar trend in the decline in the number of non-managed pubs, which have fallen by 26% since 2015. While it is difficult to assess the causal impact of the Code on the number of non-managed pubs, the similarities to trends in Scotland is indicative of wider industry challenges being faced by all types of pubs across the whole of the UK, regardless of where the Code is in operation, for instance Covid-19 challenges and changing consumer tastes.

Findings of the statutory review

Operation of the Pubs Code

Introduction

18. The Code creates rights and protections for tied pub tenants in recognition of certain risks and issues which generally do not arise in other types of pub operating models. The Code does not aim to promote one pub operating model over another, whether tied, free-of-tie, managed etc. Each is different, bringing different considerations for the parties, playing to the different strengths, objectives and personal circumstances of the individual and where the different contractual conditions may suit one tenant or operator more than another. The Code is underpinned by two principles. These are the “fair and lawful dealing by pub-owning businesses and in relation to their tied tenants” and “tied tenants should be no worse off than they would be if they were not subject to any product or service tie” (“no worse off”).

19. The Code ensures greater transparency in pub-owning businesses’ dealings with their tied pub tenants and prospective tied pub tenants by:

- requiring certain information to be provided to tenants prior to signing a contract
- creating requirements for rent proposals and rent assessments
- creating a process to appoint an independent assessor to determine the rent under a market rent only tenancy, where this cannot be agreed
- prohibiting provisions in tied tenancies which only allow for rent increases
- preventing abuse of flow-monitoring devices
- preventing tied tenants being required to rent or purchase gaming machines
- requiring POBs to make provision for the role of their Business Development Managers, including agreed written records of meetings with tied tenants
- requiring POBs to each establish a Code Compliance Officer responsible for the POB’s compliance with the Code
- the right to price match premises insurance
- protection from detriment for exercising or attempting to exercise Code rights

The Code also created a right for a tied pub tenant, in certain circumstances, to be offered the option to change their commercial contract from a tied tenancy to a free-of-tie tenancy – the Market Rent Only (“MRO”) right.

20. This part of the report covers the main areas identified by stakeholders and from other available evidence relating to the operation of the Code. Respondents’ views in respect of the PCA performance are covered from page 25 onwards.

Scope

21. Some trade bodies supported the retention of the existing threshold¹⁷, noting the Pub Governing Body Code of Practice had worked well in providing protection for the tied tenants of smaller, unregulated pub-owning companies. However, some respondents proposed a Government study examining other pub operating models with a product tie and, should significant detriment be identified, including these in the scope of the Code or extending its scope to all businesses owning a tied pub in England and Wales.

Government assessment:

22. The Government introduced the Code in 2016 to address concerns specific to the tied operating model where the combination of a product tie and tied rent had led to the consideration of

¹⁷ The Code applies to businesses that own 500 or more tied pubs in England and Wales

evidence of unfair treatment. Other types of commercial contracts willingly entered into by parties which contain terms relating to a product or service tie do not in themselves provide a compelling reason for Government scrutiny. In the absence of robust evidence related to the poor treatment of tied tenants of pub-owning companies not regulated by the Code, the Government will retain the current scope of the Code but will continue to keep this under review.

Provision of information

23. The Code and Schedule 1 of the Code specify the information a POB must provide, in particular for new agreements, to ensure clarity of parties' respective obligations for the tied pub in question. The PCA viewed tenants' understanding of their Code rights as the foundation for the delivery of the two principles underpinning the Code, with others adding it had observed an improvement in understanding and actioning of Code rights among its tenant members. The PCA and some other respondents referenced data from the PCA's 2022 Survey showing increased tenant awareness of the Code. POBs added prospective tied tenants' improved commercial awareness to run a tied pub, coupled with pre-training and the need to obtain professional advice, had also led to better clarity of expectations for both parties.
24. For tied tenants with repair or maintenance obligations, the Code requires the completion of a "Schedule of Condition" setting out a full and clear description of the premises, including some dilapidation related matters. With regard to property condition obligations, and specifically "initial works", the PCA proposed an extension of the Code's existing information provisions applying to all new tenancies to the renewal of tenancies protected under the Landlord and Tenant Act 1954 (the "LTA") to ensure these align. An adviser proposed the removal of time limits for PCA referrals where, at the end of a tenant's lease, a POB had failed to provide a Schedule of Condition or where the dilapidation schedule had failed to reflect the original condition. Some POBs and others called for the Code's information requirements to be simplified to reduce costs by exempting Code provisions in relation to sustainable business plans or the assigning of tenancies for experienced tenants to recognise their differing information needs. The findings from the PCA's 2022 Survey showed 83% of tenants¹⁸ had found the information provided to them by their POB useful, rising to 86% among tenants that had started their tenancy in the past two years. Moreover, the majority of tenants¹⁹ thought that their sustainable business plan was useful in managing their tenancy, and newer tenants again found this the most useful. Compliance with the provision of information remained high, though 3% of tenants reported they had not received any information prior to the start of their tenancy.

Government assessment:

25. The Government agrees the information requirements of the Code are an important aspect of tenants' rights in improving their awareness and understanding of the respective rights and responsibilities of the commercial parties and help manage expectations. Prior to agreeing a contractual tied agreement, whether new or a renewal, the Government stresses the importance of obtaining professional advice to ensure the condition of the premises is accurately recorded and agreed, to ensure clarity for both parties regarding their respective repair and maintenance obligations throughout the period of the agreed tenancy. The Code requires the Business Development Manager to make appropriate notes of any discussion with the tied pub tenant in connection with repairs to the tied pub premises where the tenant must be provided with a written copy of the note within 14 days for their agreement. Where information requirements are thought

¹⁸ PCA Annual Tied Tenants Survey 2022 https://www.gov.uk/government/publications/pca-annual-tied-tenant-survey-2022-results?utm_medium=email&utm_campaign=govuk-notifications-topic&utm_source=83488d52-8913-4129-aa39-e769a04ba891&utm_content=immediately

¹⁹ PCA Annual Tied Tenants Survey 2022. 59% of tenants who started their tenancy since July 2016 found their sustainable business plan useful in managing their tenancy. 70% of tenants that had started their tenancy in the past two years found the sustainable business plan useful.

not to have been observed, the tenant should address the matter with the Business Development Manager, their Code Compliance Officer or, if it cannot be resolved, refer the matter to the PCA. Given the high numbers of tenants considering these to be useful, the Government considers the Code's requirements to remain appropriate.

26. The Code's maintenance and repair provisions go further than other landlord and tenant legislation in terms of clarifying the respective parties' obligations and largely reflect the industry professional standard set by RICS. The LTA sets out a commercial landlord's legal responsibility to maintain in a safe state of repair those parts of the building for which they are responsible, advises tenants to seek independent, professional qualified advice and also advises them to ask their landlord to undertake any necessary work prior to signing a commercial tenancy. The Government welcomes the PCA's advice²⁰ on repairs and dilapidations for tied tenants and in noting the dilapidation best practice²¹ developed and agreed by the POBs, encourages tenants to highlight instances where POBs' handling of dilapidations deviates from their own best practice guidance.

Assessment of rent

27. Where a tied tenant has requested an MRO proposal, the Code allows for the referral of the proposed rent to an independent assessor for determination. The PCA observed this process had worked well with positive outcomes for tied tenants in establishing a market rent. Some tenant representatives and advisers alleged some surveyors had undertaken assessments with a particular final rent figure in mind to be achieved. While tenant groups noted surveyors, depending on whether acting on behalf of the tenant or the POB, could arrive at different assessed rents for the same pub, another respondent noted surveyors, working in accordance with RICS²² procedures, were able to conduct valuations fulfilling the different needs and interests of their client. Some respondents observed the lack of disregard of any improvements tenants had made to their pub in the setting of a market rent. Another respondent noted this to be due to the differences between the definitions for a "market rent" in the Act and the RICS standards which meant that rent assessments undertaken for the purposes of the Code differed from a valuation undertaken in the wider hospitality sector, such as for secured lending or financial reporting. They proposed replacing the Code's reference to "RICS guidance" with "RICS standards" or for advice to be issued. A tenant representative questioned the process that applied to benchmark rent assessments and claimed, as figures were supplied by the POBs, this had led to inflated incomes and suppressed expenses compared to the actuals experienced by tied tenants.

Government assessment: assessment of rent

28. It is not surprising landlords and tenants start from very different positions in rent negotiations. This is why the Code allows for the referral of the proposed MRO rent to an independent assessor where both parties' needs and interests are fulfilled. Concerns about the standards applied by surveyors should be taken up with the Royal Institution of Chartered Surveyors (RICS). With regard to tenants' investments, the Government advises prior written agreement on the works to be undertaken and how improvements to the property are to be reflected in future rent assessments. The Government also encourages parties to take account of the PCA's guidance²³ on this matter.

²⁰ <https://www.gov.uk/government/publications/what-tied-pub-tenants-need-to-know-about-repairs-and-dilapidations/what-tied-tenants-need-to-know-about-repairs-and-dilapidations>

²¹ <https://beerandpub.com/policy-campaigns/pub-operations>

²² <https://www.rics.org/>

²³ <https://www.gov.uk/government/publications/guidance-on-clarity-in-the-mro-procedure/guidance-on-clarity-in-the-mro-procedure>

Market Rent Only (MRO)

29. The MRO right in the Code presents the main mechanism enabling a tied tenant to determine whether they are “no worse off” than they would be if they were not subject to any product or service tie. The Code specifies four circumstances²⁴ (“MRO events”) where a tied tenant can issue an MRO notice requiring the POB to issue its response, including with an MRO proposal setting out the proposed terms and, as of 1 April 2022, the rent for a ‘free-of-tie’ tenancy.

MRO: take-up

30. One of the rights of a tied tenant is to issue an MRO notice. The period under review saw the number of MRO notices received stay stable, consistent with the trend observed before the start of the review period. During the 3-year review period from April 2019 to March 2022, 650 MRO notices were received²⁵, 84% of which were accepted²⁶. This is relatively consistent with the overall trend since the Code was introduced in 2016. The PCA’s 2022 Survey indicated 61% of all tied pub tenants were aware of their MRO right to go free-of-tie in certain circumstances²⁷.

31. Most tenants with the same tenancy since July 2016 would have had the opportunity to use their MRO right²⁸. POBs thought, as a free-of-tie tenancy required a different profile of operator to deal with different objectives, risks and rewards, taking on a free-of-tie tenancy had not been a viable option for most tied tenants. They viewed the purpose of the MRO right was not to increase the number of free-of-tie agreements nor for the take-up of MRO to be used to assess the Code’s operation. Given the high level of awareness of the Code and low numbers of tenants changing to free-of-tie tenancies, they thought tenants were aware they were “no worse off” remaining tied, including on re-negotiated terms, where the tied model balanced tenants’ appetite for risk and reward with the commercial interests of the POB. BBPA MRO statistics showed since the Code was introduced, 60% of accepted and completed MRO notices had resulted in renewed tied agreements and 23% in free-of-tie tenancies. The PCA also provided some case study evidence of tenants’ experience of using their MRO right²⁹.

32. Other respondents considered the low number of conversions to free-of-tie tenancies to be due to tenants being deterred by rent increases, the complexity and duration of the MRO process, arbitration costs and the additional costs of free-of-tie terms, such as Retail Price Index (“RPI”) rent reviews and upward-only rent terms. A tenant representative proposed backdating the free-of-tie rent to the rent review date to discourage delays though others noted the MRO process had become quicker and easier and not a barrier to take-up. The PCA thought a lack of independent professional advice, combined with a historic focus on complexity and arbitration delays, may have deterred tenants’ use of their MRO right. Some respondents suggested high terminal dilapidation bills had discouraged tenants and considered this an “unfair business practice” to be tackled by the PCA. POBs shared they had granted concessions to transition changes in rent frequency, supported tenants’ deposit build-ups and allowed for dilapidations bills to be carried over. The PCA had also issued guidance related to the treatment of dilapidations in the MRO process and included a question in the PCA’s 2022 Survey for tied tenants on Business Development Managers’ handling of dilapidations. The best practice dilapidation guidance agreed and produced by the POBs was also noted and some respondents thought this should be clearly referenced on the PCA’s website.

²⁴<https://www.gov.uk/government/publications/market-rent-only-mro-rights>

²⁵ BBPA. Number of MRO notices received (accepted or rejected), excluding notices that were withdrawn.

²⁶ 546 accepted out of 650 received between April 2019 to March 2022.

²⁷ PCA’s Survey 2022.

²⁸ If, in the last 5 years, no rent assessment has ended and no rent review has concluded, the tenant can request a rent assessment where receipt of the rent assessment proposal is an MRO event.

²⁹ The small scale survey by the PCA found 9 out of 10 tenants had used the MRO process to negotiate better tied deal.

MRO: impact

33. The POBs referenced arbitration data showing the MRO right as the main source of disputes, resulting in high costs despite its low take-up. Published arbitration data showed, during the period under review, 83%³⁰ of accepted arbitration referrals were on MRO matters, compared to 17% on non-MRO matters. This remained consistent with period since the Code's introduction³¹. The PCA noted tenants' improved experience of the MRO process and the reduced number of arbitration referrals despite the challenges caused by the Covid-19 pandemic. Some respondents noted the MRO right had been used to negotiate better tied deals, POBs added this had created more favourable terms for ex-tied tenants not available to other free-of-tie tenants, causing lower investment in the tied pub market.
34. While POBs said the tied model had remained important to most, they considered the MRO right had eroded security of contract, diverting investments to more secure options, disadvantaging tied tenants and posing a risk to the risk-reward nature of the tied model. Some POBs had taken steps to mitigate MRO-related risks, such as by changing to managed agreements or tied pub franchise operations exempted from the MRO provisions, but they also noted the operation of other types of pub models had suited the different skills and financial situations of existing and new tenants. Some respondents, including a tenant representative, suggested POBs were using section 25 notices³² to convert the tied pub into operating models out of scope of the Code and proposed the Code's improved interaction with the timing of LTA processes. However, the PCA shared data collated from POBs' compliance reports for the review period, which showed low numbers of non-renewal of tenancies under section 25 of the LTA, while also noting the lower number of pubs with protected tenancy renewal rights. The PCA proposed issuing guidance on the need for POBs to keep a record of reasoned decisions for opposing statutory renewal of a tenancy, in light of the Code's interaction with the provisions in the LTA to help increase tenants' confidence to use their Code rights.
35. Other effects of the MRO right were said by POBs to include the reduced resilience of the tied model potentially leading to pubs being sold, fewer opportunities for entrepreneurs, tenancy renewal rights no longer being offered and a 25% reduction of longer-term agreements since 2016. It was felt the use of shorter tenancies had impacted on tenants' longer-term security and their ability to secure a return on their investment, particularly for tenants with repair and maintenance obligations or those who sought to improve their business. While the Code contains an investment exception³³, POBs saw the qualifying conditions as overly restrictive. The PCA noted POBs' compliance reports for 2020/21 had shown 167 qualifying investments had been made across the regulated tied estate. The POBs proposed amending the definition for a "qualifying investment" or allow for the level of investment and the MRO deferral period to be set and agreed by both parties. Some respondents, including POBs, proposed amending the Code to enable tenants at the renewal stage to opt-out of the MRO right in return for a longer lease and/or investment in order to achieve longer-term business security.

Government assessment: MRO

36. Available data on the low number of arbitration cases and the results of the PCA's 2022 Survey suggests tenants being reasonably content; with 61% of all tied pub tenants being satisfied with the type of arrangement they chose for their pub. This may be due to a combination of reasons, including the effect of the Code's rights, particularly information for prospective and new tenants

³⁰ Between 2019 to 2022, 212 out of 254 accepted arbitration referrals were on MRO matters.

³¹ Between 2016 to 2022, around 85% of accepted arbitration referrals had been on MRO related matters.

³² Section 25 of the Landlord and Tenant Act 1954 enables the landlord to issue a notice to end an existing, protected business tenancy to indicate that renewal is opposed and applying at least one of the statutory grounds set out in section 30(1) of the Landlord and Tenant Act 1954.

³³ Regulation 56 of the Code allows for the deferral of the MRO right up to seven years in return of an investment meeting the requirements of the Code.

leading to informed decision making, and Code protections leading to fewer situations where tenants might want to break with the tied model.

37. The Government notes POBs' views that the MRO right may have led to a lack of contractual certainty, impacting on their investment decisions and leading them to manage the occurrence of MRO events by, for example, offering shorter leases with no renewal rights. The Government is interested in whether there is a case for creating an additional choice for experienced tied tenants to forego their MRO right in return for a longer tenancy and/or greater investment. As few tenants have directly made their views known on this issue, the Government believes further work with the regulated businesses is required following the conclusion of the review to establish tied tenants' views and identify any potential concerns about an MRO opt-out before deciding whether to consult more widely. The Government recognises the need to ensure that any possible proposals do not undermine a key Code right and tied tenants are given a genuine choice. This work will also consider trends in the unregulated tied pub sector in terms of investments and length of tenancies.
38. The Code maintains a careful balance in creating rights and protections for tied tenants and POBs' legitimate rights over the property they own. Provided contractual and legal obligations are fulfilled and the lawful process followed, it is not unlawful for a landlord not to renew a commercial tenancy. A tied tenant who believes they have experienced detriment when seeking to exercise their MRO rights should bring this to the attention of the PCA. Commercial leases in England and Wales are underpinned by the commercial leasehold legislation, which includes the LTA. While section 25 of the LTA and MRO processes may run concurrently, the Civil Procedure Rules Practice Direction 56³⁴ clarifies a claim for a new tenancy will be stayed where an MRO claim is ongoing. Due to concern the LTA has not kept pace with the realities of the sector, the Government has committed to review³⁵ how the right to renew business tenancies is working and consider options for reform.

Events where an MRO right might be exercised

39. With regards to the four events where an MRO might be exercised³⁶, most POBs considered the "significant price increase" MRO event had created an unfair advantage for unregulated pub companies which can pass on full supplier increases to their tied tenants. A POB added that, while they had delayed passing on price increases to help tenants during the Covid-19 pandemic and from other inflationary pressures, their inability to reference the Consumer Price Index ("CPI") rate on the date of the relevant invoice had caused issues. Some POBs thought potential volatility in the CPI rate had exacerbated this and proposed amending the Code's formula so this applies from the date of the price increase, as opposed to the invoice date.
40. Some POBs had sought to use their buying power to negotiate lower energy prices to be offered to their tied tenants through an energy scheme but felt deterred due to the uncertainty whether an increase in energy costs, at the end of the period, could serve as an MRO event. As a voluntary scheme, a tenant representative considered energy schemes not part of the tie or in scope of the Code but proposed preventing POBs from passing on higher energy prices to protect tenants' income. Some respondents felt smaller brewers were disadvantaged by the formula applying to beer where a lower percentage price increase trigger had been set compared to other tied products whereas another queried the "change of circumstances" MRO trigger event applying only where an event was unlikely to affect all pubs in England and Wales.

³⁴ https://www.justice.gov.uk/courts/procedure-rules/civil/rules/part56/pd_part56

³⁵ <https://www.lawcom.gov.uk/decades-old-laws-affecting-business-tenants-to-be-reviewed/>

³⁶ <https://www.gov.uk/government/publications/market-rent-only-mro-rights>

Government assessment: MRO events

41. The Government welcomes the initiative by the POBs' application of their purchasing power to negotiate more favourable energy prices on behalf of their tenants. For such schemes to work well, the Government presumes the importance of clarity for all parties involved, including the energy supplier, and their respective commitment to a specified period of supply. The Government would not wish the Code to negatively impact on this type of support being made available to tied tenants, however, POBs will need to be mindful of the provisions of the Code when considering the detail of the arrangements proposed.
42. The Code's formula applying to beer supplied under the tie, is set at CPI+3% and applies where the tied product is invoiced under the same name, unit size or capacity of packaging³⁷. The use of CPI in the Code formula remains an appropriate method to account for the effect of inflation when calculating any significant price increase. CPI has national statistics status as a comprehensive and commonly used measure of inflation, published by the Office for National Statistics. Its use in the Code with a tolerance rate allows for a consistent threshold over the longer term and its overall volatility since the Code's introduction of the Code in 2016 has been low month to month, outside of an extraordinary period of inflation in the last year of this review. Where a significant price increase has occurred, the tenant's MRO Notice must be received by their POB within 21 days from the day after the event. The invoice is the point at which the tied tenant is subject to the price increase and is therefore the most appropriate date from which to apply the formula. It might otherwise prove challenging for tied tenants to identify when the price of one of their tied products or services had increased in time to exercise their MRO right, should they wish to do so. The MRO trigger relating to a "change of circumstances" applies to local events which impact on the tied pub as opposed to events affecting all pubs in England and Wales which could result in permanent changes to the commercial and property rights of a pub-owning business despite events being outside its control³⁸.

MRO – terms

43. The PCA noted the reduced number of arbitration referrals during the period under review and considered this due to a better understanding of compliant MRO terms and its compliance checklist for POBs. POBs agreed clarity had improved but questioned the PCA's pub-by-pub approach towards compliance which they reflected had raised costs, causing delay and complexity for POBs in managing their tied estates, and confusion whether tied terms might influence the compliance of the terms in an MRO proposal. The POBs sought greater certainty on "uncommon" and "unreasonable" terms and proposed these should be listed by the PCA to limit costs or for the PCA to work with a third party to identify "common" clauses. POBs proposed the PCA's accreditation of each POB's MRO proposal template would improve compliance and reduce disputes but suggested more complex cases could still be referred for arbitration.

Government assessment: terms

44. The provisions of the Code must be able to take account of the particulars of each individual tied pub and do so by requiring the reasonableness of an MRO proposal and restricting the use of "uncommon terms". The Government believes the accreditation of MRO templates might erode important flexibility of the Code and risk deterring a tenant from negotiating a better deal if they believed the POB's template proposal had the PCA's approval.

Gaming machines

45. Some respondents sought greater clarity on the use of tied gaming machines which they thought had been banned by the Code. They proposed amending the Code to enable a tied pub tenant

³⁷ <https://www.gov.uk/government/publications/what-tied-pub-tenants-need-to-know-about-significant-increase-in-price>

³⁸ <https://www.gov.uk/government/publications/what-tied-pub-tenants-need-to-know-about-trigger-events>

to use any gaming machine supplier and ensure a gaming machine tie could not be imposed. The PCA shared it had received no substantive information from industry stakeholders how the use of tied gaming machines had affected tenants.

Government assessment: gaming machines

46. The Code prevents a POB requiring the tenant to have a tied gaming machine in a new or renewed tenancy but does not prevent the tenant from having a tied machine where they chose to do so. As the tenant cannot be required to have a tied gaming machine, there is nothing to prevent them from using this to negotiate, for example, their share of the profits from such machines.

Guest beer

47. Some respondents considered the tied pub operating model difficult to access for small brewers and proposed a right for tenants to stock a guest beer to create more choice for consumers and improve access to the tied pub model for independent brewers. Other proposals included a requirement for POBs to publish the names of their tied pubs and providing a list of brewers able to supply beer to their tied tenants, rules of engagement to help awareness of which pubs could be offered brewers' products, a suggestion that the PCA should publish a list of ex-tied pubs and clearer indication of brand ownership for consumers. A campaigner thought a competition review into the beer and pub sector to be overdue, including consideration of the restrictions for tied tenants to buy products direct from independent breweries.

Government assessment: guest beer

48. The Code regulates the relationship between large POBs and their tied pub tenants. It is a matter for prospective tenants, tenants renewing their tied agreements or tenants considering an MRO proposal to agree their ability to offer guest beers as part of their commercial negotiation before agreeing terms. However, it is generally for the landlord of the property to decide the basis on which they wish to lease out their premises, and, provided these are not unfair or discriminatory, the Government does not seek to intervene in such commercial decisions. Evidence of anti-competitiveness should be referred to the Competition Market Authority for its consideration.

Appeal route

49. Some respondents commented on the appeal route of the Code which, in accordance with the Arbitration Act 1996, is the High Court. The PCA highlighted four appeals had been brought to the High Court by the POBs and suggested that costs, complexity and delays might have deterred tied tenants from bringing an appeal. A POB agreed the process could unduly involve the tenant and expose them to High Court costs despite the appeal concerning the PCA or an external arbitrator's determination.

50. A POB supported changing the appeals route from the High Court to the First-tier Tribunal as a cheaper option for parties, allowing for issues to be heard anew by an inquisitorial tribunal more experienced on land and landlord matters, with a further appeal route to the Upper Tribunal (Lands Chamber). Another respondent considered a change to the First-tier Tribunal likely to cause new and separate complications, proposing instead a taxpayer-funded Government legal fund to help bring appeals to the High Court. Some POBs proposed a third-party procedure to consider submissions by the arbitrator and the POB, with the tenants' participation being optional or, alternatively, a judicial review where either the POB or the tenant acted as the principal party and the PCA as the respondent.

Government Assessment: alternative appeal route

51. As an outcome to the first statutory review and a subsequent consultation³⁹ on changes to the Code, the Government committed to undertake further work to consider alternative appeal routes for arbitration awards made by the PCA. There have been four appeals to the High Court since the introduction of the Code in July 2016 and the Government welcomes the resultant case law creating greater legal clarity of the Code's provisions for POBs and tied tenants. However, given the low number of arbitration referrals to the PCA⁴⁰, the Government is concerned a legal change to the appeal route would have little practical impact and has concluded it will not further pursue this option.

Fair and lawful treatment

52. The PCA, an adviser, POBs and most business representatives believed the Code to be consistent with the principle of fair and lawful dealing by the POBs in relation to their tied pub tenants. Some respondents considered the Code had operated relatively well overall, where the issues which had led to the Code being introduced had largely been resolved, resulting in increased trust and a lower level of disputes, to the benefit of both parties. However, there were some reflections that the Code's operation could improve further.

53. The PCA thought the Code had delivered fair and lawful treatment through its transparency and information requirements, where access to clear information and quality advice at the right time had led to a more balanced business relationship. Most POBs said fair and lawful behaviour had been demonstrated through the improved rigour in day-to-day processes. This had embedded good working practices with tenants, such as training in on-boarding, improved information provisions, transparent rent reviews, better day-to-day support and accurate Business Development Manager discussion notes (on issues such as business planning). The PCA said it had worked with Code Compliance Officers to improve new tenants' awareness of their Code rights⁴¹, how they support tenants, particularly during the early stages of the business relationship, and to agree the sign-off of MRO proposals as compliant to allow for balanced negotiation. This was supported by the result of the PCA's 2022 Survey which showed 76% of tied tenants believed their Business Development Manager had been fair with them in discussions, and where most tenants were satisfied with their POB. As non-MRO disputes could be referred to the PCA at any point, some POBs considered the improvements in the fair and lawful treatment were supported by the low number of non-MRO related referrals to the PCA.

54. Campaigners and some other respondents thought the Code had failed to uphold the fair and lawful principle, alleging tenants had not challenged POBs due to concerns of legal action and that tenants had continued to face anti-competitive tied pricing and unfair rents. One respondent shared comments from its small open-access survey⁴² which included anecdotal case study evidence where some tenants felt the approach by POBs to the Code had worsened their relationship or had left it unchanged. A tenant representative thought the PCA had failed to tackle new unfair practices, such as upward only rent changes, variance in surveyors' rent valuations, inflated earnings based on historical trading figures for new tenants, high terminal dilapidations costs, health and safety compliance issues not being tackled, exploitation of tenants on short-term agreements and the take-up of franchise pub management models.

³⁹ www.gov.uk/government/consultations/options-to-amend-the-pubs-code

⁴⁰ www.gov.uk/government/publications/pca-arbitration-data-quarterly-release-april-june-2023

⁴¹ In 2022, 61% of tied pub tenants were familiar with their right to request an MRO option and 61% of tied pub tenants were familiar with their rights when receiving a rent assessment proposal regarding an existing tenancy.

⁴² a short, open access survey of tied tenants between 15 July and 8 August 2022. The survey received 68 responses; 45 from tied tenants of regulated pub companies, 8 from tied tenants of unregulated pub companies, and 15 from interested parties, typically brewers on tied pricing. While the sampling method was not necessarily representative of the tied tenants population, the survey provided some direct case study quotations from individual tied tenants about their own experiences.

“No worse off” principle

55. Tenant representative groups thought the Code had not delivered the “no worse off” principle due to complexities and high costs, a failure to transfer profits to the tenant, the lack of disregard of tenants’ improvements in the determination of the MRO rent and prohibitive costs to move to a free-of-tie tenancy, such as the application of annual RPI, which allow for annual adjustments to the rent, and lack of “upward and downward” rent reviews, which typically take place every three to five years.
56. Some POBs viewed the MRO right to be inconsistent with the “no worse off” principle due to misunderstandings about the differences between the tied and free-of-tie model and tenants’ expectation the Code would deliver the same lease but without the tie. POBs considered many tenants had underestimated the value of Special Commercial or Financial Advantages (“SCORFA”) benefits until the Covid-19 pandemic where tied tenants had received significant rent concessions and support, which they estimated had added up to £242m. POBs advised caution in quantifying the benefits of SCORFA for the purpose of the “no worse off” principle as they are unique to each pub and the experience and skill of the tenant, and POBs suggested the Government should acknowledge the “no worse off” principle to be different for every tenant and reconsider this concept.
57. Some POBs considered the PCA’s comparison of a 3 or 5-year tied tenancy with a free-of-tie lease had failed to adequately reflect the differences between the different operating models. Some POBs added that some arbitrators had misunderstood the “no worse off” principle and had left some ex-tied tenants better off than tied or better off than other free-of-tie tenants in the pub sector. Some POBs and a business representative considered this due to PCA’s ‘reasonableness’ approach which they viewed had exceeded the “no worse off” principle.
58. Other respondents believed the Code to be consistent with the “no worse off” principle and had seen a noticeable improvement in the MRO right being accessed, improving tenants’ overall commercial position. The PCA agreed the MRO right had enabled tied tenants to choose the best option for their business and achieve a more favourable tied deal or a free-of-tie tenancy though noted some tenants, due to shorter tenancy agreements or franchise arrangements, had been unlikely to be able to access the MRO right to determine if they were “no worse off” than free-of-tie.

Government assessment: the Code’s principles

59. The Code places proportionate obligations on POBs while establishing specific rights and protections for their tied tenants.
60. The Government is encouraged that most respondents’ views recognise the largely positive impact of the Code on the regulated tied relationship but also notes some suggestions of poor treatment of tied tenants. Analysis of publicly available data, particularly where the tied tenant was directly engaged, such as the results of the PCA’s 2022 Survey, support the generally positive experiences of the Code. For instance, in 2022, 62% of tied tenants reported being satisfied with their overall relationship with their POB, and 61% of tied tenants were satisfied with the type of tenancy arrangement they chose for their pub. The PCA’s 2022 Survey further showed that 83% of tied tenants found the information received from their POB prior to the start of their tenancy to be useful, and this was higher among the newest tenants.
61. The PCA’s published arbitration data shows a lower number of disputes since before the review period started which may be due to better compliance and improved provision of information and guidance. Where there are issues, the tenant should raise the matter with their Business Development Manager or Code Compliance Officer, whose role is to ensure the POB’s compliance with the Code or, if unable to address or resolve the matter, contact the PCA. While the Code contains tied rent related provisions and enables the parties to appoint an independent assessor to determine the MRO rent, neither the Code nor the PCA are intended to deal with, or

resolve, tied rent disputes. Tied rent related concerns should be taken up with the surveyor or assessors in question or, if necessary, submitted to the relevant governing body.

62. The MRO process presents the Code's main mechanism for a tied tenant to determine whether they are no worse off in a tied tenancy compared to a free-of-tie tenancy. The Government considers the "no worse off" principle will be different for each tenant where a term in an MRO proposal viewed as unreasonable in one situation might be reasonable in another, for example, if off-set with a lower rent. For instance, if a tenant decides to remain tied – on the same or renegotiated terms – the "no worse off" principle could be viewed as met for that particular tenant and, similarly, if the tenant were to accept the free-of-tie offer if they considered themselves to be worse off remaining tied. Where proposed MRO terms are considered unreasonable, these can be renegotiated or referred to the PCA for formal arbitration and resolution to ensure the offer is compliant. As some POBs have highlighted, no two pubs are the same and the Government considers a pub's particulars should be taken into account to determine whether the MRO proposal is reasonable and compliant, in order to help the tenant make an informed decision whether they are "no worse off" remaining tied or decide to change to a free-of-tie tenancy.
63. The Government has noted respondents' comments on the use of shorter tenancies, non-renewal clauses, franchises and the conversion to alternative operating models. As the legitimate property owner, it is for the POB to determine the particulars of a tenancy and the Government considers the detailed substance of commercial tenancy agreements to remain a matter for negotiation between the two commercial parties. However, the Code requires a POB not to subject a tied pub tenant to any detriment where the tenant wants to exercise their Code rights. Any evidence of practices used to deter tied tenants from accessing their Code rights should be referred to the PCA which has the necessary tools and powers to address such behaviour.

Following analysis of publicly available evidence, and the consideration of respondents' responses, the Government believes the Code is consistent with the principles in the Act.

Regulatory costs

64. POBs and a business representative estimated the total cumulative Code related costs had amounted to £6.4m in 2021, comprising costs related to the PCA's levy, compliance, legal and administration, development of IT systems, training, senior management time, full-time staff and employment of qualified solicitors⁴³. Some POBs compared the annual cost of the Voluntary Code observed by a number of unregulated pub-owning companies of about £20-£40 per pub, which includes oversight by the Pub Governing Body and access to dispute resolution mechanisms, with the PCA's average levy costs of £100 to £350 per pub, excluding arbitration costs. POBs proposed a medium-term goal for the Government to revoke the Code using existing powers and allow for the tied sector to operate under a self-governing system. POBs added that an economic assessment of the success of the Code should be undertaken as part of the third review, in particular, an assessment of the MRO right.

Government assessment

65. The Government has noted POBs' suggestion to assess the impact of the regulatory framework. As the operation of the Code and the performance of the PCA must be reviewed every three years, the Government will work with the POBs on the type of data needed in order for this to be considered as part of the next statutory review.

⁴³ The most appropriate published estimate of the total cumulative cost of the Code is the Equivalent Annual Net Direct Cost to Business (EANDCB) on page 30 of the 2015 Impact Assessment. This estimate takes into account legal and compliance costs as well as ongoing operating costs and initial set up costs of the PCA. The EANDCB in 2015 was £2.8m.

Pubs Code Adjudicator

Introduction

66. The role of the PCA is to enforce the Code and to encourage and monitor compliance with its requirements. The PCA has a duty to arbitrate disputes where a tied tenant or a POB make a referral and can appoint a third party to do so on its behalf. The PCA is a separate statutory entity independent of government and is wholly funded by an annual levy imposed on the regulated businesses. To safeguard its independence, the PCA cannot be directed how to discharge its functions but operates in accordance with a broad governance framework⁴⁴ agreed by the PCA and the Government. Fiona Dickie was appointed as the second PCA part way through the period under review, in May 2020, succeeding Paul Newby, having previously been appointed as the deputy PCA in November 2017.

67. In November 2020, upon completion of the first review, the Secretary of State issued formal Statutory Guidance⁴⁵ to the PCA to have in mind:

- when engaging external arbitrators, their suitable experience, knowledge of the statutory framework and additional training requirements
- a clear explanation to stakeholders how reports of alleged non-compliance and complaints about POB behaviour are dealt with
- making more public statements about the outcome of its regulatory interventions or where the PCA worked successfully with POBs to resolve issues
- the importance of new tenants understanding and accessing their Code rights

68. This Statutory Guidance remains in place.

General comments on the effectiveness of the PCA

69. Given the complexity of the legislation and stakeholders' different expectations, most POBs, trade association, and an adviser thought the PCA had performed relatively well overall, resulting in improved transparency of the Code's processes, better information on non-MRO provisions, clearance of the backlog of arbitration cases and shorter dispute resolution times. Some tenant representatives thought the PCA had not upheld the two principles of the legislation or addressed the non-renewal of tenancies under section 25 of the LTA, dilapidations and the less generous assistance for ex-tied tenants during the Covid-19 pandemic. POBs expressed concern at the PCA's involvement in matters they considered to be outside the scope of the Code, such as those governed by the LTA, or raising best practice on issues where the costs met by the POBs had not equalled the benefits and suggested the PCA should acknowledge the Code was achieving its objectives.

70. POBs considered the PCA's costs and administrative burden should be reduced, in recognition of the lower number of regulated tied pubs and the low number of disputes referred to the PCA. They felt regulatory burdens had increased, despite issues being resolved within POBs' own complaints procedures, and that new data requests by the PCA which had exceeded the requirements of the Code had meant internal systems required changes. Other general suggestions included:

- introducing a mechanism to lower the levy for POBs with few or no complaints
- a new tapered levy fee system with lower payments in recognition of POBs' performance

⁴⁴ <https://www.gov.uk/government/publications/pubs-code-adjudicator-pca-framework-document>

⁴⁵ www.gov.uk/government/publications/pubs-code-and-pubs-code-adjudicator-statutory-review-2016-to-2019

- a role for Government in directing the PCA to take a lighter-touch approach by reducing compliance and administrative costs, capping average levy costs per pub and lowering third party fees.

Communication and engagement

71. The POBs and tenant representative groups noted the current PCA had favoured communication through what they considered to be an overly legalistic approach, rather than through more informal means. POBs and tenant representatives also felt the PCA had often taken some time to respond to enquiries or issues being raised and, when writing to the PCA, they had not always received a response. POBs and tenant groups encouraged the PCA to improve its formal and informal engagement with all of the Code's stakeholders to achieve swifter resolution of issues. However, most POBs also noted the constructive engagement by the regulatory team within the PCA, which had been positive, and the improved structure of POBs' annual compliance reports which had further driven transparency.
72. Some respondents, including the PCA, cited the results of PCA's 2022 Survey where surveyed tenants had lacked awareness of the PCA. The PCA highlighted its increased engagement with the sector through virtual and in-person events, social media and a regular column in a trade publication. Some respondents felt that the PCA should do more to engage directly with tied pub tenants and their representatives and to build their trust in the PCA. Additionally, the PCA's intention to double the size of its Annual Tied Tenants Survey was welcomed.
73. Some respondents, including the POBs, welcomed that the PCA's 3-year strategy set performance measures for the handling of enquiries and correspondence, though the adoption of "service level agreements" for tied pub tenants and POBs was also suggested. The POBs and a business representative noted the PCA's strategy had not committed the PCA to adopting a lighter touch regulatory approach and viewed the PCA's decision not to consult on the strategy as a missed engagement opportunity.

Giving advice and guidance

74. Most respondents considered the PCA's guidance to have improved, providing clear and matter-of-fact information about the Code and welcoming the PCA's flowcharts as useful for Business Development Managers and tied tenants. The PCA noted the PCA's 2022 Survey showed that while awareness of the Code had increased only 32% of tied tenants had visited the PCA's website in the past two years and the PCA was keen to increase this. Of those that had used its website, many recalled a positive experience. 71% had found the information on the website helpful, and 72% had found the website easy to navigate and use. However, of the tenants aware of the Code, 39% of tenants surveyed were unaware of their right to request MRO in certain circumstances and one respondent felt this showed that an imbalance of information had continued to exist. While there was some suggestion the PCA's web-based content had improved, some POBs suggested the PCA undertake further work to index documents and make documents searchable.
75. Some POBs felt the PCA's statutory guidance had created extra layers of complexity and compliance, citing the regulatory handbook, guidance on the MRO process, rent proposals, sediment and operational waste. Most POBs said the PCA had not provided sufficient clarification on the application of guidance leading to differing interpretations and confusion about compliance. A number of respondents proposed the PCA's guidance could be improved through better alignment with arbitral decisions, being shortened and simplified using more accessible language, and proposed the PCA's formal and informal engagement with the Code's stakeholders to achieve this.
76. Some POBs welcomed the Code's provisions requiring information to be provided to the tenant, particularly in respect of business decisions, but also stressed the importance of tenants

obtaining professional advice from an accredited source due to the technical and legal complexity of the Code. They also welcomed the PCA's work and support for the British Institute of Innkeeping's advice panel⁴⁶ in building the capacity of qualified advice. Some POBs considered the PCA should mandate the accreditation of advisers advocating on Code related matters to prevent poor or prejudiced advice being issued to tied tenants. The PCA noted that its survey of 50 tenants who had used the MRO process found that those who had used a competent advisor had had a much more positive experience.

Enforcing the Code

77. Some respondents, including tenant representatives, claimed the PCA had failed to address alleged "unfair POB behaviour" to deter the take-up of MRO rights, such as the use of high dilapidation bills and the non-renewal of tenancies. The PCA said it had identified non-compliance through intelligence and self-reporting and had improved annual compliance reports to provide more detail on Code breaches but also added it could not always publicly share its enforcement actions to avoid prejudice or impact on future enforcement action. The PCA had worked with Code Compliance Officers on self-reporting of breaches which included taking steps to avoid repeat breaches and remedying tenant detriment. The PCA published '*Pubs Code Action*' stories on its website, promoted best practice across POBs and shared positive examples of self-reported breaches. Most POBs noted the Code requirement to report breaches in annual compliance reports and thought the PCA's asks to self-report minor breaches at the time of occurrence should remain proportionate to the breach. A POB added the PCA had expected POBs to propose solutions to issues but should work with them to address these and suggested a more hands-on approach by the PCA. Some POBs and a business representative said the PCA had exercised welcome pragmatism during the unprecedented circumstances of the Covid-19 pandemic, recognising where POBs' declarations had protected tenants' rights and ensured the fair and transparent methodology of discretionary support provided during the pandemic.

PCA powers

78. Some respondents referred to a High Court judgment⁴⁷ which confirmed the arbitrator did not have powers to direct terms in respect of a non-compliant MRO proposal but thought such powers should be granted to aid effective arbitration and the speed of resolution. While noting its existing powers⁴⁸ to address "unfair practices" designed to avoid the operation of the Code, the PCA sought greater information gathering powers to determine the existence of evidence of "unfair practices". Some POBs and a business representative considered the PCA to have the necessary regulatory tools and powers to enforce the Code.

Investigating non-compliance

79. A number of respondents welcomed the PCA's first investigation⁴⁹ into non-compliance. Following its investigation, the PCA noted the improved position and profile of the Code Compliance Officers within POBs and a tenant representative added that some tenants had felt encouraged by the fine for non-compliance. Others thought, with one formal investigation, the PCA had been poor at investigating non-compliance. Another respondent proposed increasing the PCA's scope and resources to investigate unfair business practices, such as the conversion of tied pubs into alternative models, though others noted the PCA's resources had been freed up following faster dispute resolution to investigate issues. A tenant representative observed the number of complaints referred to the PCA and how these had been dealt with was unknown; suggesting that these should be made public to help gather evidence of non-compliance.

⁴⁶ www.bii.org/BII/BII/Industry-Advice/Accredited-Advisors.aspx

⁴⁷ <https://www.bailii.org/ew/cases/EWHC/Ch/2020/714.html>

⁴⁸ Section 71A Small Business, Enterprise and Employment Act 2015

⁴⁹ www.gov.uk/government/publications/pca-investigation-into-star-pubs-bars

80. The PCA stressed the importance of tenants' confidence to be able to share concerns and information about their POB to the PCA which could lessen if there were concerns about the confidentiality of information provided. A POB suggested the PCA's actions should be proportionate with the potential Code breach and the evidence of impact on the tenant. The PCA explained it had worked with POBs to reduce the use of failed legal arguments used in arbitrations, and had emphasised the need for the POB to be satisfied of the compliance of its MRO terms, the use of an MRO-compliance checklist for MRO proposals signed off by the POB's Code Compliance Officer and the requirement to ensure processes were in place demonstrating a POB's Code compliance.

Arbitrating disputes

81. While some POBs and a business representative thought the length of time of arbitrations had continued to be a feature of the Code, others noted the improved resolution times and the reduced number of open arbitration cases which the PCA said had halved from 85 (on 1 April 2019) to 43 (on 31 March 2022). Some respondents thought the low number of disputes had been due to the combined effect of better information to tied tenants, increased appreciation of the tied model, greater clarity from arbitration awards on the use of common and reasonable terms in MRO proposals, the PCA's advice and guidance, improved tied tenancy offers and a drop in arbitration referrals due to the improved MRO process, which came into effect on 1 April 2022.

External arbitrators

82. Some respondents noted the PCA no longer personally arbitrated disputes following its contract with the Chartered Institute of Arbitrators ("CI Arb") to administer the arbitration service from referral to case closure, including the recommendation of CI Arb-accredited arbitrators, which the PCA said had enabled it to focus on its regulatory priorities. Some respondents highlighted some concerns about external arbitrators' different skills and approach and cited issues such as their experience and understanding of the Code or landlord and tenant laws. Some POBs proposed mandatory, formal training on relevant legislation with guidance to aid better decision-making by external arbitrators and consistency in appointment terms to ensure higher standards. The PCA added its contract with CI Arb required adherence to the PCA's arbitrator service standards on timeliness, quality and consistency in arbitrations and that it included the development and delivery of external arbitrators training from September 2022 onwards.

83. POBs and some tenant representatives felt external arbitrators' costs were high and inconsistent but which could not be disputed or challenged as the PCA had no jurisdiction and complaints to CI Arb could only be brought on the grounds of malpractice. Some POBs proposed a standardised hourly rate for external arbitrators as part of the PCA's appointment process or for fees to be capped, for example at £300 per hour, as well as other administrative costs to ease the financial burdens of compliance. An amendment to the Code was also proposed requiring the reasonableness of arbitration fees or to enable the PCA or an independent tribunal, such as the First-tier Tribunal, to review external arbitrators' fees.

Publication of arbitration awards

84. Some respondents, including some POBs, welcomed the publication of arbitration awards in helping to improve understanding of the Code's key principles, creating a better understanding of the nature of the disputes being referred to the PCA and benchmarking compliant terms. While data protection legislation would continue to apply, the PCA repeated its case for bespoke arbitration rules removing the need for parties' consent to publish arbitration awards. However, some POBs argued the benefits of transparency needed to be balanced against the safeguarding of commercially sensitive material. Some respondents viewed the PCA's summaries of awards as useful for tied tenants though a POB considered some summaries to contain an insufficient level of detail to be helpful and noted some had failed to reflect important findings.

85. Some POBs commented on the layout of the PCA's website where awards had been published without regard to date and proposed their display in chronological order for ease of reference. Where arbitration awards had pre-dated High Court judgments, some POBs said the PCA had failed to reference these, particularly where the Court had clarified the burden of proof usually lies with the tenant to prove an MRO lease to be non-compliant or, where an MRO proposal was found non-compliant, the arbitrator did not have the power to direct the terms. Some POBs and a tenant representative proposed the PCA should contextualise the consequences of a High Court ruling or an arbitration award for parties. The PCA shared it had made published arbitration awards and High Court judgments easier to find on its website and had indexed these to allow for the principal issues to be more easily identified.

Government's assessment: PCA performance

86. A number of the issues which stakeholders felt should have been addressed by the PCA relate to matters which are outside the scope of the Code. The Government notes the PCA has considered where those issues might have Code implications, for example, whether the threat of section 25 notices under the LTA or high dilapidation costs were being used by POBs to discourage tenants from exercising their MRO rights. Indeed, the suggestion by some of the POBs that the PCA was being involved in matters outside of the Code suggests the PCA was looking at matters which may not have been immediately obviously within scope of the Code. The Government believes that the PCA was right to do so to ensure that there were no behaviours which had impacted on Code rights. The provisions around unfair business practices within the Act⁵⁰ define these as practices engaged in by a POB in order to avoid provision of the Code to the detriment of the tied pub tenants and which are unfair. The Government understands that, while looking at areas raised by tenants and their representatives, the PCA has not identified evidence to support the use of such practices.

87. While some respondents alleged the discriminatory treatment of ex-tied tenants in respect of the discretionary support provided by the pub-owning businesses during the pandemic, no evidence supporting such allegations, for example showing tenants who had agreed an MRO arrangement had been treated differently to other free-of-tie tenants, was provided to the PCA or to the Government. Discretionary support may be something which tied tenants are likely to take into account when considering if they are no worse off than if they were free-of-tie. Once a tenant enters into a free-of-tie tenancy following completion of the MRO process, they are no longer covered by the Code rights and protections with recourse to the PCA to seek redress.

88. The Government notes the concerns of POBs about the costs of the PCA. The Government's 2015 Impact Assessment estimated the ongoing operating costs of the PCA to be around £1.6 million⁵¹. This means that the estimated levy cost per pub was £120 per year, based on an assumption of the number of pubs in scope, set at 13,000 tied pubs at the time of the Impact Assessment. This is the central estimate and includes the expected annual costs of investigations, arbitrations and appeals, and therefore represents, at the time of the Impact Assessment, the best estimate of the levy imposed on POBs⁵². It is not an estimate of the cumulative Code related costs. We do however note that the 2015 Impact Assessment has been used as part of responses to the review to comment on ongoing operating costs. We note that in

⁵⁰ See section 71A of the Small Business, Enterprise and Employment Act 2015

<https://www.legislation.gov.uk/ukpga/2015/26/section/71A>

⁵¹ Impact Assessment, page 21

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/408449/bis-15-64-pubs-statutory-code-and-adjudicator-final-stage-impact-assessment.pdf

⁵² The central estimate was made for the 2015 Impact Assessment prior to the introduction of the Code. Assumptions were based partly on observed annual levy costs for the GCA. To account for uncertainty, a lower bound estimate of £0.6m and upper bound estimate of £3.6m were also included.

2022 prices, the relevant central estimate should be adjusted to £1.9 million⁵³. We also note that the 2015 estimate of the number of pubs in scope was likely an overestimate. The actual number of pubs covered by the Code, when the PCA was first able to collect this data was 11,500, or £168 per pub in 2022 prices⁵⁴.

89. As allowed by the Act, the PCA is fully funded by a levy imposed on six regulated businesses. The PCA's business case for the levy is approved by the SoS to ensure this has been set at a level which enables the PCA to deliver its statutory functions. As the legislation does not allow it to carry over a surplus to the next financial year, the PCA must estimate its likely activities and costs for the coming year. The imposed levy therefore does not reflect net levy costs once the PCA's refund to the POBs of any remaining monies is processed. The table below sets out the annual levy imposed on the six regulated POBs during the three-year review period, and the net levy once the monies refunded to the POBs by the PCA has been taken into account. As the number of tied pubs in scope of the Code varies each year, the average levy cost per pub is presented taking into account the number of tied pubs in scope during the same year.

Table 2: Annual PCA levy imposed during the review period

Year	Levy Imposed	Net Levy	Number of tied pubs in scope of the Code	Average levy cost per pub
2019/2020	£3,000,000	£2,232,935	9126	£245
2020/2021	Loan	Loan	Loan	Loan
2021/2022	£2,838,878 ⁵⁵	£1,754,699	8828	£199

90. The net levy was £2.2 million for 2019/20 and £1.8 million for 2021/22⁵⁶. Based on the number of tied pubs covered by the Code, the average levy cost per pub was £245 and £199 respectively. In view of the difficulties affecting the tied pub sector due to the Covid-19 pandemic, the Government decided not to approve a levy in 2020/21 and instead used existing powers to provide services, mainly the provision of staff, worth around £1m to the PCA without charge and provide it with an interest free loan of around £1.372m to cover the rest of its expenses. This was repaid through the levy in 2021-22 and 2022-23⁵⁷.

91. The Government notes the points raised by businesses regulated under the Code about the regulatory burden of, for example, information requests from the PCA. The Government notes that the PCA has committed to the principles of the Regulators Code and hopes that the Adjudicator will continue to act proportionately in making requests of the regulated businesses. Good communication between regulators and those they regulate is important in ensuring

⁵³ Calculation: £1.94m = £1.61m * (111.69/92.82). Department for Business and Trade: Impact Assessment and Options Calculator 2023, GDP deflator, which uses ONS Quarterly National Accounts Release. Price index correct for 2015 and 2022 as of April 2023.

⁵⁴ £1.94m / 11,500 tied pubs

⁵⁵ The 2021/2022 year also included a 20% repayment of the loan provided by BEIS for the previous year

⁵⁶ These are presented in current prices at the time of their publication. The 2015 Impact Assessment estimate has been presented in 2022 prices above.

⁵⁷ The outstanding 80% of the BEIS loan was included in the 2022/23 levy

proportionate, targeted and effective regulation. The Government accepts that it was difficult for the PCA to undertake face-to-face meetings with pub-owning businesses when this was prevented by the pandemic lockdown and distancing rules during the review period. The Government welcomes the PCA's recent approaches in establishing regular face-to-face, more informal engagement with all of the Code's main stakeholders to address and resolve issues raised at an early stage. The Government is aware the PCA is also seeking to improve its offer to tied tenants, in part following issues raised in the first statutory review and reflected in the Statutory Guidance, including the development of a new website. The Government hopes that the views provided to the review summarised above will be helpful to the PCA as it develops its communication with tied tenants and other stakeholders.

92. Following the first statutory review, the PCA developed and published performance measures⁵⁸ to show how the PCA is performing against defined standards, identify areas for improvement and be more transparent in the way the PCA works. The measures include a target of 95% of correspondence and enquiries (excluding regulatory interactions with POBs and arbitration case correspondence) being responded to within 15 working days. The PCA's first report on those measures for the period 1 April 2021- 31 March 2022⁵⁹ indicated that 98.97% of correspondence and 100% of enquiries were responded to within 15 working days.
93. The PCA has the power to issue statutory guidance and issue statutory advice under the Act and has issued guidance on accounting for beer duty and waste in profit and loss statements in the rent proposal or rent assessment proposal, and advice in updates to its Regulatory Compliance Handbook, dealing with the tied rent during the MRO process, timings for non-MRO referrals and further issued and updated facts sheets. The PCA's 2022 Survey showed 84% of tied tenants had heard of the Code⁶⁰ though familiarity with certain specific rights was mixed⁶¹. Only 32% of tenants had visited the PCA's website in the past two years, 71% of these reported that the information they found on the PCA website was helpful⁶².
94. The Government recognises the significant improvement in dealing with arbitration cases during the review period and the work of the current PCA in particular to reduce the backlog of cases. While some concerns were articulated about the use of external arbitrators, the Government recognises the work that the PCA has done in response to the Statutory Guidance issued following the first statutory review, in particular developing service standards to which all external arbitrators must adhere to and ensuring the training of external arbitrators. The Government expects that work to continue.
95. While there may be a number of different factors behind the reduction of arbitration cases over the review period, this may also be in part due to matters being resolved before reaching the arbitration stage which in itself is likely to be a feature of clearer understanding on the part of POB and tied tenants of compliance with the Code. The Government believes that guidance issued by the PCA, the publication of arbitration decisions and summaries, and the issues addressed in the PCA investigation into the compliance of Star Pubs and Bars with the Code have all helped to raise awareness of how to ensure Code compliance.

⁵⁸ <https://www.gov.uk/government/organisations/pubs-code-adjudicator/about-our-services>

⁵⁹ <https://www.gov.uk/government/publications/pca-annual-report-and-accounts-2021-2022>

⁶⁰ PCA Annual Tied Tenants Survey 2022. Out of those surveyed in 2022, 84% of tied tenants had ever seen or heard anything in relation to the Pubs Code.

⁶¹ 61% were familiar with their right to request an MRO option to go free of tie under certain circumstances, while 53% were familiar with their right to price match the amount they pay their POB for premises insurance on the open market.

⁶² PCA Annual Tied Tenants Survey 2022. 71% of those that had visited the PCA website in the past two years.

96. The Government welcomes the PCA's work in response to the Statutory Guidance, issued following the first review, to improve tenants' understanding of their Code rights, including her engagement with Code Compliance Officers. However, the Government notes that in the PCA's 2022 Survey only 27% of respondents were aware of who their Code Compliance Officer was and, of those, only 44% had confidence in how they had handled issues related to the Code. While confidence increased to 51% in the PCA's 2023 Survey, awareness of the Code Compliance Officers had decreased slightly and this suggests there is scope to improve their effectiveness in ensuring the fair and lawful treatment of tied tenants.
97. Overall, the Government considers that the PCA has been effective in enforcing the Code over the review period, with particular success in reducing arbitration cases and successfully completing the first investigation under the Code. The Secretary of State does not intend to issue new guidance to the PCA following the review but would refer the PCA to the areas set out in the Statutory Guidance issued following the first review which it should continue to have regard to in the discharge of its functions.

Fees, Costs and Financial Penalties

Introduction

98. Code and PCA related fees, costs and penalties are set out in associated legislation⁶³. The referral cost of a dispute to the PCA by the tenant or the POB is £200 and, unless the arbitrator finds the complaint to be vexatious, or the tenant to have unreasonably increased the costs of the arbitration, the Code limits the tenant's liability for the POB's costs in the arbitration to £2,000. Furthermore, the liability for the arbitrator's fee lies with the POB, unless the complaint was vexatious. As a result of an investigation, where the POB failed to comply with the Code or follow the PCA's recommendations, the PCA may impose a maximum fine not exceeding 1% of the POB's group annual turnover.

General

99. The PCA and most trade associations considered the Code's costs, fees and penalties to be appropriate but considered they should be regularly monitored. With over 97% of referrals made by tenants, the PCA considered the £200 referral fee, which could be recovered from the POB as an arbitration cost, had not deterred tenants. While the above cost protections created a reduced risk for tenants, POBs noted they had been unable to recover costs where they had won the case, unless the referral had been deemed vexatious. Some respondents noted only one case had been deemed vexatious since the Code's introduction. Most POBs considered the bar for vexatiousness had been set too high by the PCA, leaving little disincentive for the referral of speculative or unreasonable claims with little prospect for success. Some POBs added this had led some advisers to avoid settlement, pursuing cases of no clear benefit to their client, at the POB's expense and their financial gain, though noted the changes to the Code, creating a longer negotiating period for MRO proposals, had helped to address this issue. The PCA clarified, out of 65 costs awards during the review period, eight had required the tenant to pay towards the POB's costs in respect of both MRO and non-MRO disputes, of which in six cases the tenant had paid the maximum £2,000 and, in the remaining two cases, £500.

100. Most POBS proposed a number of changes, such as:

- assessment of referrals with a limit on POBs' costs to deter vexatious referrals
- referrals on grounds previously established by the High Court to be rejected
- referrals with little chance of success to be rejected
- mandated use of accredited advisers requiring training, personal indemnity cover and an understanding of the duty towards clients under the Arbitration Act 1996
- increase the cost cap for the tenant to £5,000 to encourage private settlement
- First tier Tribunal to apply the test requiring the tenant to pay arbitrator costs if found to have acted unreasonably in bringing, defending or conducting the proceedings
- removal of the £2,000 cost cap to enable the arbitrator to determine the tenants' costs on a case-by-case basis to deter referrals with a low prospect of success

101. Some POBs considered the maximum penalty of 1% of turnover should be retained but proposed this should be applied to the leased and tenanted parts of the business and not the wider group where the wider group had no causal role in circumstances leading to an investigation. One POB thought the maximum penalty should be reduced to 0.5% of annual turnover whereas CAMRA proposed a new fine for POBs unreasonably prolonging MRO negotiations, to incentivise rapid resolution.

⁶³ The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016

Government assessment:

102. A tenant is less likely to be able to access similar types of resource available to a larger business and the Code therefore sets clear safeguards which serve to protect a tenant's ability to seek redress. The Government recognises the importance all parties' time and expenses are not wasted on cases which have little to no prospect of winning. The Pubs Code (Fees, Costs and Financial) Regulations 2016 therefore enable the arbitrator to order the tenant to pay the full or partial costs of the POB where a tenant's conduct has resulted in an unreasonable increase in the cost of arbitration. The Government therefore considers the £2,000 cost cap on the exposure to POB costs to remain appropriate.
103. The threshold for cases deemed to be "vexatious" is a matter for the arbitrator in each case. The Government considers it is important that the threshold for vexatious cases or potentially high costs do not inadvertently discourage a tenant from referring a complaint to the PCA.

Annex A – respondents to the review

Respondent type	Total*
Tied pub tenant	2
Non-tied tenant	0
Pub-owning business with 500 or more tied pubs in England and Wales	6
Other pub-owning business	0
Tenant representative group	2
Trade association	3
Consumer group	2
Business representative organisation/ trade body	4
Charity or social enterprise	1
Individual	0
Legal representative	0
Consultant/adviser	1
Trade union or staff association	0
Surveyor	2
Other	4

*Where respondents identified with more than one category these have each been reflected as indicated and accounts for the total number of responses above exceeding the 22 respondents who replied to the review. Where no indication was provided, where possible the content of the response was used to determine the most appropriate category.

