Department for Business, Energy & Industrial Strategy

Invitation to contribute views and evidence to the statutory review of the Pubs Code and the Pubs Code Adjudicator

For the period from 1 April 2019 to 31 March 2022

Response form

The consultation is available at: www.gov.uk/government/consultations/pubs-code-and-pubs-code-adjudicator-invitation-for-views-on-the-second-statutory-review-2019-to-2022

The closing date for responses is 17 August 2022

Please email completed forms to pubscodereview@beis.gov.uk

Or send by post to:

Pubs Code team
Department for Business, Energy and Industrial Strategy
4th floor, Victoria 2
1 Victoria Street
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Comments: Click here to enter text.

About You

Name: Admiral Taverns
Organisation (if applicable): Admiral Taverns
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	Respondent type
☐	Tied pub tenant
☐	Non-tied pub tenant (please indicate, if you have previously been a tied pub tenant and when)
☒	Pub-owning businesses with 500 or more tied pubs in England and Wales
☐	Other pub-owning companies (please describe, including number of tied pubs in England and Wales)
☐	Tenant representative group
☐	Trade association
☐	Consumer group
☐	Business representative organisation/trade body
☐	Charity or social enterprise
☐	Individual
☐	Legal representative
☐	Consultant/adviser
☐	Trade union or staff association
☐	Surveyor
☐	Arbitrator
☐	Other (please describe)

Review questions

Part A: The Pubs Code

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

Comments:

We believe that as a whole, the operation of the Pubs Code has worked reasonably well during the period of 1st April 2019 to 31st March 2022. Admiral and the wider industry have faced significant challenges as a result of the Covid-19 pandemic, and whilst some of these challenges have subsided to a degree, the current volatile economic environment threatens to challenge the industry even further. As noted below, during this period the Pubs Code has constrained the ability of pub-owning businesses (POBs) to respond to the fast-changing trading environment.

We feel that the following has worked well during the period:

1. *Publication of arbitration awards*

   The publication of arbitration awards by the PCA is helpful and provides greater clarity around the operation of the Pubs Code, particularly MRO referrals which make up the vast majority of referrals made to the PCA during the period. As a business with little to no experience of the arbitration process, it is useful both for Admiral and tied tenants to understand the nature of the disputes being referred for arbitration and the resulting decisions. Having previously suggested that the PCA approves each POB's form of MRO lease to ensure that the terms being offered are MRO-compliant (a request which was subsequently declined) the availability of arbitration awards allows each POB to benchmark their own terms and form a view as to whether the terms being offered are MRO-compliant. This, coupled with the legislative changes referred to below, has reduced the number of disputes and referrals made to the PCA.

2. *Legislative changes made following the introduction of the Pubs Code etc. (Amendment) Regulations 2022*

   The amendments made to the Pubs Code following the last statutory review are welcomed and in most cases, much needed. In particular, the introduction of the 3 month resolution period should prove beneficial for both POBs and tied tenants and help reduce the number of referrals made to the PCA. Due to the extremely restrictive timescales contained in the Pubs Code, a number of the referrals were purely protective referrals made to ensure that a tied tenant did not lose their Pubs Code rights. Had the Pubs Code afforded more time for the parties to engage in meaningful negotiations, we believe that the number of referrals made to the PCA would have been much lower. During the period, Admiral received 3 referrals and had the 3 month resolution period been available at that time, we are confident that all of those referrals would have been resolved amicably between the parties without the need for a referral to the PCA,as in all of those cases the terms of Admiral's offer were accepted with no material changes made.

However, it should be noted that the legislative amendments are still relatively new and it is therefore important that they are given sufficient time to 'bed in' and become fully effective.

3. *PCA response to the Covid-19 pandemic*

Few could have predicted the massive impact of the Covid-19 pandemic on the industry, which included several periods of mandatory pub closures and the furloughing of staff. The PCAs pragmatic approach to Pubs Code compliance during this incredibly difficult period, which included a temporary pause of Pubs Code rights, was therefore welcomed.

The PCA also intervened and required all POBs to provide clarity to their tied tenants regarding the support being put in place as a result of the Covid-19 pandemic. However, Admiral had already communicated the support being given to its tied tenants before this intervention by announcing the cancelling of rent followed by a continued significant reduction in rent, and were therefore the first regulated POB to do so. Admiral's proactive and transparent approach was recognised and commended by the PCA at the time.

4. *Low numbers of referrals regarding non-MRO disputes*

Based on arbitration data published by the PCA, around 13% of total referrals (34 from a total of 258) made to the PCA during the period of review relate to matters other than MRO or the MRO process. This suggests that the majority of the Pubs Code is working as intended and the behavioural issues, highlighted at the time that the Pubs Code was first considered by the Government, now no longer exist.

However, we do not feel that the following aspects of the Pubs Code are working well and should be improved for the mutual benefit of both POBs and tied tenants:

1. *Significant increase in price mechanics*

As part of the first statutory review of the Pubs Code, the Government considered whether the effect of extraneous price increases should be disregarded for the purposes of calculating what constitutes a significant increase in price, but ultimately decided against amending the legislation in this area. Since then, the economic landscape has adversely shifted substantially, and we now find ourselves in a high inflationary environment fuelled by the Covid-19 pandemic and the recent Russian invasion of Ukraine.

A particular area of concern for the industry and tied tenants in particular is the rising cost of utilities and Admiral, as a business, has considered ways of assisting tied tenants to combat the unprecedented increase in energy prices. One possible way is to use Admiral's group buying power to purchase energy in bulk at more favourable rates than a single tied tenant could find in the market, then provide it to tied tenants as a service for a set period. However, the significant increase in price mechanic does not disregard the effect of external price increases. Therefore Admiral would be unable to

pass on any such increase at the end of the set period where such an increase would exceed the levels set out in the Pubs Code (which, given the current economic climate, would be likely) without creating a right for a tied tenant to request a rent assessment and to then serve an MRO notice. The risk of MRO acts to dissuade Admiral from pursuing this option and as a result, tied tenants are suffering detriment and are left worse off as they are faced with paying a greater cost for their utilities when a POB could be providing utilities to them at a cheaper rate, thereby reducing the cost pressure on tied tenants.

Moreover, due to the current high inflationary environment we are seeing multiple price increases from suppliers at rates that exceed CPI and are therefore above the caps as set out in the Pubs Code. However, due to the extremely restrictive nature of the Pubs Code in this area we are unable to pass these extraneous increases on in full whereas smaller non-regulated pub companies are free to do so without restriction. This therefore places regulated POBs at an unfair disadvantage by being forced to partially absorb these rising costs. Furthermore, calculating CPI in the month before a price rise is a wholly inadequate approach at a time when CPI is rising rapidly month on month.

We do not believe that this was the intention of the legislation when it was first drafted, which was to stop POBs from unilaterally increasing prices unfairly and unreasonably without any justification or limits. Instead, it is reducing the choices available to tied tenants and potentially costing them more, as well as severely restricting the ability for POBs to pass on price rises that are beyond their control.

We therefore strongly feel that this area as a whole should be revisited to better reflect the dynamic and high inflationary environment and the Government's position should be reconsidered as part of the current review.

2. Investment Agreements

We feel that as drafted, the criteria required to be met in order for an investment to qualify as a qualifying investment under the Pubs Code are far too restrictive for the investment exception to be fully utilised by POBs and tied tenants.

Whilst in principle we do not disagree with the level of investment required, in addition the investment must meet three distinct requirements in order to qualify:

(a) The project would be reasonably expected to change the trading environment, nature of capacity of the tied pub, as well as increasing the trade and profit of the tied pub;
(b) The investment must not be made pursuant to any other duty under the terms of the tenancy; and
(c) The investment must be at least twice the rent payable under the tenancy.

This therefore limits the works that may be carried out to genuine betterment and excludes works that the tied tenant may be contractually obliged to carry out pursuant to the repairing obligations in their lease, but may be carried out on their behalf by the POB. During the period that the Pubs Code has been in force we have entered into a very small number of investment agreements where we have been fully able to satisfy all of the criteria listed above. However, we have received requests for works to be

carried out from tied tenants but have been unable to enter into investment agreements due to the nature of works that had been proposed and the requirements of the Pubs Code. The restrictive criteria are therefore stifling potential investment by POBs and putting tied tenants at a disadvantage.

As an example, where a tied tenant is on a long-term fully repairing lease, but does not have the required capital to invest in the property to ensure that it is in a condition as required by the lease, we feel that the landlord should be able to complete those works on behalf of the tied tenant and for those works to qualify as a qualifying investment under the Pubs Code. Following those works, the tied tenant will have a property that is back in good decorative order and condition and it would be a reasonable expectation that the tied tenant would then see an increase in trade and profitability.

We therefore welcome a review into this area of the Pubs Code with a view to expanding the definition of what constitutes a qualifying investment, so more tied tenants can benefit from this provision of the Pubs Code and resulting POB investment.

3. MRO

Having now completed a full 5 year cycle of the Pubs Code, all tied tenants with the right to serve an MRO notice have had the opportunity to do so. However, there has been a relatively low uptake of the MRO option. In respect of Admiral's own estate, just 5 tied tenants have entered into an MRO lease from a total of 22 accepted notices since the Pubs Code came into force in July 2016, despite routine signposting of rights and the removal of financial barriers to taking the option being adopted across the wider industry.

During the last statutory review of the Pubs Code the Government provided a number of explanations in response to the low uptake of MRO at that point, with one of these explanations being the fact that tied tenants are happy with their tied deal and their relationship with their landlord. Having now operated under the Pubs Code for 6 years, we firmly believe that to be the case and as highlighted by the PCA's 2022 Tied Tenant Survey, 80% of Admiral's tied tenants are satisfied with their relationship.

Moreover, MRO continues to be the source of the majority of disputes and referrals made to the PCA according to published arbitration data, with 224 accepted referrals to the PCA relating to MRO or the MRO process during the period of review. MRO therefore appears to be creating more problems rather than solving them.

Question 2
To what extent do you think the Pubs Code is consistent with the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants? Please provide any evidence you have to support your view.

Comments:

We believe that the Pubs Code is consistent with the principle of fair and lawful dealing. This is supported by the low numbers of non-MRO referrals made to the PCA, suggesting

that tied tenants are being treated fairly and lawfully in all aspects of their relationships with POBs. Admiral remains fully committed to abiding by this principle and is proud of its record of compliance with the Pubs Code and the positive working relationship created with its tied tenants.

Since the Pubs Code came into force we have received just three referrals to the PCA, with all three referrals related to the MRO process, and the first of those referrals not coming until January 2021. Two of those referrals were settled by consent between the parties (with no material changes made to the MRO terms originally proposed) and one referral was withdrawn by the tied tenant shortly after it had been made. As we noted earlier in our response to question 1 had the Pubs Code afforded more time for MRO negotiations to take place, we do not believe that any of the referrals would have been necessary. We also receive low numbers of complaints from tied tenants in matters beyond the scope of the Pubs Code.

However, the Pubs Code itself has not changed Admiral's approach to its relationships with its tied tenants. Before the Pubs Code was introduced in 2016 Admiral was a signatory to the voluntary Industry Framework Code and during that time, did not have any disputes referred to PICAS for resolution or disputes regarding tied rents referred to PIRRS. We feel that although the Pubs Code has assisted in certain areas, such as the requirement to provide information to tied tenants at certain points, it has not changed Admiral's ethos as a business and our approach and commitment to fair and lawful dealing has remained the same throughout.

This is further evidenced by both the 2022 PCA Tied Tenant Survey results and the October 2021 KAM Media Licensee Index. In the former survey, 86% of Admiral's tied tenants agreed that their BDM is fair in discussions with them. In the latter, Admiral was the only POB to score an average of 7 or more out of 10 in all aspects of the survey which clearly demonstrates a consistent and high level of tied tenant satisfaction.

Question 3
To what extent do you think the Pubs Code is consistent with the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie? Please provide any evidence you have to support your view.

Comments:

For the reasons stated in our response to question 1, we do not believe that MRO is required.

We firmly believe that Admiral's tied tenants are happy with their existing tied relationship and the tie itself. Since the Pubs Code came into force, Admiral have accepted 22 MRO notices with just 5 tied tenants have elected to enter into a free of tie arrangement with the remainder choosing to remain tied.

Admiral is fully committed to the tied leased and tenanted model and have a stated ambition to continue to grow our estate. The acquisition of Hawthorn Leisure in August 2021, a company with a solid reputation and similar values to Admiral, demonstrates our ongoing commitment to the tied leased and tenanted model. Whilst we acknowledge that

the other models such as franchise agreements and community wet-led operator agreements may suit certain pubs and licensees more than the leased and tenanted model, and may be more attractive in the current high inflationary cost environment, the Admiral business will remain predominantly leased and tenanted. To this end, we have recently confirmed both publicly and directly to the PCA that we will not serve a notice on a tied tenant under Section 25 of the Landlord and Tenant Act 1954 in order to convert the property to an alternative operating model.

There is a perception that free of tie tenants are by default better off than tied tenants, but we do not believe that to be accurate. The relationship between a landlord and a free of tie tenant compared to a landlord and a tied tenant is fundamentally different and this was most evident during the Covid-19 pandemic, where tied tenants were provided with far more financial support and business assistance by their landlords when compared to free of tie tenants. During the pandemic, Admiral provided financial support of around £27,000,000 to its tied tenants, and as stated earlier this was unprompted by the PCA or other external parties. At the same time, it was clear that free of tie tenants were not being given the same level of support by their landlords due to the difference in the relationship between the parties. In this respect, tied tenants therefore found themselves 'better off' when compared to their free of tie counterparts.

Tied tenants also enjoy other benefits that free of tie tenants do not have access to, such as special commercial or financial advantages provided as part of the tied model, as well as the protection of the Pubs Code itself. It is also important to remember that the tied market has changed, with landlord and tenant relationships having improved considerably since the Government concluded that a statutory code was required almost 10 years ago.

When taking all factors into account we do not believe that the right to request MRO is the answer for most tied tenants. There will of course be occasions where the MRO option suits certain tied tenants, but for the majority of tied tenants MRO does not serve a purpose nor is it a suitable or viable option. The tied model offers a low-cost, attainable route to running a public house business in partnership with a supportive landlord and it therefore cannot be viewed as an unattractive and unfair option when compared to the free of tie model.

As evidenced by the 2022 PCA Tied Tenant Survey and October 2021 KAM Media Licensee Index, the majority of Admiral's tied tenants are aware of the Pubs Code and their rights. 86% of tied tenants surveyed by the PCA confirmed that they were aware of the Pubs Code, which is further supported by a rating of 8.3 out of 10 in the Licensee Index in the same area. In addition, Admiral received a rating of 7.9 out of 10 in respect of signposting Pubs Code rights. The high degree of Pubs Code awareness and low MRO uptake shows that the majority of tied tenants do not deem it necessary to explore a free of tie option and instead are happy to remain tied.

Part B: The Pubs Code Adjudicator

Question 4
How effective do you think the Pubs Code Adjudicator has been between 1 April 2019 to 31 March 2022 in discharging its functions in relation to the Pubs Code? Please comment in particular on the PCA's performance in undertaking the following:

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

Comments:

Given Admiral's lack of referrals to the PCA, our interaction with the PCA is limited when compared to other POBs. Therefore, it is difficult to fully comment on the effectiveness of the PCA in certain areas when we have not had sufficient exposure. Generally we feel that we have a positive working relationship with the PCA, created through our approach to building relationships with our tied tenants, an approach that has been recognised and commended by the PCA. Notwithstanding whilst we do not wish to be perceived as negative, there are some issues that we wish to raise as part of this review.

Admiral's recent relationship with the PCA has constituted responding to numerous requests for information and data, providing periodic reporting and complying with guidance, the majority of which Admiral already adhered to. Whilst we are generally comfortable with providing information and data, we were recently advised during a meeting with the Office of the PCA that a lot of this information and data has not been used for any purpose. We must allocate staff resource accordingly to comply with such requests and it was therefore disappointing and frustrating to hear that the time and effort spent in gathering the information has been somewhat wasted. We have also extended a number of invitations for the PCA to spend time with Admiral's BDMs to gain a better understanding of how the tied relationship works and the important role that BDMs perform but have yet to be taken up on our offer.

We were also disappointed with the decision to withdraw the Initial Stay available during MRO process. The stay was introduced by the PCA in 2018 but Admiral did not have the opportunity to make use of it until 2021 when the first referral involving Admiral was made. The PCA cited a low settlement rate amongst POBs and subsequently withdrew the stay with effect from 1st September 2021. This therefore left a period of 7 months where all referrals immediately involved the appointment of an arbitrator, and this position continued until the amendments to the MRO process were made in April 2022. We feel that the premature withdrawal of the Initial Stay has likely resulted in increased unnecessary costs for both POBs and tied tenants during that 7 month period.

We also wish to take this opportunity to raise an issue regarding the interpretation and application of regulation 54 of the Pubs Code. Regulation 54 confirms that certain parts of the Pubs Code do not apply where a POB and a tied tenant enter into a Short Agreement (being a tied agreement of 12 months or less). This is set out in a technical guide published by the PCA. We were recently involved in a dispute with a tied tenant as to the application of regulation 54 and an enquiry was subsequently made to the PCA for clarification to be provided. However, despite Admiral complying with the Pubs Code as it is drafted, the PCA contradicted the technical guide and instead suggested adopting a purposive approach to the regulation. Rather than provide clarity, the guidance provided by the PCA achieved the opposite by creating even more uncertainty around the regulation in question. Ultimately, the PCA suggested that this matter was raised as part of this current statutory review and we therefore welcome greater clarity in this respect.

Finally, it should also be highlighted that at the time of writing we have yet to be notified of the levy arrangements for the year 2022/2023 (some 4 months into the current year), the levy rebate arrangements for 2021/2022 or how the remainder of the levy that was deferred during the Covid-19 pandemic is to be recovered. Given the considerable financial sums involved, we believe that the PCA should be notifying POBs in advance.

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

Question 5
Do you think the regulations relating to costs, fees and financial penalties remain appropriate or should these be adjusted? Please give the reason(s) for your answer and, if you believe these regulations should be amended, please set out how.

Comments:

When the Pubs Code was first introduced, the estimated levy per pub was around £100. The latest levy was set at an average of around £350 per pub, which represents a considerable increase and shows no sign of slowing down or levelling out. This increase of 250% is despite all arbitrations now being conducted by external arbitrators appointed by the PCA with their fees paid separately by POBs. We have raised our concerns directly with the PCA as we feel that the approach to the levy calculation does not provide an incentive for POBs that have conducted themselves in the manner that Admiral has. We also felt it necessary to raise our concerns regarding the recovery of the majority of the loan provided by BEIS for 2020/2021, which would have effectively heavily penalised Admiral for its acquisition of Hawthorn Leisure in August 2021 by basing repayments on its tied pub numbers as at 2022/2023.

As noted earlier, we have had little interaction with the PCA insofar as referrals are concerned and have therefore not materially contributed directly towards the PCAs workload. We therefore feel that our approach should be recognised by a proportionate reduction in the levy payable by Admiral, and that this approach to calculating the levy would act as an incentive going forward.

In addition, having now been through the arbitration and independent assessment process we are now able to share relevant experience insofar as those considerable additional costs are concerned. In two of the three referrals involving Admiral an arbitrator was appointed but was not required to make a substantive determination, as in both cases we were able to agree MRO lease terms amicably. The arbitrator's role therefore consisted of granting stays where necessary and ultimately terminating the referral, but incurred fees totalling £3,000 and an increased PCA levy payment for the following year. Whilst in isolation the arbitrator's fees may seem reasonable, the appointed arbitrators simply carried out a basic administrative role during the process. When coupled with our own legal and surveyors fees, the cost of both referrals for Admiral was significant. We feel that there should be a cap on arbitrators fees and other administrative costs connected the Pubs Code to ease the financial burden of compliance, thereby freeing up greater capital for investment.

Thank you for taking the time to let us have your views.

At BEIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒Yes ☐No

PUBS CODE AND PUBS CODE ADJUDICATOR

STATUTORY REVIEW

Submission by Greene King

17 August 2022

Respondent Type:
Greene King is a pub-owning business with 500 or more tied pubs in England and Wales

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INTRODUCTION

This document sets out Greene King's response to the UK Government's statutory review on the operation of the Pubs Code and the performance of the Pubs Code Adjudicator.

Greene King is the UK's largest brewer and pub company and we've brewed beer in Bury St Edmunds and sold it through our pubs for over 200 years. Today we employ about 39,000 people and operate c. 2,600 managed and tenanted pubs, restaurants and hotels across England, Wales and Scotland.

We brew quality beers from our Bury St Edmunds and Dunbar breweries, including market-leading brands such as Greene King IPA, Old Speckled Hen, Abbot Ale and Ice Breaker.

Out of our 2,600 pubs we run around 1,600 ourselves and they include well-recognised brands such as Chef & Brewer, Hungry Horse and Farmhouse Inns, while the remainder of our pubs are tenanted pubs run by independent publicans.

Our leased and tenanted division is called Greene King Pub Partners and we own c.800 tenanted pubs in England and Wales, which are let out on a range of leases, tenancies and franchises. This represents approximately 10% of the tenanted tied pubs in England and Wales. We also own around 120 tenanted pubs in Scotland.

The tied model has formed an integral part of our successful business and has adapted over the years to offer flexible, transparent and competitive agreements to our Pub Partners. Today, Greene King is recognised for the quality of our pub estate and the strong partnerships we have with our tied pub tenants. In 2021, Greene King Pub Partners was named best leased and tenanted pub company at the Publican Awards, the industry's leading awards event recognising outstanding operations and we were a finalist for the same award this year, 2022.

A key part of establishing this reputation has been our continued, significant level of investment in our tied estate and the value provided to tied pub tenants through SCORFA benefits (special commercial or financial advantages). The type of support provided to Greene King tied pub tenants includes transformational investments, building repairs and decoration but also training, business coaching and helping to share the risks that are associated with running a small business such as flexible credit arrangements.

As one of the six pub companies legislated by the Code, and with our strong background in the industry, we feel well placed to give clear feedback on the current operation of the Code, alongside commentary on the wider pubs and brewing industry at a time of sustained external challenges and cost pressures.

We will provide detailed answers to expand on the points below, but overall we do question the cost and bureaucratic burden the Pubs Code is adding to tied tenants and pub companies at a time when the industry is still to recover fully from the pandemic. This is particularly the case against the current backdrop of rising costs throughout the supply chain and inflationary pressures. In a recent tied tenant survey conducted by KAM Media for Greene King, nearly two thirds of the respondents answered "yes" to the question, *"Do you feel the Pubs Code has placed additional cost burdens on you?"*.

The tied pubs industry today is substantially different to 2016, when the Code was introduced. We feel the strengths and benefits of the tied model have never been clearer, with the Covid-19 pandemic and subsequent restrictions highlighting the real value of the tied pubs model.

Over the course of the pandemic, we provided more than £44m worth of support to our tied pub tenants, largely in the form of rent concessions, in addition to PPE and credits to purchase beer. The level of SCORFA support provided to mitigate the effects of the pandemic magnified the benefit of the tied pub model. Our support extended to our tied pub tenants in Scotland as well. Greene King's partnership and

support for tenants goes well beyond what is required by the Pubs Code and is something that is not replicated in the wider commercial landscape.

Given the significant costs still associated with the Code, we therefore recommend the Government uses this review to scrutinise these various cost burdens and the detrimental impact this is having on investment and the recovery of the sector.

We also recommend that the Government undertake an impact assessment on the Code and MRO in particular. Almost 80% of respondents to our tied pub tenant survey also support the recommendation for an impact assessment of the Code, with two thirds also saying they would support an opt-out from requesting an MRO option in exchange for benefits such as a longer lease agreement and access to greater capital support.

While appetite to take up MRO is low among tied pub tenants, it is still proving to be a significant barrier to long-term investment by pub companies. Its impact on the pubs trade overall must be properly assessed and reforms undertaken to ensure pub businesses and tenants alike are able to invest in their businesses, secure longer term, beneficial agreements, help the industry to recover, create more jobs and boost local economies up and down the country.

We provide further reasoning and background for these points in our answers below.

PART A: THE PUBS CODE

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

Much has changed in the pub sector since the Pubs Code was introduced in 2016. There is no doubt the Code has helped to formalise the relationship and processes between pub-owning businesses and tenants. Indeed, trust and relationships between Greene King and our tenants are stronger than ever.

The pandemic highlighted the real value of the tenanted relationship and in particular the SCORFA benefit. Pub companies led the way by providing rent support for their tenants, who were facing an existential crisis in their businesses. Other commercial high street tenants did not receive this level of support which led to significant business failures as a result.

Over the course of the pandemic, we provided over £44 million worth of support to our tenants, largely in the form of rent concessions, in addition to PPE and credits to purchase beer. Greene King's partnership and support for tenants goes well beyond what is required by the Pubs Code.

Although some elements of the Code have benefitted the industry, it has also added cost and bureaucratic burden to pubs that are still to recover fully from the pandemic and are now facing cost rises across their supply chain. We believe that some reforms, including to the market rent only option (MRO), would reduce this burden and enable businesses to invest.

Overall, we believe that the increased trust between pub-owning businesses and tenants and the significantly reduced instances of poor behaviour by pub-owning businesses indicates that, over time, the Code can become redundant, with pubs operating under a self-governing system.

Impact of the MRO

The tied model remains central to the majority of pub-owning businesses and we have not seen the development of an alternative free of tie sector. Nor is that likely to be the case in the foreseeable future. Examples such as the Wellington Pub Company remain very much the exception. Pub companies remain committed to the tied pub model.

Only a very small number of tenants decide to use MRO to go free of tie. At Greene King, a total of 1231 MRO triggers have been available to date, with just 167 valid MRO requests made (8%). We have granted 14 MRO agreements – just 1% of the triggers available – and we have only 8 live MRO agreements in place. This shows that when faced with the choice of either triggering the MRO option or following through with the MRO option once details have been received, our tenants are choosing to remain in a tied arrangement.

We are however seeing pub companies adapting their operating models to limit the impact of the MRO option. Many are now turning to granting short agreements (five years or less) without rent reviews and which are contracted out of the security of tenure provisions of the Landlord and Tenant Act 1954. Such agreements avoid an MRO event occurring as a result of a contractual rent review or a lease renewal.

In partnership, with a long-lease on the table, a successful tenant and pub company can invest together in a significant capital project at a pub that takes a long-term view on return of investment, benefitting all parties including the local community and customers.

However, while MRO remains a possibility and the tied-pub tenant has the option to effectively 'move the goalposts' part way through the agreement, the pub company is unlikely to commit such a level of investment and will likely only offer a five-year agreement.

Short leases operate as a barrier to entrepreneurship and access to capital investment for both tenants and pub-owning businesses. A longer lease has commercial value for both the landlord and tenant. For a landlord it guarantees a long-term income stream and for a tenant there is security of tenure allowing for the development of a business in the form of significant capital and value should the lease be assigned or purchased. However, the granting of longer-term agreements has declined since the introduction of the Code in July 2016 due to the uncertainty that the MRO option poses. At Greene King we now have 25% fewer longer-term agreements compared with July 2016.

Alongside shorter leases, we are also seeing the following steps being taken by pub companies to mitigate against the impact of the MRO:

- Taking back pubs when tenancies end and operating them on a "fully managed" basis.

- Offering a managed agreement rather than a tenancy under which the pub-owning business retains a high degree of control such that the operator falls outside the definition of a "tied pub tenant".

- The development of a franchised model under which the pub-owning business retains a high degree of control. Such agreements fall within the Pubs Code but are exempt from MRO if they fall within regulation 55.

- Careful management of price increases to avoid a significant price increase triggering a rent assessment or MRO event. In itself this has the potential to distort the market with those pub-owning businesses and brewers not subject to the Code being free to increase prices as input costs increase, while regulated pub-owning businesses are unable to do so and therefore bear the additional cost increases.

These changes to the market are not surprising and were recognised by Paul Scully MP, then Minister for Small Business, Consumers & Labour Markets and Minister for London in his introduction to the previous statutory review:

"It is worth noting that pub-owning businesses covered by the Code have legitimate rights over their property and a responsibility to their shareholders and investors to secure returns. It is not unexpected that businesses might adapt operating models in response to regulation and, if there have been increases in pub management models that are not covered by the Code (such as conversion to managed premises), this is not unreasonable provided those models do not result in the kind of unfair treatment that led to the establishment of the Code."

Whilst unsurprising, these changes as a result of the MRO have not been properly measured or assessed, which is why we recommend the Government use this review to undertake an impact assessment of the MRO and Code. 79% of the respondents to our tied tenant survey also supported the Government undertaking an impact assessment of the Code, with just 9% not in favour.

Ultimately removing the MRO provision from the Pubs Code would encourage investment and longer-term agreements, helping the industry to recover, create jobs and boost local economies up and down the country. Pubs are in the heart of communities across the country and have a real opportunity to help rejuvenate local areas and provide jobs and training opportunities.

Should the Government decide to retain the MRO, we would be supportive of introducing an opt-out to the MRO, if agreed by both parties. This proposal is supported by our tied pub tenants. 66% of respondents to our tied tenant survey, said they would support a scenario where they could sign an opt-out from the MRO option in exchange for a longer-term agreement and greater capital support from the pub company. In contrast only 9% didn't support this proposal and 25% said they weren't sure.

A mutually agreed exemption from the MRO would reverse the curtailing of entrepreneurship and investment and give tenants the opportunity to build their business over a long period of time.

The case for an impact assessment of MRO

Prior to 2015 the tied pub sector operated a voluntary code of practice which applied to all pub-owning businesses irrespective of size. With the exception of MRO and a regulator, the majority of what we see in the Pubs Code was already to be found in the voluntary code, known as the Industry Framework Code. As the 2015 Impact Assessment (see below) states:

"The main difference between the statutory code and the current voluntary code is the inclusion of the market rent only option for existing tenants and parallel rent assessments for new tenants."

The extent of the additional state intervention in this sector therefore comprises MRO and the creation of the PCA. We believe that the continued impact of this intervention on the sector requires an assessment, which the Government should use the opportunity of this review to undertake.

It is helpful to consider how the legislation came into being, including the MRO provision. The research papers published by the House of Commons provide a detailed analysis of this.


Pub companies, pub tenants & pub closure


House of Commons Library Research Pape

The first report explains:

"The Bill did not provide for a 'market rent only option': provision to give all tenants the automatic right to choose a free-of-tie agreement. At the Report stage of the Bill on 18 November 2014, the Commons agreed an amendment, tabled by Greg Mulholland, to make the 'market rent only' option a feature of the new regulatory regime.[4] Subsequently in the House of Lords the Government introduced a series of amendments to the Bill to retain this principle, amendments considered, and agreed, by the Commons on 24 March 2015.[5]"

In the impact assessment (a copy of which is attached) which was undertaken during the passage of the Bill, the assessment said:

"This was not the Government's preferred option following the consultation and was not the policy when the Small Business Bill was introduced in Parliament in June 2014. During Report Stage of the Bill in November 2014 the House of Commons voted to introduce a Market Rent Only option. The Government resisted the clause partly on the basis that it could have unintended consequences for the sector. However, the Government recognises the strength of feeling in Parliament on this issue and understands that many people believe that pub-owning companies need the threat of tenants going free-of-tie before they will offer their tenants a fair tied deal. That is why the Government has now accepted the introduction of a Market Rent Only option and this is now the preferred option. This was confirmed at Lords Second Reading in December 2014."


Impact Assessment dated January 2015.p

This confirms it was not evidence that resulted in a change of policy, but "*strength of feeling in Parliament*". Such evidence as had been produced did not favour MRO (see below). Additionally, the 2015 impact assessment states that:

"The outcomes are highly uncertain due to the dynamic and unpredictable nature of markets. Of particular importance will be the response of pub owning businesses, particularly those who will be obliged to offer a free of tie alternative to the tied

offer. This, in turn, will partially depend on the current level of unfairness, which is highly disputed."

The impact assessment also draws on the report produced in December 2013 by London Economics, which was commissioned by the then Department of Business, Innovation and Skills.


London Economics
Report - Modelling th

For the report, London Economics modelled five different options which included allowing tenants to go free-of-tie. The report quoted that 48% of pubs were tied tenanted pubs.[1] However, according to the British Beer & Pub Association, around 27% of pubs are now tied-pub tenancies. It was considered that 13,300 pubs were within the scope of the legislation[2] at the time of its introduction. By contrast this has now reduced to c.8,275. In conclusion, the 2013 report noted that:

"The tied pub model is one of the most complex industrial relationships remaining in UK industry and aims to deliver a system to ensure floor levels of demand for British brewers, sustaining diversity and the traditional family brewery model. In recent times, this has become increasingly necessary, as the consumption of beer in pubs has declined, with the numbers of barrels sold falling dramatically as consumption patterns have changed, both due to lower prices in supermarkets and the emergence of alternatives such as restaurants, clubs, and bars. A number of stakeholders interviewed noted that the UK is probably still operating excess pub supply of approximately 6,000 pubs, suggesting a sustainable number of pubs of approximately 45,000.

This over-supply has led to low profitability, both for many tenants and pubcos, particularly in a climate where servicing debt has become difficult. The key finding of this study is not the number of pubs which may close as a result of one policy or another, but rather the high number of pubs that currently appear to be at the margin of viability. Irrespective of what changes may be proposed or considered, the interlocking nature of a large variety of revenue-streams, and the high level of costs being faced by pubcos, suggest that almost any policy reform may have noticeable and unpredictable effects.

In the estimates we produce of the impact of the consultation proposals, even taking account of second order effects, of the 13,300 pubs we believe will be in scope of the Code, up to 2,400 or 18 percent could become unviable for their pubco owners, on top of those already unviable (c.1,300)[40] within the base case scenario, although we estimate a third of these would re-open under alternative management.

The threat that the number of tied pubs currently operated by the pubcos may diminish by between 25-30% due to closures, even if these pubs subsequently re-open under a different owner, and disregarding any who may wish to take up the free-of-tie option, may be sufficient to eliminate the economies of scale in purchasing that many tied tenants in this sector (unknowingly) benefit from. This suggests that there is a real possibility that each of the proposed policy reforms, except possibly the code without permitting guest beer, instead of delivering the policy objective of ensuring tied tenants are treated fairly, i.e, 'no worse off' than free of tie tenants, may lead to the end of a large scale tied pub system.

This, however, may not be as disastrous as it initially sounds. The tied pub model is very similar to a more standard franchising arrangement, albeit one where the pubco supplies the sales product and leases the property to the franchisee. This model is already being attempted by some pubcos and may be worthy of further consideration.
In the short-term, it is also worth noting that the PICAS/PIRRS system, which is the most concrete element of the current voluntary framework, is now becoming an established part of the infrastructure, and appears to be having some effect in starting to address the worst tenant circumstances[41], although some stakeholders have raised the point with us that some tenants are wary of taking the PICAS/PIRRS route in case the discretion available ends up

[1] London Economics Report, Fig 1, page 2
[2] London Economics Report, para 4.3 Conclusions, page 32

increasing their rental. If one assumes, as we have done, 60% of consumers move to another pub that implies that, on average pubs which remain will see footfalls 7.2% higher than present. This would be sufficient to turn a poorly performing pub into a more attractive prospect if it can see the immediate future out. As such it may deliver enough of a boost to other pubs to reduce closure rates in the medium term."

The concerns expressed in the report have proven to be correct. The number of total pub closures since 2013 in the UK is around 10,000, according to data collated by the British Beer and Pub Association from the CGA and the Valuation Office Agency. The result is now a much-reduced tenanted sector which accounts for only 29% of the pub sector. Only 8,275 pubs now fall within the scope of the Pubs Code as a consequence of being owned by a pub-owning business with 500 or more tied pubs in England and Wales, representing just 18% of the wider hospitality sector. Yet it is only in relation to this very small number of pubs that the Pubs Code applies.

It is within this context that the question "how well has the Pubs Code operated" needs to be considered. The London Economics report describes the original policy objectives behind the Pubs Code as being:

"The proposed reforms aim to deliver a healthy pubs sector, where pub companies treat their tenants fairly, where 'fairly' is defined in that tied tenants are no worse off than free-of-tie tenants, as measured by the share of profits they are able to retain".[3]

Whilst the UK's pub sector continues to be successful, notwithstanding the challenges brought by the Covid-19 pandemic and the current inflationary pressures, the MRO has had a negative impact on investment and the unintended consequence of distorting the market. We believe that these, and other impacts of MRO, should be formally assessed by the Department as part of this review.

Bureaucratic burden

In addition to considering the MRO, the Government must also ensure that the Pubs Code is proportionate. Regulation should not hinder investment and the success of an industry. Indeed, this Government committed to reducing the burden of regulation on business in its 2019 manifesto:

"Good regulation is essential to successful businesses: we will strive to achieve the right regulatory balance between supporting excellent business practice and protecting workers, consumers and the environment. Through our Red Tape Challenge, we will ensure that regulation is sensible and proportionate, and that we always consider the needs of small businesses when devising new rules, using our new freedom after Brexit to ensure that British rules work for British companies.[4]*"*

It is our view that the Pubs Code does not currently meet this objective. The Code is incredibly complex, comprising primary legislation in the form of the Small Business, Enterprise and Employment Act 2015 and the Arbitration Act 1996, two sets of statutory instruments, rules of procedure set by the Chartered Institute of Arbitrators, factsheets, guidance notes and ad hoc directions and advice issued by the Office of the PCA.

It is therefore unsurprising that pub-owning businesses need to employ qualified and experienced solicitors to deal with various aspects of the Pubs Code and to provide advice on its interpretation and application. Most tenants do not have the same access to that legal advice. There are only a small number of solicitors who understand the Pubs Code and provide expert and measured advice to their clients. Despite efforts to improve representation there are also too many unqualified advisers across the market who are not delivering for their clients.

[3] London Economics Report, Para 1.2 Objectives, page 3
[4] https://www.conservatives.com/our-plan/economy

The need to comply with the Pubs Code can also impede commercial flexibility. This is especially the case where tenants wish to move from one form of agreement to another and the provisions of the Code, including the need for a sustainable business plan, the provision of information and the requirement for independent professional advice, can all act as barriers to progressing with the transaction.

The cost of complying with the Pubs Code should also not be underestimated. Pub-owning businesses face increased costs to operate the Code and meet the expectations of the PCA. At Greene King we estimate these costs to be in excess of £500,000 per year, representing around £625 per pub, which include staff costs, legal and administration costs, training costs, development of IT systems and digital resources along with other supporting materials, aside from the cost of the Code levy. This cost far exceeds the suggestion in the 2015 impact assessment that the burden of complying with the statutory Code would be similar to that of the voluntary code, which was shown as approx. £40 per pub. Add in the levy and the cost has spiralled to almost £1,000 per pub.

Greene King is proud of its strong relationships with its tenants. The company has embedded the principles of the Code in its business-as-usual dealings with tenants and our Code Compliance Officer (CCO) is on the Board of our Pub Partners division. We have developed pre-entry training and business planning disciplines have made tenant recruitment more informed and transparent. We provide consistent information and regular communication with our tenants which has built trust and strengthened relationships. We strongly believe that we can only be successful as a business if our tenants are successful, and we work together as partners with a shared interest. As outlined above, this partnership and support has gone well beyond strict Pubs Code requirements, including through the high level of support provided to tenants during the Covid-19 pandemic and the provision of membership to the British Institute of Innkeeping (BII), which gives tenants access to impartial professional advice.

This has resulted in a high rate of satisfaction amongst our tenants, while the average satisfaction for tenants across the six regulated pub-owning businesses is 67%, at Greene King this number is 74%[5]. Complaints are low, and those that do arise are resolved amicably within the existing complaints procedure. The average tenure of our tenants also continues to increase and now stands at seven years and two months.

Despite this, we feel that the PCA continues to increase the need for further administration and red tape. The introduction of the Head of Regulation Development and Compliance role has been a refreshing change, but we would like to see a change in the PCA's approach to the administrative burden it places on companies and tenants.

A clear example of the further administration introduced by the PCA is its approach to the reporting of breaches of the Pubs Code. The Code provides that breaches are to be reported on an annual basis in the annual compliance report that pub-owning businesses are required to submit to the PCA each year. Over recent years the requirements of the Office of the PCA have expanded so that pub-owning businesses have been asked to provide substantial amounts of data, over and above the limited requirements in the legislation. Pub-owning businesses have sought to work with the PCA and have generally produced this data in the spirit of co-operation with their regulator and where the data exists. Requests tend to be after the event and so systems have to be changed to capture the data for the next report, only to find that the form of report has changed again and further data is needed.

Furthermore, the Office of the PCA is now expecting pub-owning businesses to report breaches not on an annual basis but every time there is a breach, however minor. It is not entirely clear the intentions behind requesting this data. In one recent case, Greene King did not meet the 3-month statutory window to serve a rent assessment proposal following a pub visit linked to a rent assessment. The service of the rent assessment proposal was delayed due to the tenant suffering from a severe health issue and Greene King

[5] KAM Media Licensee Index Survey November 2021

did not want to trouble the tenant at the time. However, the rent assessment proposal was issued by the minimum timeframe set out in the Pubs Code. The tenant did not suffer any Code detriment as a result of this as Greene King ensured the tenant's rights remained in place while they were able to focus on their recovery. When sharing this information with the Office of the PCA as part of a general discussion, the expectation was clear that Greene King should still notify them of the matter even though there would be no obvious action taken because of the circumstances.

We would be supportive to a more light-touch approach to regulation, which more accurately reflects the requirements of the Code.

Cost of the Code and PCA

In addition to increasing administration, the cost of this level of regulation has increased significantly. The Office of the PCA is funded by the pub-owning businesses through the levy. The costs of this have increased substantially. In the 2015 impact assessment the costs of operating the Office of the PCA were believed to be approximately £1.6 million per annum. Of this, arbitration was estimated to cost £260,000 per annum and appeals £400,000 per annum. When these costs are taken out, the operating costs for the remainder of the services were estimated to be £940,000 per annum.

Since then, there has been a significant increase in the cost of operating the PCA and the PCA's Office. According to the published approval issued by the Secretary of State for 2021 – 22 (attached) the current operating costs are running at £3,268,000. This excludes most of the arbitration work that was previously undertaken by the PCA and the Deputy PCA, all of which is now outsourced to the Chartered Institute of Arbitrators who manage the end-to-end arbitration process. Additionally, appeals have been few, with only two of significance.

2021_11_29_PCA_Levy_methodology_202

On a like for like basis, the cost of operating the Office of the PCA has increased by 348%. This is at a time when the number of pubs subject to regulation has fallen by 24%. It is therefore unclear why the costs have increased so significantly.

The significant levy fees paid by pub-owning businesses should be addressed as part of this review. The pub sector is facing increasing costs throughout the supply chain and margins are increasingly thin. We would therefore be supportive of a mechanism which would lessen the burden on those pub-owning businesses which are supporting their tenants and against whom there have been no complaints. For example, a tapered levy fee system, with the levy payments lowering in recognition of the pub-owning business's performance.

The need for the Code

As set out above, much has changed in the pub sector since the Pubs Code was introduced in 2016. The level of complaints is low. The PCA's Quarterly Arbitration Report for March 2022 to July 2022 shows that only 28 arbitrations are open and only 2 of these are non-MRO related. During the last Code reporting period (1 April 2021 – 31 March 2022) Greene King received only 2 complaints. This demonstrates that the relationships between pub-owning businesses and tenants have strengthened and become more professionalised since the introduction of the Code. The take up of MRO is extremely low, and the majority of tenants are satisfied with their relationship and the actions of their tied pub company. Our own tied tenant survey responses showed that just 31% felt that their business had benefitted from the Code, with 39% saying there had been no benefit, and 30% not sure.

There is therefore a real question of whether there is a level of unfair treatment that is sufficient to justify the scale of state intervention in, what is now, a small part of the hospitality sector. It is unclear why the landlord of a hotel should be able to negotiate a lease with a tenant in an unrestricted manner, but a landlord of a pub is unable to do so simply because it happens to be a pub-owning business and there is a tie.

Part 4 of the Small Business. Enterprise and Employment Act 2015 requires the Government to undertake a review of the operation of the Pubs Code and the performance of the Pubs Code Adjudicator. As a result of that review the Government may choose to alter the provisions of the Pubs Code or indeed to abolish the role of the Adjudicator under section 66. This provides as follows:

"(1) The Secretary of State may by regulations abolish the Adjudicator—

(a) if, as a result of the findings of a review, the Secretary of State is satisfied that the Adjudicator has not been sufficiently effective in securing compliance with the Pubs Code to justify the continued existence of an Adjudicator,

(b) if, as a result of the findings of a review, the Secretary of State is satisfied that it is no longer necessary for there to be an Adjudicator to secure compliance with the Pubs Code, or

(c) if the Pubs Code is revoked and not replaced.

This review needs to consider the current position ten years on from the initial discussions about a statutory Code. In that time, pub-owning businesses have professionalised their approach and the market has radically altered. It is therefore our view that the Pubs Code now lacks a legitimate aim.

There are huge challenges facing the sector and the Pubs Code, as it currently operates, is often a hindrance to investment and developing successful businesses. Part 4 of the 2015 Act makes clear that Parliament envisaged that there may be circumstances where the Code would no longer be required. The Government should consider through this review whether this is now the case.

Whilst ultimately, we believe that there is no longer a need for the Code, reforms to the Code – particularly the removal of the MRO, or at the least the introduction of an opt-out for the MRO – would improve its operation, reduce the burden on businesses and encourage investment.

Question 2:
To what extent do you think the Pubs Code is consistent with the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants? Please provide any evidence you have to support your view.

We welcome the work that has already been undertaken to fine tune certain aspects of the legislation and, in light of the changes made in April 2022, Greene King does not consider that further significant changes are required. However, we do consider that the Government missed an opportunity to address the question of what terms in an MRO lease would be considered uncommon and/or unreasonable. This is a frequent subject of arbitrations and one where there is a lack of consistency in awards.

Our other recommendations to improve the operation of the Code are outlined in our response to Question 1.

Question 3:
To what extent do you think the Pubs Code is consistent with the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie? Please provide any evidence you have to support your view.

Again, our recommendations to improve the operation of the Code are outlined in our response to Question 1.

PART B: THE PUBS CODE ADJUDICATOR

Question 4:
How effective do you think the Pubs Code Adjudicator has been between 1 April 2019 to 31 March 2022 in discharging its functions in relation to the Pubs Code? Please comment in particular on the PCA's performance in undertaking the following:

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

We recognise that the job of the PCA is not an easy one, and she has a number of committed and passionate stakeholders to engage with on what is very complex, and sometimes challenging, legislation.

We noted during the recent BEIS Select Committee hearing that the chairman requested she commit to meeting regularly with some of the groups representing tied pub tenants as it had been some time since their last meeting.

While there have been difficulties brought about by the Covid-19 pandemic, we are in a similar position to the tenant groups in not having had much direct engagement with the PCA since her appointment to the role. It is understandable if she has tried to treat all interested parties equally, however if she is now to commit to meeting tenant groups on a more regular basis then we would hope to see a similar requirement to engage with pub-owning businesses. Since her appointment no bi-annual meetings have taken place between Greene King and the PCA, which was something that used to take place under her predecessor. We believe regular meetings would be a helpful way for both sides to engage on the Code and provide feedback to each other.

One recent example where this might have been helpful was in the publication by the PCA of a new three-year strategy. While we welcome advance planning such as this and the clarity it provides, there was no consultation beforehand and it did feel like a missed opportunity not to have discussed it in advance and so allow businesses to forward-plan themselves in order to be able to better support the strategy.

In addition, we would make the following observations:

Advice and guidance

- The technical factsheets have improved over time and are very useful. We share these with our tenants.

- We welcome the publication of arbitration awards. However, the manner in which they are published is unsatisfactory as is the way that they are stored on the PCA's website. Both are confusing with awards being published individually and cumulatively so that it is sometimes not possible to tell if the award is newly published. In addition, the awards are published without regard to their date.

- This is particularly relevant in considering awards made prior to the judgments in *Jonalt*[6] and *the Highwayman*[7]. In *Jonalt* the court clarified that the burden of proof lies with the tenant to prove that an

[6] *Punch Partnerships (PTL) Ltd & Star Pubs & Bars Ltd v Jonalt Ltd [2020] EWHC 1376 (Ch)*
[7] *Punch Partnerships (PTL) Ltd & Star Pubs and Bars Ltd v Highwayman Hotel (Kidlington) Ltd [2020] EWHC 714 (Ch)*

MRO lease contains terms which are uncommon and/or unreasonable. In *the Highwayman* the court held that the arbitrator can only determine whether a term is uncommon and/or unreasonable and declare the MRO lease to be non-compliant. He cannot direct what terms the MRO lease should contain. Despite these two cases the Office of the PCA continues to publish awards which pre-date these judgments where it is clear that the outcome would have been different now in light of the clarification in the law. This has the potential to mislead, contrary to the purpose of publication. While we understand the reluctance of the PCA to contextualise these awards, some health warnings are necessary over and above what is currently said.

Investigating non-compliance with the Pubs Code

- Greene King has not been the subject of any formal investigation and we are therefore unable to provide evidence to assist this review.

- As to informal investigation we would refer to the specific comments on bureaucratic burden made in relation to Question 1.

Enforcing the Code where non-compliance is found

- Greene King has not been the subject of any enforcement action and therefore we are unable to provide evidence to assist this review.

Arbitrating disputes under the Pubs Code

- In all Greene King matters an alternative arbitrator has been appointed.

PART C: PUBS CODE (FEES, COSTS AND FINANCIAL PENALTIES)

Question 5:
Do you think the regulations relating to costs, fees and financial penalties remain appropriate or should these be adjusted? Please give the reason(s) for your answer and, if you believe these regulations should be amended, please set out how.

There are significant costs incurred when a matter goes to arbitration, and therefore it is right that a tenant may have to contribute towards these costs up to a particular limit. However, given the passage of time and our experience of the actual costs of arbitration we consider that a more appropriate figure would be £5,000. This may also encourage the parties to negotiate and conclude settlements.

In relation to fees, we believe that the significant levy fees should be addressed as part of this review. With the pub sector facing increasing costs and burdens, we would be supportive of a mechanism which would lessen the burden on those pub-owning businesses which are supporting their tenants and against whom there have been no or low complaints. For example, a tapered levy fee system, with the levy payments lowering in recognition of the pub-owning business's performance. Further information on our views on costs and fees incurred under the Code is set out in our response to Question 1.

19 August 2022

Pubs Code Review Team
Department for Business, Energy and Industrial Strategy
4th floor, Victoria 2
1 Victoria Street
London
SW1H 0ET

Sent be email only to: pubscodereview@beis.gov.uk

Dear Pubs Code Review Team

We write in follow-up to our recent contribution to the Pubs Code and Pubs Code Adjudicator Statutory Review 2022 and to share further evidence in support of the review and our concerns with how the Pubs Code Adjudicator is discharging her duties.

In October 2021 the Pubs Code Adjudicator (the PCA) published a consultation on proposals to issue statutory guidance on matters relating to the operation of the Pubs Code, and more specifically the application of the Market Rent Only (MRO) provisions of the Pubs Code.

The PCA published her response in March 2022, which stated that, *"Statutory guidance will be developed taking into account the responses received to this consultation. Any further consultation, formal or informal, with interested and affected groups will be considered and undertaken by the PCA if considered necessary and proportionate ahead of the publication of any statutory guidance."*

On 1 August 2022, [Redacted] Office of the PCA, shared a draft version of the statutory guidance that h ad been developed and invited feedback prior to its finalisation. We have duly responded to this invite, however it's the content of the draft guidance that we would like to bring to your attention, particularly as we believe that the PCA is exceeding her jurisdiction.

To confirm we do not disagree with the intent to produce statutory guidance, as this provides an opportunity for the PCA to provide transparency and clarity on areas of the Code that are complex, particularly around processes and behaviours. However, we do disagree with statutory guidance if it is inaccurate, misleading and wrong in law.

This is the case with the current draft guidance. We have attached a copy of the feedback we have sent to the Office of the PCA which highlights our concerns.

While we recognise that the PCA is attempting to hold pub-owning businesses to account in ensuring we approach the application of the Code fairly and lawfully, it is important that we have a PCA who upholds the legislation as it is written and not attempt to rewrite legislation to suit her purpose. The PCA has the opportunity through the statutory review to put forward suggested amendments to the law if she feels this is necessary.

Should you wish to discuss this further please do not hesitate to contact me.

Yours sincerely

[Redacted]
[Redacted]

Encs

19 August 2022

FAO: [Redacted]
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4th Floor
23 Stephenson Street
Birmingham
B2 4BJ

Sent by email only to office@pubscodeadjudicator.gov.uk

[Redacted]

Re: MRO Draft Guidance

Thank you for sharing the above guidance following the Office of the PCA consultation, and your invitation to provide feedback ahead of publication.

1 Purpose and effect of guidance

1.1 We do have concern with some of the content contained within the draft. This stems from the fact that any guidance published by the PCA, while not law, is still a source of information for stakeholders such as pub-owning businesses, tied pub tenants and arbitrators.

1.2 Where a dispute is referred to the PCA (most obviously in relation to the MRO process), arbitrators are required to follow the guidance in making their awards. It is therefore important that the guidance is accurate both legally and in practice, because if an arbitrator follows guidance that is wrong in law, there is a right of appeal to the High Court under the Arbitration Act 1996 but it is not simply a case of the arbitrator having made an error of law and so the award is nullified. Section 69(3) of the Arbitration Act provides:

"(3) Leave to appeal shall be given only if the court is satisfied—
(a) that the determination of the question will substantially affect the rights of one or more of the parties,
(b) that the question is one which the tribunal was asked to determine,
(c) that, on the basis of the findings of fact in the award—
(i) The decision of the tribunal on the question is obviously wrong, or
(ii) The question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and
(d) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question."

1.3 This was the position in the *Ei Group* case (see below). The difficulty of a legal challenge to an arbitration award means that real importance attaches to ensuring that the guidance is legally correct; otherwise it is storing up problems for the future. The PCA recognises that the costs and formality of an appeal may deter tenants from challenging an award. However as is apparent if the issue is important the pub-owning businesses can and will appeal. That will inevitably involve the tenant who will still face costs and risks in dealing with the appeal. That appeal may well be

successful where the arbitrator has erred in law and in the case of guidance which is legally incorrect, the potential for an error is that much greater.

1.4 The PCA is required to consult on the draft guidance, however we recognise that there is no requirement to make formal amendments to it or to agree the guidance. The only remedy for the issuing of draft guidance that is wrong legally would be to seek a judicial review.

2 Contents of the Guidance

2.1 Having reviewed the content of the guidance, Greene King makes the following comments.

3 Transparency in the MRO procedure/ Transparency around proposals of rent in the MRO procedure/ Provision of information to support the rental offer/ Provision of comparables/ Tenant improvements/minimum levels of information

3.1 The changes made to the process in April have meant that there is a period of engagement before any MRO offer is issued that would form the subject of a challenge. And so, the problem of a lack of information prior to any reference to arbitration is much less likely to arise in the future. In consideration of this Greene King does not have any particular comments for these sections.

4 Removing uncertainty of potential financial barriers in the MRO procedure

4.1 The PCA advocates consistency of approach. While we understand the general desire for this, it is not a requirement of the legislation or the Code to adopt a consistent approach to the treatment of upfront costs. There might also be accusations by some of collusion or it being a closed shop and different pub-owning businesses are entitled to take a different view on some of these costs and how they are to be addressed and paid for.

5 Incremental build up

5.1 At Para 20 I do not agree with the statement that the High Court made this clear in *Ei Group v Clarke and anr*. The case concerned an application for permission to appeal against an award made by Professor Graham Chase in an MRO arbitration. The High Court in its judgment set out its reasons for the refusal of permission. What actually happened is this:

5.2 The PCA made a preliminary award in the following terms:

"[73] The Claimants' position is that the starting point for the MRO lease is the existing lease terms. However, there is no support in the legislation for this assertion. A tenancy which contains product or service ties and an MRO tenancy are treated as different creatures by the Act and the Code. The definition of an MRO-compliant tenancy (in section 43(4) and (5)) makes no reference to the terms of the existing tied tenancy.

[74] By comparison, when renewing a tenancy under section 32 to 35 of the 1954 [Landlord and Tenant] Act (arguably the closest example on the statute books of a statutory jurisdiction to determine the terms of the commercial tenancy) "reasonable" terms [are determined] by reference to the existing lease as a starting point. It is for the party seeking a departure from those terms to justify why it is fair and reasonable, having regard to the purpose of the Act. The legislature would have been aware of the criteria used in the 1954 Act when enacting Part 4 of the Act and the Code and I consider it is significant that it in doing so it did not choose to take the same path.

[75] Moreover, there are instances in the Code where reference is made back to the tied tenancy, e.g. in relation to provisions for security of tenure (regulation 31(3)(b)) and the duration of the new term (regulation 30(2)). The absence of any reference to the terms of the tied tenancy in both section 43(4) and (5) is significant.

[76] I therefore make it clear to the Claimants: the existing lease is not the necessarily starting point in this statutory procedure. A DOV is not the default option. The tie and tie free lease are fundamentally different relationships. That does not mean however that it will always be reasonable to change terms in the existing lease which are also common in FOT leases.

[77] Furthermore, in my view that does not mean that the existing lease terms and conditions cannot be relevant to the question of whether the new terms and conditions are MRO-compliant. In order not to be unreasonable, the landlord in offering terms of the MRO option may need to have regard to the existing contractual relationship between the parties. The existing lease terms will be in the mind of the TPT, who is entering into negotiations for a new lease. The landlord will have their own commercial considerations in mind. From their respective positions, parties motivated to reach an agreement rather than a stalemate will negotiate from these starting positions to one that is acceptable for both. Therefore, both will have to take into account the position of the other if they intend to reach a deal. This is what a landlord would do if it wanted to tempt a preferred tenant into a new contractual relationship. That is the position in which the TPT tenant should be in the MRO procedure.

[78] There may be other reasons why the existing terms are relevant, but I cannot set out an exhaustive list. For example, where a landlord offered (perhaps fairly recently) very favourable deposit terms on the tied lease, which suggests the tenant was viewed as a preferred operator, and there has been no relevant change of circumstance, if the POB will not offer favourable deposit terms now that may be an indicator that the POB is seeking to raise unmanageable entry costs and is not acting fairly, and that the terms of not therefore reasonable. The particular terms (e.g. a keep open clause) may have had an effect on trade and goodwill to date, such that it would be unreasonable to change them. There may be an occupation clause pursuant to which wider family members reside in the pub, and it may be unreasonable to restrict that. Each case must be looked at on its merits, but to suggest existing lease terms are always irrelevant is untenable in my view."

5.3 As the judge in *Ei Group* then explained:

"15. There was no appeal from the preliminary award and the parties accept, for the purposes of this application, that Ms Dickie correctly stated and explained the legal principles."

5.4 The correctness of the statement made by the PCA was not therefore considered by the court as this was not the subject of the appeal.

5.5 Professor Chase was then asked to make a final award. In that award the judgment records that *"The arbitrator's reference to "the tenant being no worse off as a tenant free of tie" shows that he thought that a comparison had to be made between the tenant's position under its existing tied lease and its position free of the tie. That is the wrong comparison"* (para 36). The judge said this:

"39. I find this reasoning very hard to follow. It is not what Ms Dickie held in the passages I have cited above. She emphasised not just that the existing tenancy was not the starting point, but that the 2015 Act did not generally require a comparison between the existing tenancy and the proposed MRO tenancy to determine whether the tenant would be "worse off" in a given respect under the latter than the former. She highlighted the textual differences between the 2015 Act and the Pubs Code, on the one hand, and the Landlord and Tenant Act 1954 on the other. She then went on to say that the existing terms might, in some circumstances, be relevant to the question whether the proposed MRO-compliant tenancy was reasonable, and that the outcome would be sensitive to the particular facts. For instance, if there were favourable deposit terms in the existing tied tenancy it might be unreasonable in all the circumstances to require a different and more onerous deposit arrangement in the proposed new lease. She did not, however, suggest that the tenant could complain about a particular term merely on the basis that it would leave it in a worse position than under the existing tied tenancy in a given respect.

"40. I consider that the arbitrator made an obvious error on the question of law in these passages. Section 42(3)(b) of the 2015 Act does not require a comparison between the tied lease and the proposed lease to determine whether a particular term would leave the tenant worse off than under the

existing tied lease. It is to my mind obviously wrong in law to regard differences between the two as a benchmark for assessing whether what is proposed is reasonable.

41. Given this conclusion, the decision of the arbitrator on this question is at least open2`to serious doubt."

5.6 In other words, the judge was determining whether Professor Chase had erred in law and concluded that he had done. However, the ratio of the case is not that *"the starting point for a MRO lease is not necessarily the tied agreement"* this emerges from the statement quoted above by the PCA in her preliminary award. Arbitration awards are not binding on anyone other than the parties and the contents are not the law.

5.7 Judgments made in cases before the High Court set out the law but only where the subject matter is actually being considered and argued before the court. In those instances the matters is what is termed *res judicata*. However, that is not the case here. The correctness of that statement, however, was <u>not</u> a matter on which the court in *Ei Group* was asked to make a judgment as this was merely an application for permission to appeal. The court was only required to consider whether Professor Chase had made an error of law and it conclude that he had done so. It did not actually consider the correctness of the statement *"the existing lease is not the necessarily starting point in this statutory procedure."* Accordingly, it cannot be *res judicata*.

6 Nor is the ratio of the case that *"tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie"* and that a comparison with the existing tied tenancy is not the correct test. Again, the court was only required to consider whether Professor Chase had made an error of law. The ratio of the case, to the extent that there is one, is that an error of law is not enough; it also needs to have affected the outcome and that is why permission to appeal was refused.

7 The statement made at paragraph 2 of the draft guidance note is therefore wrong. By using the word *"necessarily"* it implies that the starting point may be the tied agreement. We do not disagree that the terms of the existing tied agreement form part of the circumstances which the arbitrator needs to consider when determining reasonableness but the judgment in *Ei Group* is not authority for that proposition and it is misleading.

8 We also disagree with the contents of paragraphs 21 and 22. The opinion of the PCA as to whether it would be reasonable *"in most cases"* to seek to agree a period of build-up and that *"in the majority of cases it is likely to be unreasonable for the POB to offer no transition period at all"* creates the impression that this is the law. That is not the case. It suggests that only in exceptional cases can payment in full of sums due on completion be unreasonable. That is not the law.

9 The statements in paragraph 21 also create the impression that there is a presumption in favour of a build-up where none in law exists. It also appears to alter the burden of proof such that it is for the pub-owning business to show that a build-up is exceptional. Again, that is not legally the case. The burden of proving that a term is unreasonable lies on the tenant, see *Punch Partnerships (PTL) Limited and anr v Jonalt Limited [2020] EWHC 1376 (Ch)*. But you would never understand that from the guidance. Indeed, nowhere is either *The Highwayman* or *Jonalt* even mentioned.

10 Paragraph 21 talks about terms needing to be reasonable. However, this is again not what the legislation says. A lease is not MRO-compliant if it contains terms that are <u>unreasonable</u>. In practice one might say what is the difference? The difference is that while the PCA can give guidance as to what might be considered to be unreasonable, she cannot set out what she considers to be reasonable. As it states at paragraph 23, it might be reasonable for any transition period to be personal. However, it does not follow that the absence of such a provision is unreasonable.

11 As the court made clear in *Punch Partnerships (PTL) Limited and anr v the Highwayman Hotel (Kidlington) Limited [2020] EWHC 714 (Ch):*

"[92] Thus the result of a finding that the MRO offer is non-compliant is that the POB must provide a 'revised response' within 21 days. Regulation 32 does not state that the arbitrator can determine the separate and logically subsequent question of whether, if a proposed tenancy is not MRO-compliant, it would be rendered compliant by the insertion of a particular term, and still less does it state that she can order at the same time that the pub-owning business include that particular term in order to make a tenancy MRO-compliant.

[93] There is no other provision entitling the arbitrator to determine the content of the revised response and no other suggestion in the Pubs Code that such an order may be made. If the arbitrator were permitted to order the terms that the POB is required to include in its revised response, there would be no need for a dispute resolution mechanism in respect of the revised response."

12 We also do not agree with the statement that *"the POB should make it clear what transition period in respect of an increased deposit or less frequent rental payments it will offer to the tenant".*

12.1 First, it implies that there should be such an offer and for the reasons outlined above we don't accept that. Secondly, the POB is entitled to base what it offers on the actual circumstances of the tenant. Those circumstances may not be known at the date of the initial offer and may only become apparent during the negotiation stage when there is engagement with the tenant. It may result in an updated full response but it might not.

13 Given the purpose for which the statutory guidance will be put, particularly use by arbitrators in making awards in MRO cases, it is not therefore within the jurisdiction of the PCA to lay down rules as to what terms are to be included in leases to make them MRO compliant. Despite this the approach being taken in this guidance is to seek to impose particular terms that pub-owning businesses must include in the MRO offer. That is wholly contrary to the decision in the *Highwayman*. To quote from the judgment:

"[101] As the Landlords put it, it could not have been intended in the statutory framework that OPCA, as arbitrator of whether an offer was MRO-compliant, would have the power unilaterally to change one term in an MRO offer, given that any MRO offer represents a commercially balanced package of terms which are inter-dependent, without clear express wording.

"[102] I consider with respect that paragraph 62 of the Award, to the effect that the powers of the arbitrator in Regulation 33(2) are "not exhaustive… [and] its language is permissive in that it does not restrict [the arbitrator] in the scope of any ruling [she] may make as to the terms of the revised proposal", is wrong. The language of the 2015 Act and the Pubs Code is restrictive as well as permissive, or more simply put, permissive language is not sufficient to empower the arbitrator to interfere with the economic and property interests of the parties unless clearly expressed and applicable to that end.

"[103] I am sympathetic to the OPCA's objection, that if the arbitrator is not permitted the power to specify and impose reasonable terms in a revised offer (this already having been the second arbitration reference between the parties), there is a danger of locking a tied tenant into a cycle of litigation, as the Landlords might repeatedly propose terms, which are repeatedly referred to arbitration, the arbitrator decides that the terms proposed are no longer unreasonable and thus MRO compliant, so leaving the rest of the statutory MRO procedure and the Pub's future as free-of-tie in abeyance.

"[104] The point is well-made and I am not wholly satisfied by the Landlords' two answers to this fear, which they deny in any event that they have any intention or reason to escalate. First, they say that the 2015 Act and the Pubs Code empower OPCA as regulator to control or address the risk which it identifies, by investigating whether a POB has failed to comply with the Pubs Code and if a POB has failed to comply, imposing financial penalties or making further recommendations.

"[105] Secondly the Landlords suggest that if OPCA considers the regulatory powers provided by the statute are insufficient or that additional arbitral powers are required, it should recommend a change to the legislation. In particular, they say, section 46 of the 2015 Act imposes an obligation upon the Secretary of State to review the Pubs Code at regular intervals and to recommend to Parliament any revisions to the code that would enable it to reflect more fully its essential principles.

""[106] Pursuant to that provision, the DBIS is currently undertaking a statutory review, in which OPCA has (so far) said that the Secretary of State may "wish to consider whether the Code should provide further prescriptions or presumptions on…the nature of compliant terms, to reduce the risk of protracted challenge either in arbitration or to the exercise of the regulator's powers in this area", although it has not (yet) recommended any extension or clarification of the powers of an arbitrator appointed pursuant to the Pubs Code.

"[107] I cannot but consider these may not be practical solutions for now, and that at least in theory there is a risk of further delay, cost and attrition involved in repeated offers and arbitrations, which might harm the Tenant more than the Landlords. But whilst these points do not cure easily the lack of power, on my understanding of the 2015 Act and the Pubs Code, for the arbitrator to impose what she might consider a reasonable period and/or other terms of a POB's offer for an MRO-compliant lease, that does not dissuade me from the conclusion of law to which I am driven as to the absence of such a power in the arbitrator within the statutory framework as it stands."

13.1 We believe it is wrong and unlawful to attempt at introducing requirements that could not be sought through arbitration.

14 Obligations in respect of pub condition

14.1 The same misstatement of the law occurs in paragraphs 28 and 29. The statement *"if a POB requires the completion of terminal dilapidations or completion of compliance issues as a condition of a MRO tenancy, the PCA is likely to consider this is unreasonable unless there is a compelling reason for the requirement"* is wrong in law in a number of key respects:

14.1.1 First, it prejudges the outcome of any arbitration.

14.1.2 Secondly, it gives the false impression that the burden of proof is on the pub-owning business to prove that there is a *"compelling reason"* for the term (contrary to *Jonalt*).

14.1.3 Thirdly it misrepresents the correct legal test, which is not that there needs to be a *"compelling reason"*. Rather the correct test is whether the term is unreasonable within the meaning of section 43(4)(iii) and also regulation 31. Nowhere in either the legislation or caselaw will you find the phrase *"compelling reason"* which creates a higher threshold. As a statement of the law this is plain wrong and should not feature in the guidance.

14.2 We do think that in the specific case of statutory compliance, a good distinction should be drawn between repairs and actions required to comply with legislation such as fire safety measures. They are treated differently both in the covenants contained in leases and under both the common law and different legislation (for example the Leasehold Property (Repairs) Act 1938. In our opinion in most cases it will be possible to identify specific actions that the tenant needs to take to ensure that the premises are safe and compliant. These requirements may come from legislation but also from the requirements of Greene King's own insurers.

14.3 We do not believe that the draftsperson of this guidance properly understands the law of dilapidations. It is worth repeating what we said in our consultation response on the subject:

"Greene King approaches the need for repairs to be carried out on a case-by-case basis. There will be situations where a POB requires work to be undertaken. It is common for such matters to be put off by TPTs and only dealt with at renewal (whether the lease is tied or free-of-tie). This is because the

Leasehold Property (Repairs) Act 1938 ("the 1938 Act") which affords significant protection to tenants from the enforcement of repairing obligations mid-term does not apply during the last 3 years of the term. Situations where it is likely to be reasonable to require works include:

- *The condition of the premises and where the tenant is in breach of covenant, the seriousness of the breach and the measures that may be ongoing to secure compliance with the repairing covenants.*

- *Whether the existing lease contains covenants to undertake specific works within a specified period of time.*

- *Where urgent work or measures to comply with legislation is required and, were the 1938 Act to apply, the tenant would be required to undertake them. In practice this is the approach which Greene King commonly takes.*

- *Where the MRO event is a lease renewal and the landlord opposes the new lease on grounds that include ground (a) of Section 30(1) of the 1954 Act. This is a discretionary ground and it is open to the Court to dismiss the ground of opposition (including by consent) on conditions that the works are undertaken. In such a situation it would be a bizarre result if it was unreasonable for the POB to require that the MRO lease contained similar terms. It would put such a tenant in a better position than would be the case absent this statutory scheme.*

- *Where the existing lease contains a full covenant to repair to one where the repairs are limited. This might be the case where the MRO lease is for a relatively short term and the repairing covenant is commensurate with that term by being limited in its scope or because the tenant's obligation is limited to putting into better condition than the condition at lease commencement as evidenced by a schedule of condition. This would mean that the expiry of the old tied lease is the trigger for dilapidations as the repairing obligations will not roll on.*

Whether such instances would be regarded as "exceptional" is unclear. We suspect they are more common than the PCA anticipates. In the absence of any evidence, however, it will be impossible for the parties to determine this.

It should be noted that there is a distinct difference between dilapidations

It should be noted that there is a distinct difference between dilapidations repairs and statutory compliance liabilities. Greene King considers that statutory compliance elements must be dealt with in a specified period of time to ensure legislation is met. If a TPT has not met their statutory obligations, it is not unreasonable for a responsible Landlord to require these are met before entering into a new contract where the TPT will continue to have these obligations.

A timetable commensurate with the severity of dilapidations repairing works would be considered reasonable. Greene King's TPTs are reminded in writing of their repairing obligations on an annual basis. In addition, a periodic visit by a property surveyor is also made to support those TPTs on long term leases in the management of their repairing obligations."

15 Regulation 50 and decisions at renewal in respect of the Landlord and Tenant Act 1954

15.1 Greene King does not have any particular comments to add about this section.

We appreciate that this is lengthy feedback, most of which comes from the legal opinion we have sought. While we agree with the reasons behind the decision to issue guidance it is important to ensure where the guidance addresses the terms of MRO leases rather than processes, the legal position is properly and accurately set out and that it is not misleading, contrary to the caselaw and does not introduce requirements that go over and above the law. We would also want to avoid any potential legal action we might need to consider should the drafting not be corrected.

To that end, and in support of ensuring the guidance can be upheld, our solicitors are willing to discuss directly with you the areas we have highlighted in this letter. Alternatively, we do suggest that you review with your own counsel the aspects of the guidance in respect of which we have expressed concern.

Yours sincerely

[Redacted]

GREENE KING PUB PARTNERS
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Department for Business, Energy & Industrial Strategy

Invitation to contribute views and evidence to the statutory review of the Pubs Code and the Pubs Code Adjudicator

For the period from 1 April 2019 to 31 March 2022

Response form

The consultation is available at: www.gov.uk/government/consultations/pubs-code-and-pubs-code-adjudicator-invitation-for-views-on-the-second-statutory-review-2019-to-2022

The closing date for responses is 17 August 2022

Please email completed forms to pubscodereview@beis.gov.uk

Or send by post to:

Pubs Code team
Department for Business, Energy and Industrial Strategy
4th floor, Victoria 2
1 Victoria Street
London
SW1H 0ET

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I want my response to be treated as confidential ☐

Comments: Click here to enter text.

About You

Name[Redacted]
Organisation (if applicable): Marston's Plc
Address: Marston's House, Brewery Road, Chapel Ash, WV1 4JT

	Respondent type
☐	Tied pub tenant
☐	Non-tied pub tenant (please indicate, if you have previously been a tied pub tenant and when)
☒	Pub-owning businesses with 500 or more tied pubs in England and Wales
☐	Other pub-owning companies (please describe, including number of tied pubs in England and Wales)
☐	Tenant representative group
☐	Trade association
☐	Consumer group
☐	Business representative organisation/trade body
☐	Charity or social enterprise
☐	Individual
☐	Legal representative
☐	Consultant/adviser
☐	Trade union or staff association
☐	Surveyor
☐	Arbitrator
☐	Other (please describe)

Review questions

Part A: The Pubs Code

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

Comments: Click here to enter text.

The Code is now embedded into normal working practices with new lettings, rent reviews and MROs etc following consistent processes. Since 1 April 2019 the Code has been more intrusive with more layers of complexity than in the first 3 years. We must comply with statutory guidance that becomes an addendum to the Code including guidance on sediment and operational waste, guidance on MRO process and rent proposals and the regulatory handbook. Consideration should be given to simplify the Code, there are 84 pieces of separate information we are required to provide to tenants under the Code.

As a 5 year period has now passed since the commencement of the Pubs Code, all tenants that qualified and had the contractual right would have had the opportunity to use their right to an MRO option. Take up has been a very small number and it appears there isn't a large appetite for MRO. Since the commencement of the Pubs Code, Marston's have received 94 valid MRO notices of which only 20 have gone on to complete an MRO tenancy which highlights the value of the tied model. Based on these figures an MRO opt-out should be a consideration if both parties are willing to agree to this in writing. The tenant would maintain all other existing Code rights.

Question 2
To what extent do you think the Pubs Code is consistent with the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants? Please provide any evidence you have to support your view.

Comments: Click here to enter text.

We comply with the fair and lawful dealings principle across the tied estate which is reflected by our behaviours and the information we supply. We have a transparent, clear and consistent process in the place for rent reviews. We provide informative property packs to new tenants or existing tenants taking a new agreement which complies with the requirements of the Code. These property packs contain all the information a tenant would need to know to make an informed decision on whether to take the pub.

Our BDMs conduct meaningful Business Development Reviews with our tenants and produce transparent and accurate discussion notes. In fact in the recent PCA survey Marston's ranked 1st with 88% of our tenants agreeing BDMs were fair in discussions.

Question 3

To what extent do you think the Pubs Code is consistent with the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie? Please provide any evidence you have to support your view.

Comments: Click here to enter text.

We have ensured that tied tenants are no worse off than free of tie tenants. During the consultation period the hospitality industry was severely affected by COVID and the lockdowns that followed. During the lockdowns tied tenants received fantastic support and were given significant rent concessions. This supports the rationale to remaining tied because of the benefits and support that can be offered by a pub owning business and can offer an explanation as to why the MRO take up has been so low. It is worth noting that Free of Tie tenants are not covered by the Pubs Code once their MRO tenancy has completed. The benefits to remaining tied include; relevant and accessible in-house training, access to Bii membership, rent payment plans for debt, marketing support, access to a wide portfolio of wet products and cask range and a dedicated BDM.

Part B: The Pubs Code Adjudicator

Question 4
How effective do you think the Pubs Code Adjudicator has been between 1 April 2019 to 31 March 2022 in discharging its functions in relation to the Pubs Code? Please comment in particular on the PCA's performance in undertaking the following:

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

Comments: Click here to enter text.

a) We believe the PCA has sufficient powers to enforce the Code and regulatory tools at her disposal to do this. During the consultation period there were often times that the PCA would request information with short timescales and provide very little feedback once information had been provided. Recently there has been a change to the way the Code Compliance Officers workshops are run which has resulted in better communication to ensure there is a smooth functioning of the Code.
The PCA has been unwilling to provide pub owning businesses advice in relation to practicalities of the Code which results in different interpretations of the Regulations. Where guidance has been issued, these can often be overly clunky and too general which makes the process slower than it could be.
The website flowcharts and factsheets are useful and helpful for tenants and BDMs to simplify the Code, we signpost these.

b) We have no experience of being investigated for non-compliance so no comment

c) Marston's complied with all aspects of an award where non-compliance was found in 2019 and satisfied the PCA of the changes made to our RAP. We also check other awards to ensure we remain compliant in other areas. Although outside of the

consultation period, , any actions taken as a result of the newly introduced self-reporting of breaches should be proportional to breach identified.

d) The PCA no longer arbitrates disputes and passes to external arbitrators. The difference in knowledge and ability between different arbitrators is substantial, with some being very clear on the Code and practices, but others less so. One example is a recent award where the arbitrator was getting several facts wrong (despite them being in the list of agreed facts) and several elements of the Code wrong. A higher and more consistent standard is needed across external arbitrators.
Referrals do not seem to be rejected even when they have no chance of success. These types of referrals should be seen as 'vexatious', especially if an advisor is using the arbitration route to satisfy their own agenda.

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

Question 5
Do you think the regulations relating to costs, fees and financial penalties remain appropriate or should these be adjusted? Please give the reason(s) for your answer and, if you believe these regulations should be amended, please set out how.

Comments: Click here to enter text.

The standard for requiring payment of arbitration fees by a tied pub tenant remains 'vexatious'. Certain tied pub tenant representatives take advantage of this and cause pub owning businesses significant costs in defending cases with no prospects of success (for example when the referral is out of time), but it is very difficult to label anything as 'vexatious' without significant evidence of intention and malice. The standard should be reduced so as to include referrals with no realistic prospects of success.

There is no incentive to the tenant not to refer as they do not bear any risk or cost yet the cost to pub owning businesses can be layered depending on different circumstances. Costs should be decided on a case by case basis.

Thank you for taking the time to let us have your views.

At BEIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒Yes ☐No

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I want my response to be treated as confidential ☐

Comments: Click here to enter text.

About You

Name[Redacted]
Organisation: (if applicable): Punch Pubs & Co
Address: Jubilee House, Second Avenue, Burton on Trent, Staffs, DE14 2WF

	Respondent type
☐	Tied pub tenant
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☒	Pub-owning businesses with 500 or more tied pubs in England and Wales
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☐	Charity or social enterprise
☐	Individual
☐	Legal representative
☐	Consultant/adviser
☐	Trade union or staff association
☐	Surveyor
☐	Arbitrator
☐	Other (please describe)

Review questions

Part A: The Pubs Code

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

Comments:

OVERVIEW

- **In 2019, the six pub companies, with the support of BBPA, commissioned a major piece of independent analysis from Europe Economics on the impacts and workings of the Code since its inception. Using data for the period 2019-2022, Europe Economics have published an updated report, a copy of which accompanies this submission.**

- The provisions introduced by the Code were evolving practices already present in the industry under the Voluntary Code of Practices. The Pubs Code has introduced a defined threshold of minimum requirements for provision of information from a Pub-Owning Business (POB) to their Tied Pub Tenant (TPT). This acts to safeguard the ability for informed decisions to be made and addresses the perceived imbalance of information. A tenant looking to take on a tied pub has never been as well informed about the prospective business decisions as they are under the requirements set out by the Code.

- In addition to the mandatory provision of information, the Code also overlays a requirement for education and commercial awareness of the TPT. This includes the need for pre-entry training, consideration of professional advice and the requirement for sustainable business plans to be produced, ensuring a complete commercial awareness required to run a tied pub business. In our experience, from the original Voluntary Code and now the Code, the requirements regarding the provision of information and ensuring fully informed decisions are able to be made by both parties have continued to operate very well.

- The issues of 2013 and before (under-informed tenants, entering agreements without a full understanding of them etc.) have been largely resolved. Transparency and the level of and quality of shared information are now embedded, and there is a genuine partnership approach.

- The operating landscape for pubs is vastly different to that of 2016, or 2019 for that matter. The pandemic has fundamentally changed the nature of the market in which pubs operate, and relationships and trust within the tied model have never been stronger.

- The first Code review (2016-2019) was always likely to be limited in scope because of the sense that there would have to be some "bedding in" period for businesses and other stakeholders. But this second review **MUST** consider opportunities for the cost and administrative burden to be reduced, as well as seeking to understand where

investment is being curtailed or stifled to the ultimate detriment of all parties and to local economies.

- The unintended, but not unpredicted, effects of the Code pose a risk of an unfortunate change to the basis of a tied contractual relationship that has been working for centuries. This, in turn, might risk "harming the risk-reward scheme of the tied model that has helped to protect tenants from downside risk in the pub market." Sadly there are now fewer opportunities for some of the countries most talented entrepreneurs, as there is a relative lack of security in making large financial investments for the pub companies, versus investing in more secure levels of return elsewhere.

- **This review represents an opportunity to make fundamental reform to the benefit of all parties.**

BENEFITS OF THE CODE

- The continued evolution of the Pubs Code has helped to establish good working practices and has brought some better controls into and around the L&T model (i.e. Schedule 1).

- Pub companies are now led by diverse and innovative executives, who have a long-term view of the sector and want to invest in their pubs, with growth of their own businesses and the success of partnership pubs seen as inextricably linked.

- The pub sector is now a professionalised industry whereby pub companies compete for the very best Publicans and talent to run their pubs, and all new Publicans undertake formal training and further development. Punch represent best practice in this area; examples including:

    - **Best-in-class Publican training facilities, following a £1m investment in 2018/19.**

    - **A State-of-the-art Development Kitchen with training facilities, working cellar and two fully functioning bars. Supported by an excellent training and conference space – The Academy.**

    - **Punch Buying Club - personalised & tailored offering to each pub including, business account management, online ordering, marketing, training & HR support. This is also a primary communication vehicle for vital business and industry comms.**

    - **Our Progress with Punch Publican training, supported by thousands of interactive eLearning modules, Punch Academy Workshops – and our new webinar programmes – is unparalleled in the industry.**

- This partnership between pub owners and small business entrepreneurs focuses on creating and running profitable and sustainable well-invested pubs that thrive within their local communities, bringing people together and fostering social cohesion whilst ensuring that risk and reward is shared fairly.

- Pub company behaviours are supportive and collaborative, as evidenced by the huge levels of rent reductions and other support that enabled the vast majority of Publicans to battle through the pandemic (see Question 3). **At Punch, we are proud that we had no early surrenders during the height of the pandemic and that we reopened every one of our pubs when the restrictions were lifted.**

- We have established formal call cycles and professional meetings between Operations Managers and Publicans – providing a genuine two-way conversation to help our pubs grow their businesses.

MARKET RENT ONLY (MRO)

- MRO remains the most problematic element of the Code. It is important to note that the Pubs Code was not introduced with the aim of increasing the number of free-of-tie agreements; its core aim was to ensure that tied tenants are "no worse" off than free-of-tie tenants.

- MRO, and the consequential lack of security in investing in tied pubs, causes a clear drag on investment and business growth. It incurs significant costs and creates conflicts which would otherwise no longer exist. The Code itself needs major reform to remove the MRO element, which incidentally was never intended by Government.

- MRO agreements have ultimately only been taken by a small number of Publicans, proving the fact that the demand for free-of-tie agreements (from Publicans who have actively chosen to take a tied pub in the first place) is low. The benefits from MRO remain unproven, and they are without question outweighed by the negative consequences, such as the reduction in opportunities for entrepreneurs, the adversarial nature of the Code and PCA, and the huge regulatory cost that falls on the regulated businesses, thereby further stifling investment (see Question 5).

- Our experience is that the majority of TPTs are not actually seeking to become free-of-tie tenants because the tied partnership model provides a number of options which tenants see as beneficial. The fact that there is so little movement between contracts (tied to free-of-tie) should not be a surprise, as the two models are entirely different and accomplish different objectives aimed at a different profile of operator.

- To date, despite consistently pro-actively reminding our TPTs about their rights to explore MRO, **only 15%** of Punch Publicans with the opportunity to exercise their right to explore MRO have chosen to do so.

- Of the **35 valid MRO notices since April 2019, only five MRO leases have ultimately been taken up (14%)**. The remaining Publicans have chosen to remain tied or, in some cases, chosen to surrender their leases back to us. The cost to POBs and the time and effort involved in resolving MRO requests is entirely disproportionate compared to the relatively low numbers of MRO leases granted. Repeatedly we see that, when given the choice, TPTs ultimately elect to remain tied due to the lower cost base and the wide array of SCORFA support on offer. This has been further strengthened by the support provided by all pub companies during the pandemic.

- What we do see is an MRO option being requested as a negotiation tool, which is understandable, but was not an intended outcome of the Code.

- So we strongly believe that the success of the Code should not be measured by the number of those Publicans wishing to depart from the tied model through MRO, but more so by the fact that the vast majority of those operating within it actively choose to remain within the tied model due to the significant benefits that this model provides to them versus a free-of-tie agreement (SCORFA benefits etc.).

- Since the commencement of the Code in July 2016, there have been a total of 581 referrals for arbitration accepted by the PCA (cumulative from 21/07/2016 to 30/06/22). **Of those 581, 72 were on non-MRO matters (12%). This comes from a total population of circa 9,000 TPTs covered by the Pubs Code**, equating to less than 1% of the applicable population raising a dispute to the PCA on non-MRO matters during their relationship with their POB since July 2016.

- MRO notices that are accepted by POBs have numbered around 200 a year since 2016, but their numbers are declining and dipped in 2020 to just 176 (see table below). This is especially clear when framing these figures as a share of the total tied-partnership estate of the POBs regulated by the Code: over 2016-2021, **just 2.3% of tied-partnership pubs submitted MRO requests** that were accepted, and **only 0.4% migrated to free-of-tie agreements** following the MRO procedure.

BBPA MRO survey data

	2016	2017	2018	2019	2020	2021	Total
Tied pubs	11,500	11,142	9,600	9,126	8,745	8,275**	58,388
MRO activity							
- Notices received*	241	237	216	190	176	191	1251
- Free-of-tie agreement	0	21	39	59	23	73	215
- New tied agreement	33	203	129	101	55	97	618
MRO activity (per pub)							
- Notices received*	2.1%	2.1%	2.3%	2.1%	2%	2.3%	2.1%
- Free-of-tie agreement	0%	0.2%	0.4%	0.6%	0.3%	0.9%	0.4%
- New tied agreement	0.3%	1.8%	1.3%	1.1%	0.6%	1.2%	1.1%

Sources: Tied pub numbers from PCA annual reports [online] and pubco submissions to BBPA in 2022 on financial support provided to tenants; MRO numbers from BBPA [online].
Notes: * Notices accepted by pubcos. ** Figure reflects pubco submissions to BBPA (see 'Sources') and predates Admiral's purchase of Hawthorn, which increases the true number of pubs covered by the code by approximately 450. The percentages reported do not adjust for this.

- The existence and continued success of the Voluntary Code and associated dispute resolution systems is evidence that MRO is not the answer to a successful partnership.

    - Across the sector, overall tenant/lessee satisfaction rates with their pub company is over **7 out of 10.** Interestingly this rises to more than **8 out of 10** for

those covered by the Voluntary Code *(Kam Media Licensee Index, October 2021)*.

MRO & INVESTMENTS

- Punch retains a strong desire to invest in TPTs, and we want our leased and tenanted estate to remain at the core of our strategy.

- However, this statement of intent doesn't hide the fact that an unintended consequence of the Code remains the stifling of investment into existing tied lease agreements within the leased and tenanted estate. This is a direct consequence of the risk that the MRO option could lead to uncertain future income streams and, consequently, a return on investment being harder to quantify. This makes an investment into a tied pub higher risk than an investment into a different ownership model. Money, and investment, follows the path of lowest risk and most secure return.

- This consequence has been a significant contributing factor leading to a number of pubs either being operated under different models, once the tenancy or lease has ended, or being sold. This inevitability was highlighted by independent economists ahead of the Code coming into force, when almost 13,000 'tied' pubs were operated by the six regulated pub companies, compared to under 9,000 covered by the Code in the current year. This trend is continuing.

- The Code goes some way to addressing this risk through Regulation 56 (the investment waiver), however, this could be improved further. Lowering this threshold to apply to any level of investment from the landlord whilst retaining the requirement for the TPT to agree to this, should open up the door to increased investment into the entire leased and tenanted portfolio where both parties see a mutual benefit in doing so, with further benefit to local communities, including significant job creation across the UK.

- A further unintended consequence concerning long-term investment is the risk that taking MRO might result in investment capital being harder to raise for the Publican, as this would not likely be available via the POB and access to third-party funding could be costly or unattainable to a free-of-tie tenant.

ADVISORS/REPRESENTATIVES ON CODE MATTERS

- The Code features a strong focus on ensuring a TPT is fully informed, and quite rightly when considering decisions for their business.

- The Code falls short by not ensuring any safeguards as to the quality or motivation of external advice a TPT may receive regarding Code matters. Our experience of witnessing numerous examples of poor and prejudiced advice makes us firmly believe that it is critical that TPTs must obtain independent, professional and qualified advice from an accredited source to ensure such safeguards. The British Institute of Innkeeping (BII) has recently launched an accredited advisor's panel. We believe that the PCA should mandate that all advisors acting on behalf of TPTs on Pubs Code

matters must be accredited by the BII. This would professionalise the industry further, to the benefit of all parties.

Question 2

To what extent do you think the Pubs Code is consistent with the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants? Please provide any evidence you have to support your view.

Comments:

- We believe, as was the case with the Voluntary Code, that the Code enforces good business practice between a POB and their TPTs. Through formalising requirements and expectations, the Code is conducive to ensuring transparent and professional relationships exist and continue to grow.

- There are clear timescales for key decision-making points and the obligations on pub companies to deliver against these. The MRO option, however, arguably goes beyond fair and lawful dealing allowing tenants to move to a different agreement at certain trigger points and giving tenants additional negotiating power. In addition, the PCA and arbitration routes ensure that a tenant has further recourse if any issues, including those in relation to rents and lease terms, cannot be resolved amicably. These structures are funded by the pub companies at significant cost.

- **KAM Media - The Licensee Index/PCA Follow-up Survey (March 2022):** 43% of tenants said they were better off than on a free-of-tie commercial lease vs 29% who said they were worse, highlighting the mixed feeling and views amongst tenants.

- **The Licensee Index 2021 Survey Results**: Overall Pub Co rating for Punch saw our score improve by +0.5ppts vs 2019, demonstrating long term reputational improvement in the Punch brand. *Punch Sample size was 150 out of 1,574 Publicans.*

- [Redacted] **a Punch Publican who runs** [Redacted] **says:**

"Partnering with Punch gave me the confidence to take on my own pub. I get a lot of advice from them; day to day I'm focused on running the pub, so I really value my Operations Manager helping me to spot opportunities to invest and develop [Redacted] to make it even better for our loyal customers.

"The Pubs Code has helped me to understand that there is support and guidance available to tied tenants that are considering taking on a tied pub. Understanding the code has reassured me that there are rights in place to protect and enable tied tenants to successfully run a business."

INCONSISTENCIES

- **Extrinsic Price Increases:** The Code does not allow for external or tax-related price increases aside from Duty; there were issues with the sugar tax, POBs were unable to fully pass on the price increase resulting in a dilution of the intended effects of the tax and a disproportionate burden on POBs. This area of the Code leaves POBs highly exposed to different risks and it is critical that it is addressed to reduce this

unreasonable level of exposure. The Code also hinders the provision of not-for-profit procurement services to TPTs to the detriment of all. This is a fundamental failing of the Pubs Code and needs to be addressed for the benefit of all parties, particularly in the light of current inflationary economic pressures.

Question 3

To what extent do you think the Pubs Code is consistent with the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie? Please provide any evidence you have to support your view.

Comments:

- Through the protections afforded by the Code, a TPT arguably enjoys far more privileges than a free-of-tie tenant does. Access to the required information prior to the (and during the) taking on of an agreement is an example of information not usually provided on free-of-tie commercial open market transactions.

- However, this "no worse off" principle has always been somewhat problematic in terms of measurement, and we believe that interpretation by the PCA has been incorrect. This has been compounded by misplaced expectations in some instances. For example, a three or five-year tied tenancy is a very different agreement to a standard free-of-tie lease. More generally, there are different repairing obligations and liabilities, different levels of initial investment required, a different balance of risk and reward and different levels of support and additional services that companies offer as part of tied deals, which are more akin to a partnership/franchise approach. Free-of-tie leases tend to be more arms-length relationships than other parts of the commercial lease sector. This means switching a tenant to an MRO agreement is never as straightforward as simply removing the beer-tie.

- This is all pertinent to the "no worse off" principle because the balance of risk and reward and the intangible aspects of the tied relationship (often referred to as SCORFA benefits) versus a free-of-tie lease, are all part of the consideration, but there is no accurate formulaic approach to measuring these and it is definitely not a like-for-like comparison. Any comparison must also be considered over the lifetime of an agreement. Essentially, the market for the two agreements is different, and therefore there will be different costs involved. Some have argued these are unreasonable barriers, but in reality they will represent what the market would expect in the event that the pub was marketed as free-of-tie.

- **Proactive reminders of the Code to our Publicans include:**

    - During the initial recruitment process, all tied Publicans receive our Punch Services Guide, which contains information about the Pubs Code (just an overview at this point to say that the Pubs Code exists and who the PCA is and with links to the PCA website).

    - Once the Publican reaches the second stage of the recruitment process, as part of Schedule 1, a letter from the PCA is sent to the Publican and sets out their prospective code rights.

- When the Publican has been in the pub for around 12 weeks, another letter is distributed from our CCO, which sets out their code rights.

- As part of the rent event process, when the rent proposal is issued, we remind the Publican that they have 21 days to submit an MRO request should they wish to do so.

- 14 days after the rent proposal is issued, we will send a further letter reminding them they have seven days to submit an MRO request.

- The 'Punch Services Guide' document and the 'A Guide to The Pubs Code' are also readily available on our website. Punch Services Guide | Run a Pub with Punch (punchpubs.com)

- Similarly, the requirement under the Code for the provision of information at rent reviews and the exclusion of upwards-only rent review clauses are both privileges that are not available to a free-of-tie tenant.

SCORFA BENEFITS

- Attempting to quantify the 'no worse off' principle has previously been a challenging task as little information is collated regarding the overall level of financial advantage or disadvantage between the tied and free-of-tie models. This leads to analysis focusing solely on the financial aspects of beer prices and respective rent figures, often ignoring the wider SCORFA benefits provided under a tied agreement. The breadth of these SCORFA benefits is extensive, ranging from a lower financial cost of entry and thus lower economic risk to the provision of mental health support during a pandemic.

- The tied model brings a lot more than a differing financial arrangement. It is not as simple as adding or removing a product or service tie. The tied model provides a genuine shared interest and partnership (delivered via SCORFA), and greater flexibility of fixed and variable costs focused on achieving sustainable success for both the POB and a TPT.

- Quantifying the benefits of the tied model has always been a subjective argument. As part of the Scottish Government Market Report, Punch was asked to cost these benefits (SCORFA) as if purchased on the open market. The same was asked of free-of-tie tenants who have to purchase them rather than have them provided by a POB. The result saw these benefits valued at a similar level by both POBs and free-of-tie tenants (£18,636 and £17,855, respectively), however, the perspective from TPTs saw the value attributed at only 20% of that figure. This would beg the question of whether the true value of such benefits is being fully understood within the tied market.

COVID-19

- The support that TPTs have received during COVID is probably the strongest ever example of SCORFA, and we believe that anyone would find the following evidence to be compelling proof of the value of the tied partnership model.

- **Aggregated data through BBPA**:

    - Over the last two years, tied pub companies provided an estimated **£360m** of rent reductions (£242m by the six regulated pub companies) and other charges waived. Presenting an average of **£28,000** per tied pub.

    - Adding deferred rents, discounts and other direct financial support in terms of refunds for spoilt/unsaleable products, PPE/Signage and other reopening cost support, this increased to **£33,000** per tied pub. This compares to an average annual rent in tied pubs of around **£26,000.**

    - Average discounted rent as a percentage of total between April 2020 and March 2021 was **87%** for tied pubs and a further **21%** between April 2021 and March 2022 (assuming the same average rent of c.£26,000).

    - Pub companies only received a fraction of this in terms of any rent reductions from their commercial landlords, with many receiving no rent discounts at all.

    - Pub companies did also provide free-of-tie pubs with support during the pandemic, but by the very nature of the different relationship and opting out of the shared risk model, this was understandably lower than for their tied pubs.

    - Whilst 800 pubs in total sadly closed their doors permanently during 2020 and 2021, the number of business failures and closures was very limited in the leased and tenanted pub estate and was considerably higher among the wider licensed hospitality sector.

    - **KAM Media - The Licensee Index/PCA Follow-up Survey (March 2022):** Regulated pub companies achieved a 70% satisfaction rate with the level of financial support provided to tenants during the pandemic and 75% in relation to the transparency of this support.

    - On top of the Covid-related support, regulated pub companies continued to invest c.£100m in 2021 and 2020 in the development of pubs as well as ongoing maintenance and repairs in their partnership pubs estate. (In a typical year, this would be c£150-£200 million).

- As it stipulates in **The Pubs Code: Europe Economics' Updated Analysis (July 2022),** "the pub company 'helps' in times of low returns but 'takes' part of the revenue in times of high returns. The tenant is partially shielded in times of low returns, hence putting the benefit of the risk-reward partnership in stark relief."

SATISFACTION LEVELS

- **KAM Media - The Licensee Index/PCA Follow-up Survey (March 2022)**: 75% of Publicans now say they are satisfied overall with their pub company, and seven in 10 would recommend their pub company to another Publican. *Punch Sample size was 42 out of 308.*

- **72%** of tenants who had worked with a Pub Co over five years said their interaction had improved.

Part B: The Pubs Code Adjudicator

Question 4
How effective do you think the Pubs Code Adjudicator has been between 1 April 2019 to 31 March 2022 in discharging its functions in relation to the Pubs Code? Please comment in particular on the PCA's performance in undertaking the following:

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

Comments:

- It should be acknowledged that the PCA continues to have a difficult job due to the complexity of the regulations and different expectations from parties around what the legislation does and does not allow for. We believe, however, the PCA has sufficient and proper powers to enforce the Code effectively and many regulatory tools at her disposal to do this.

- The PCA has also challenged the industry to raise best practice, often beyond the strict requirements of the Code, to give extra reassurance and benefit for tenants. However, we would note that there is a balance to be struck in terms of the cost and benefits in some instances.

e. Giving advice and guidance

ENGAGEMENT & COLLABORATION WITH CCOs

- Up until 2019 the PCA had regular engagement with the POBs via regular CCO meetings; these have not resumed post-Covid, and we would welcome the opportunity of regular meetings with the PCA so that any issues or concerns can be discussed.

TIMESCALES

- There are strict timescales associated with all areas of the Code stating when POBs need to respond to a TPT's request. However, there are no timescales for when the PCA must respond to TPTs or POBs which can sometimes lead to prolonged periods of inaction and frustration.

f. investigating non-compliance with the Pubs Code

- We have had no investigations during this period so we cannot comment on this question.

g. enforcing the Code where non-compliance is found

- We have had no incidents of non-compliance, therefore cannot comment on this question.

h. arbitrating disputes under the Pubs Code

- Arbitration is an appropriate method in settling Code disputes, however many cases are launched ill-advisedly by TPTs and their advisors on flimsy grounds relating to matters previously established by court precedents.

- **Arbitrations are often launched without any prior negotiation** (this has in part been due to the 14-day deadline imposed by the regulations) now varied by amended regulations in April 2022, although we see no evidence to date that advisors have adopted a different approach.

- There is a relatively low-level cost risk to the TPT, which encourages arbitration referrals. The TPT fees are capped by the Code (Fees, Fine and Financial Penalties) Regulations 2016 at £2,000 save for vexatious claims. Experience shows that the fees for settling the cost submissions are usually equal or greater than the £2,000 available to POBs.

- Some advisors are taking TPTs through expensive and lengthy arbitrations without any clear benefit to their clients. This is likely to be as a result of poor advice or advisors lacking the requisite knowledge, experience or qualification to understand the process. Alternatively, they may, on occasions, be seeking their own financial gain at the expense of the POBs.

- **Timescales** – the Arbitration Act 1996 imposes obligations on both parties to proceed to a swift settlement of the dispute with the minimum of cost. This appears not to be followed by some advisors; as an example, in a recent case, the POB was presented with a statement of case of approx. 2,000 pages.

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

Question 5
Do you think the regulations relating to costs, fees and financial penalties remain appropriate or should these be adjusted? Please give the reason(s) for your answer and, if you believe these regulations should be amended, please set out how.

Comments:

- It is essential that this second review should consider where the spiralling cost and administrative burdens imposed by the Code can be reduced and where investment is being curtailed or stifled to the ultimate detriment of all parties and to local economies.

RISING COSTS

- Punch Costs (including annual levy, staff costs and Arbitration/legal/external costs):

Punch Costs – Pubs Code	**2018/19**	**2019/2020**	**2020/2021**	**2021/22**
PCA annual levy	135,551	127,719	85,064	321,406
Staff costs	198,832	207,977	217,165	230,437
Arbitration/legal/ external costs	-	23,888	£235,420	250,000
Total (£)	**334,383**	**359,574**	**537,649**	**801,843**

- The above numbers are based on our financial years – so August to August, which means that 21/22 is shown in part.

- At the last reporting period (March 22), we had 1,025 tied pubs (including TAW and Laine) which equates to a cost of **£782 per pub**.

- Companies covered by the Voluntary Code pay c.£20 per pub to cover the costs of Code oversight by the Pub Governing Body and the two independent dispute resolution mechanisms for rent (PIRRS) and other Code disputes (PICAs). This creates an unbalanced playing field amongst businesses that directly compete with each other for talent and share of market.

ESTIMATED PCA COSTS

- The Adjudicator was initially estimated to cost £540k to set up and then £1.6m (total levy) a year to run, as evidenced in the ***'Pubs Statutory Code and Adjudicator: Final Impact Assessment – 21.01.15'.***

    - £260k – arbitration
    - £300k - investigations
    - £470k - staff for other functions
    - £400k – appeals
    - £180k - other costs of £180k

- The estimate of the cost of independent assessments for Market Rent Only Option was £2m.

ACTUAL PCA COSTS

- The costs passed on to the Pub Owning Businesses through the levy are based on the number of pubs for the 16/17 year.

- The total levy contributions required to be paid by the pub-owning businesses ranged from 7% to 40% of the total levy amount. The minimum amount was £105,000, and the maximum was £594,000.

    - **16/17 - £1.5m (Punch paid £382,500)**
    - **17/18 - £1.74m (Punch paid £252,648)**
    - **18/19 - £2.55m (Punch paid £135,551)**
    - **19/20 - £3m (Punch paid £127,719)**
    - **20/21 – Deferred levy – Loan of £1.37m from BEIS – Punch have paid £16k so far, an estimated £68k remains**
    - **21/22 – £2.99m (Punch paid £321,046)**
- ***Note: Punch sold a large number of pubs in 17/18.***

REFERRAL/ARBITRATION FEES

- The apportionment of costs is currently unfair, with POBs expected to fund the majority of any referral and arbitration. There is currently no disincentive to TPTs in making vexatious referrals and no real negative consequence to them under the Code.

- Pubs Code (Fees Costs and Financial Penalties) Regulations 2016 is a statutory instrument which runs alongside the Pubs Code and provides:

    - Sets the referral fee at £200 for the TPT to make referrals to the Pub Code Adjudicator.

    - Caps the fees that POBs can recover from an arbitration/adjudication at £2,000 unless the TPT case is deemed vexatious.

    - The consequence of this in practice is that unlike any other commercial situations, the parties do not share the risk of entering a dispute resolution on the weakest possible case. That is what we see in practice, TPT advisors launch referrals for £200 without any negotiation or engagement with the POB in challenging the compliance of the MRO vehicle, running the same arguments that have been proven in the High Court multiple times with no prospect of success. In these instances, the POB has to fight the case, knowing they cannot recover costs if they win, and if they lose (sometimes on a minor technical point), they can pay the TPT costs.

    - This is unfair, unequal, and leads to unnecessary costs and delay.

- This drain of resource delays TPTs from obtaining their MRO leases, and usually, they are indifferent to the very technical arguments on lease clauses, which have a negligible benefit to them. It is, in reality, sometimes simply a forum for advisors to generate fees and advocate against POBs.

- In a recent case that we won, an arbitrator stated we were entitled [Redacted] following the case, but he proposed to charge [Redacted] to make the award. This does not feel like a fair and reasonable outcome.

- On occasion, advisors are not seeking to negotiate settlements; they are sometimes merely furthering their 'campaigning' at the expense of TPTs and POBs.

CHANGES REQUIRED

- MRO opt-out should be a sincere consideration if both parties willingly agree to this. This would stimulate investment and job creation.

- If an MRO opt-out *per se* is not taken forward, then the investment waiver should be more flexible to something mutually agreeable by both parties.

- The accreditation of standard company MRO agreements should be revisited and implemented as soon as possible. The PCA must move away from agreements having to be tailored to individual tenants.

- The PCA office should also be directed to take a light-touch approach and actively find ways to reduce the administrative and compliance costs, recognising the spiralling admin and compliance costs to companies. The cost per pub should be capped, as well as third-party fees.

- Consideration should be given to simplify the Code, for example, the 84 pieces of separate information pub companies are required to provide under the Code.

- The inflexibility and triggers around passing through price rises is a significant challenge in the current high inflation environment and does not work, particularly when procuring services on behalf of tenants on a not-for-profit basis.

- An improvement in the arbitration procedure would be achieved if the arbitration process could only be started after **a minimum period of negotiation of not less than three months,** and both sides need to have made their best and final offers and fulfil their duty to engage in the negotiation process.

- Advisors representing TPTs in an arbitration must be **professionally qualified to undertake arbitration**. The BII accredited advisor panel is a ready-made solution to this. No RICS surveyor or solicitor would take on an arbitration without having the required experience and qualification or risk a breach of a duty of care to their client. We are seeing unqualified advisors charging at hourly rates higher than those of qualified surveyors or solicitors.

- Advisors should have **minimum training, PI cover,** and **understand their duties to their clients and under the Arbitration Act 1996.**

- In addition, the imbalance of costs risks should be reviewed. The principle of the TPT having a cost cap on the recovery of fees attempts to balance an inequity of arms against the POB, but the limit is simply inappropriate. We would suggest a minimum of £5,000.

CONCLUSION

- The MRO element of the Code remains the principal area of concern and is linked to spiralling costs, reduced investment and continued and unnecessary friction between parties. The PCA must shift away from viewing the take-up of MRO as the singular measure of the Code's success. In fact, the inverse is true; the low take-up of MRO agreements demonstrates the ongoing value and success of the tied partnership model.

- To the point above, it was explained by Fiona Dickie, the Pubs Code Adjudicator, at the BEIS Committee hearing in July 2022 that the existing tied lease should not form the starting point for determining an MRO agreement; she confirmed that that point had been confirmed by the High Court in June 2020 and is, therefore, a matter of settled law. There is a clear misconception held by some stakeholders that simply removing the drinks tie from an existing tenancy agreement automatically creates an MRO arrangement; this misunderstanding needs to be corrected and explained.

- A right to request MRO is rarely exercised, as highlighted above. The primary reason for this is that the tied-partnership model is already effective in balancing the choices of tenants with the commercial interests of POBs. Every tied tenant initially made a free choice to enter into this model, and so it is a logical conclusion that they then subsequently opt to remain in it through duration of their agreement.

- The controls on price increases are not fit for purpose and can hinder the provision of services to TPTs to their detriment. They also create an unbalanced playing field in an otherwise competitive market.

- The recent COVID-19 pandemic has provided the strongest possible evidence of how in bad times POBs are able to support their tied tenants. So, whilst a tied tenant might receive less revenue in an economic upswing than it might under a free-of-tie contract, it will in turn gain substantially in a downturn in the form of lower wet rent (purchases of beer) and potential additional financial support. That is on top of the enormous range of wider SCORFA benefits available to tied pub tenants on an ongoing basis.

- Any scope creep by the PCA, and any attempts to widen the scope of the Code should be strongly resisted. Instead, lighter-touch regulation and simplification must be the way forward to improve proportionality and lessen the spiralling costs. Indeed, the Government should maintain a medium-term goal for when the additional regulatory cost burden of the PCA and statutory regulation is no longer required. At Punch, we believe that the aspiration for this goal should be sooner rather than later.

- Finally, we feel that as an accountable body, the office of the PCA should report publicly against a set of meaningful performance indicators, supported by the introduction of service level agreements for both tenants and pub companies. To that end, we welcome the recent publication of a three-year strategy by the PCA and note the inclusion of KPIs and Success Criteria. However, we were extremely disappointed to see that none of the deliverables address the need for lighter-touch regulation or control of costs at this challenging time for the industry.

- Thank you for giving us the opportunity to express our opinions on all of the above.

Thank you for taking the time to let us have your views.

At BEIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒Yes ☐No

Department for Business, Energy & Industrial Strategy

Invitation to contribute views and evidence to the statutory review of the Pubs Code and the Pubs Code Adjudicator

For the period from 1 April 2019 to 31 March 2022

Response form

The consultation is available at: www.gov.uk/government/consultations/pubs-code-and-pubs-code-adjudicator-invitation-for-views-on-the-second-statutory-review-2019-to-2022

The closing date for responses is 17 August 2022

Please email completed forms to pubscodereview@beis.gov.uk

Or send by post to:

Pubs Code team
Department for Business, Energy and Industrial Strategy
4th floor, Victoria 2
1 Victoria Street
London
SW1H 0ET

Information provided in this response, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see the invitation to contribute views and evidence for further information.

If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential ☒

Comments: Click here to enter text.

About You

Name[Redacted]
Organisation (if applicable): Ei Group Ltd trading as Stonegate Pub Partners
Address: Stonegate Group, 3 Monkspath Hall Road, Solihull, B90 4SJ

	Respondent type
☐	Tied pub tenant
☐	Non-tied pub tenant (please indicate, if you have previously been a tied pub tenant and when)
☒	Pub-owning businesses with 500 or more tied pubs in England and Wales
☐	Other pub-owning companies (please describe, including number of tied pubs in England and Wales)
☐	Tenant representative group
☐	Trade association
☐	Consumer group
☐	Business representative organisation/trade body
☐	Charity or social enterprise
☐	Individual
☐	Legal representative
☐	Consultant/adviser
☐	Trade union or staff association
☐	Surveyor
☐	Arbitrator
☐	Other (please describe)

Introduction

Stonegate Pub Partners (formerly Ei Publican Partnerships) is the leased and tenanted division of the Stonegate Group and are the leading leased and tenanted pub business in England and Wales, with a portfolio of circa 3,000 tied leased and tenanted pubs. We strongly believe that the pub is the heart of the British culture, and we strive to ensure fantastic guest experience is delivered either direct through our teams or working with our Pub Partners.

The unique and individualistic nature of the tied leased and tenanted model sets these pubs apart, there is no brand and no franchise model. The tenant has the freedom to run their pub business their way, reacting to the demands of their local market and customers, whilst benefitting from training and support from our experienced teams. Stonegate believe that the tied pub model delivers significant benefits for tenants, their employees and for communities.

The nature of this model was recognised within the Government's Final Stage Impact Assessment for the Pubs Code in 2015[1];

> *The tie is also a profit and risk-sharing mechanism. If the tenant does well (sells more beer) they will pay more 'wet rent' and, conversely, in hard times they will pay less. For the tenant this means running a pub costs less up front and has less downside risk. The pub owning company is also an experienced partner with an incentive to help increase sales. The two parties have a shared incentive to invest in the pub. For the pub owning company the risk sharing element of the tie makes getting tenants easier by reducing their upfront cost while not necessarily reducing their overall rent. The cost of tenants failing also gives the pub owning company an extra incentive to help the tenant succeed.*

In other words, the tied model gives both landlord and tenant a shared vested interest in the sustainable success of the pub.

The vested interest and risk-sharing nature of this model was fully evidenced through the pandemic which has cast its shadow across the majority of this review period. Despite the enforced closure of pubs coming within just 3 weeks of Stonegate acquiring the Ei Group, in recognition of the nature of the tied leased and tenanted relationship, we implemented a pub support package spanning the pandemic period including circa £89m-worth of discretionary financial support. In addition to discretionary financial support, we also invested to maximise outside space in light of social distancing, provided enhanced credit terms for restocking and reopening, issued free Personal Protection Equipment as well as providing wellbeing support for our Pub Partners to help alleviate the pressures that the pandemic brought with it.

The Pubs Code has caused substantial changes within the industry. Stonegate believe that the non-MRO parts have been a success, providing tied pub tenants with the information

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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

and rights to ensure that the fundamental principles of the Pubs Code are being upheld. The Pubs Code has contributed to an improvement in the relationship between tied pub tenants and pub owning businesses. The PCA's 2022 survey found that 62% of all tied tenants are satisfied with the relationship and only 22% were dissatisfied. The satisfaction rating rises to 67% amongst those tenants who started their tenancy after the Pubs Code came into force.

The same survey showed a high awareness of Pubs Code rights amongst tenants. Set against the relatively low number of MRO requests, we believe this demonstrates a healthy working relationship and that our tenants appreciate the benefits of the tied pub model. We will continue to strive to improve that relationship.

We remain concerned that excessive credence is given to opinions and voices from outside of the tied pub relationship with no tangible quantification for representation of todays tied pub tenants. Our concern was always that legislation be based on evidence, rather than on anecdote and speculation. One example of this is the claim by some campaigners that the beer tie is the major cause of pub closures. This claim has since been debunked by the ONS "Economies of Ale" report which concluded that closures were mainly of small pubs which the large pub companies largely did not own. It remains that there has never been a proper qualitative investigation into whether free-of-tie tenants were actually better off than tied tenants.

The main mechanic of the Code looking to address the 'no worse off' principle is undoubtedly the introduction of the MRO provisions. These provisions, though well-intentioned, have produced some adverse unintended consequences and bureaucracy – as has been highlighted via the commissioned European Economics report[2]. At a time when the pub industry is trying to recover not only from the enduring effects of the pandemic but the current head winds of the cost-of-living crisis, we believe that some small amendments can prevent these unintended consequences from becoming barriers to the tied pub industry whilst also enabling much needed investment.

Our submission therefore focuses on the following areas:

1. Increasing the ability for both Landlords and Tenants to invest with certainty.
2. Increasing clarity and consistency in order to further reduce disputes
3. Enabling a move towards lighter-touch regulation
4. Reducing the time and cost burden associated with dispute resolution for all parties

[2] The Pubs Code: Europe Economics' updated analysis (August 2022)

Review questions

Part A: The Pubs Code

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

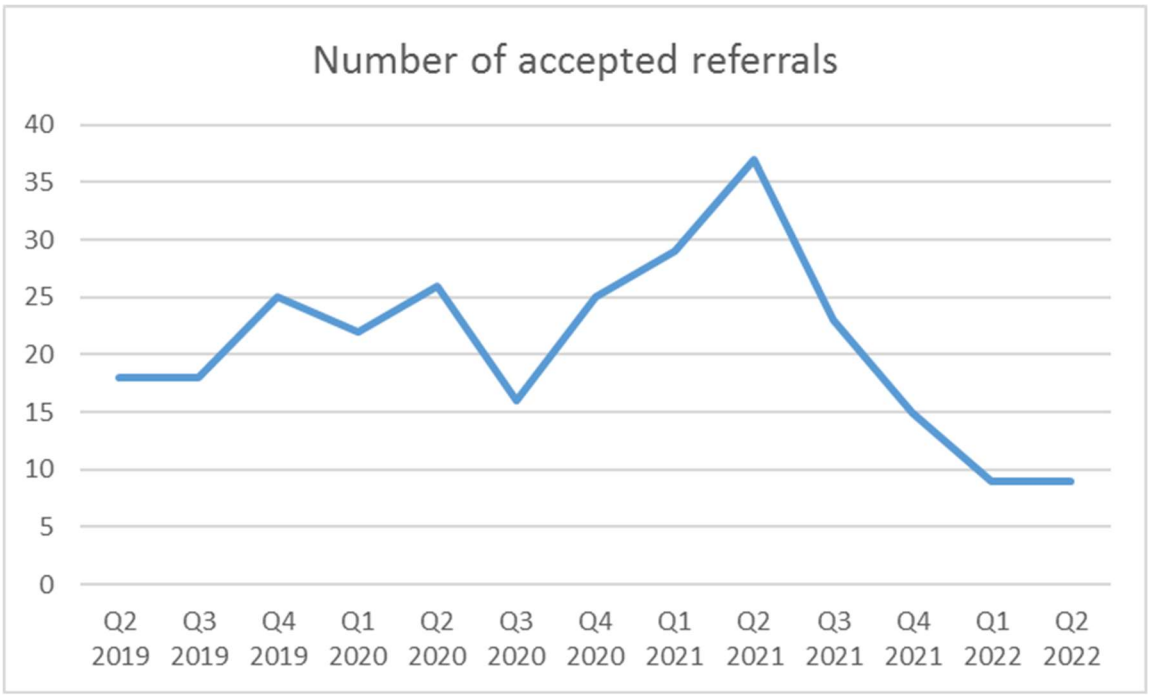
Comments:

Overview

Overall, the non-MRO parts of the Pubs Code have provided welcome structure for the industry and have provided a framework to increase standards and enable tenants to make fully informed decisions through closer working between the Pub Owning Businesses and Tied Pub Tenants.

Whereas the MRO parts of the Pubs Code operate in stark contrast to this and have given rise to a large number of disputes. In the period in question, there were 376[3] disputes between landlords and tenants referred to arbitration under the Code, c.75% of which concern MRO. Such disputes operate in contrast to the core feature of the tied model; two parties working together with a common interest in the shared sustainable success of the business. However, there are strong signs that the frequency of disputes is in decline.

The graph below shows the number of PCA accepted arbitration referrals (both MRO and non-MRO) in each quarter of the period, plus Q2 of 2022:



[3] Source – PCA statistics for referrals years to 31 March 2020,2021 and 2022.

To begin with there is a steady level of referrals, then a dip due to the pandemic, then a rise as the backlog of cases are progressed, and in 2022 a sharp drop in the number of referrals.

The 2022 drop in referrals is accounted for in part by the welcome changes in the Pubs Code made on 1 April 2022, but we are seeing a similar decline in the level of MRO notices. At present Q3 of 2022 looks like it will follow the pattern of the previous two quarters.

As of 30 July 2022 Stonegate had only 6 ongoing MRO arbitration referrals and 1 non-MRO referral. It is important to note that a Tied Pub Tenant can make a referral for arbitration on non-MRO matters at any stage in the tied relationship should they feel that their Code rights are being infringed or that the principle of fair and lawful dealings is not being demonstrated. This referral only costs £200 and is relatively risk free on costs thereafter. For most of this calendar year to date we had no non-MRO cases. To have a single live case across an estate of circa 3000 tied pub tenants represents circa 0.03% of the tied population with a grievance reaching the level of arbitration. We are proud of those figures.

We believe that this overarching satisfaction level and the associated reduction in active arbitrations is the result of the following:

- Improvements in the information and clarity we provide to tenants;
- Tenant's greater appreciation of the benefits of the tied model after the pandemic;
- The fact that the Code is now over 5 years old and that this cycle will mean that Tied Pub Tenants wishing to explore MRO will now have had this opportunity since 2016.
- A degree of clarity from arbitrator's decisions as to what are the common and reasonable terms in MRO tenancies, although there are still contradictory decisions.
- Advice and guidance from the PCA on some of the issues; and
- Our team being able to conclude improved tied agreements with tenants.

We do not think that the decline is due to perceived barriers to MRO. Our policies to mitigate the perceived barriers to MRO have been in place throughout the period. For instance, we have allowed for dilapidations to be carried over as well as granting concessions around rent frequency transitioning and deposit build ups. We have offered and granted MRO tenancies by deed of variation where appropriate, often looking to work with our publicans to resolve matters between parties.

We believe this position of reduced arbitrations and increased satisfaction could have been achieved more quickly had accredited forms of MRO tenancies been approved at the beginning, in turn saving all parties both time and costs.

The Pubs Code has added the costs of a regulator to the already heavy burden of expenditure pub-owning businesses face. In the year ending 31 March 2020 (being the last year unaffected by the pandemic) Ei Group Ltd and Stonegate paid circa £1.4m towards the total industry levy of £3m, money which could have been used to support tenants and/or

invest in pubs. Those sums are in excess of what was anticipated by the Government's Impact Assessment in 2015[4].

Non-MRO

Having an enforceable code of practice has increased standards and improved the tied pub relationship. That is reflected in the number of non-MRO claims being low. In the three-year period to 31 March 2022 Stonegate/Ei Group Ltd had only had 10 non-MRO claims referred to arbitration.

Regulations 9-11 contain the requirements for pre-entry training and advice prior to taking on a tied agreement. The provisions, whilst well intentioned, can be burdensome and confusing where an existing tied pub tenant is concerned. For instance, if an existing tenant wishes to extend their lease term by agreement, under the Code this is treated as a new letting and they have to provide a sustainable business plan invariably at their considerable frustration, However, if they are renewing their lease they do not. In the PCA's 2022 survey[5] only 26% of tenants found the provision of a sustainable business plan "very useful". In order to focus on lighter-touch regulation, and regulation where regulation is required, we believe that the Code should look to differentiate between new entrants who benefit from the pre-entry requirements as opposed to experienced operators who find the requirements unnecessary and bureaucratic. The conditional exemption criteria detailed in Regulation 9(2) & (3) would be a sensible solution if it applied across Regulations 9-14

Further to the above, there are areas of the Code that could have benefitted from increased clarity. Across the period there have been decisions by arbitrators which have found that a non-MRO referral must be brought within 4 months and 21 days of the breach[6]. However, the PCA's Advice Note[7] says that deadline will "most usually" be the case, indicating there are circumstances where the 4 month and 21-day time period starts after the date of breach. This ambiguity is unhelpful and the Pubs Code could be improved in that regard by providing definitive clarity on these such points.

In addition, we are also concerned that the report of the All-Party Parliamentary Group on Pubs (APPGP) fails to understand the non-MRO aspects of the Pubs Code. In their report

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4 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

5 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1080629/PCA_Key_Findings_Final.pd

6 See https://www.gov.uk/government/publications/2021_2_summary-of-pubs-code-arbitration-award_non-mro

7 https://www.gov.uk/government/publications/pca-advice-note-timing-of-referral-for-arbitration-by-tied-pub-tenants-non-mro-disputes/pca-advice-note-timing-of-referral-for-arbitration-by-tied-pub-tenants-non-mro-disputes

"Raising the Bar" in November 2021[8] under the heading "Experiences of Tied Tenants" they state:

> *This distinction between tied tenants of smaller brewing pub owning businesses, and those who were tied tenants of larger, non-brewing pub owning businesses was echoed in the survey data which provided similar evidence.* ***For example, some businesses were reported to have refused to offer rent support unless the tenant extended their lease, sometimes including an upwards only rent review clause*** *that would explicitly not account for the loss of revenue caused by the pandemic.*

We believe the last sentence refers to a tenant in the [Redacted] free-of-tie estate[9], who are not a pub-owning business regulated by the Pubs Code. The inclusion of upward only rent reviews would be void under Regulation 57 of the Pubs Code if it were introduced by a regulated pub-owning business. This shows the danger of basing decisions on unverified anecdotes. We are concerned that this type of misunderstanding of the tied and free-of-tie markets, often voiced from outside influences, continues to lead to poor regulation.

MRO

We believe that the present formulation of this part of the Code has potentially adverse consequences across the industry, which are increasingly at risk of outweighing the benefit to the relatively small number of tenants who choose to make use of MRO.

In the period of recovery after the Coronavirus pandemic, and with the cost-of-living crisis, the need for investment in pubs is greater than ever.

The Pubs Code has had the effect of discouraging investment by both landlords and tenants due to the uncertainties around future income levels caused by the potential MRO option. Whilst there is a wider trend for commercial property to be let on shorter terms[10], this is also being seen across the tied pub industry. Where there are only shorter agreements available:

a) Tenants who are looking to invest in a long-term sustainable business will gravitate away from taking a tenancy of a tied pub; and
b) Tenants who take a tenancy will be unlikely to invest in the pub.

From a landlord's perspective, the investment agreement exception is cumbersome. The required level of investment (2x rent) means that only the largest schemes can qualify – generating a feast or famine scenario. It is not always easy to identify the appropriate rent figure, particularly when the rent is stepped or rent concessions are given. The period of exclusion of certain MRO events (7 years) is less than the normal period for amortizing investment in the industry (10 years). As a result, only 11 investment agreement leases were

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[8] https://apppg.camra.org.uk/wp-content/uploads/2022/02/Raising-the-bar-final-compressed.pdf
[9] https://www.morningadvertiser.co.uk/Article/2020/05/29/What-is-Wellington-Pub-Company-offering-its-tenants
[10] https://www.crediahq.com/en-gb/index

granted by Ei Group/Stonegate in the period under review. It also stands that with such a high hurdle to achieve in terms of the level of investment, a landlord investor will naturally look for the most secure investment option – leading to investment being focused on more secure operating models or opportunities rather than in existing tied pubs.

This mechanic has also seen the Pubs Code becoming responsible for closed pubs or prevention from reopening. Pubs that are only viable as tied lettings with long-term investment, may not get that investment. It takes longer and costs more to let a pub on a substantive lease. For marginal pubs, that delay and cost can be the difference between opening and staying closed or selling.

Those industry-wide adverse consequences of the present MRO option, need to be considered in the context of the benefits to tenants.

We accept that the MRO option is of interest and of benefit to some tenants. However, given that most leases have 5-year rent review cycles, existing tenants in 2016 who are still in occupation under the same lease, will now have had at least one opportunity to use their MRO rights. Despite this fact, MRO does not appear to have generated a significant level of interest to most tenants:

- The percentage of tenants taking up MRO events when given the opportunity in the Stonegate estate in the period was 27% despite awareness of the Pubs Code and MRO rights being high;
- The PCA's figures show a similar pattern overall, with high awareness of the Pubs Code (78%[11]), but a falling number of MRO notices; and
- In the last government consultation on amending the Pubs Code there were only 3 responses from individual tied pub tenants.

As the arbitration figures show, the MRO process has become quicker and easier, so cannot be said to be a substantial barrier to MRO.

Of those who do start the MRO process, the number of claims is weighted heavily in favour of pubs in the South of England with long term leases. Stonegate operate across the country, but in the 3 years to 31 March 2022, of those pubs who referred their MRO claim to arbitration, only 13% were in the North West or North East.

The numbers executing an MRO tenancy is low, but it is a fundamental misconception to say that it is a measure of the success or failure of the Pubs Code, as the goal is to give the tenant a choice between the best tied deal that the pub-owning business can offer and the option of going free of tie. The fact that many tenants choose to stay tied (sometimes on re-negotiated terms) is just as much evidence of the success of the MRO process as tenants choosing to go free of tie.

Therefore, some tenants, but not most, are interested in and benefitting from MRO.

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[11] https://www.gov.uk/government/news/pca-annual-tied-tenant-survey-2022-results-now-published

Given this dynamic, there needs to be a better balance between the negative effect of discouraging investment and the interests of those tenants who wish to use the MRO procedure.

This review is an opportunity to rethink the MRO part of the Code intended to free up investment in pubs to ensure their long-term survival:

- One option would be to give properly advised tenants the option to contract out of the RAP and renewal MRO triggers in exchange for suitable countervailing benefits (such as increase tenure providing business certainty for both landlord and tenant) if they wish to do so. The process could be similar to the notice and declaration procedure under the Landlord and Tenant Act 1954 ('the 1954 Act'). As a consequence, the complicated provisions as to investment agreements could be deleted.

- Alternatively, the Pubs Code could give the tenant the right to decide the level of investment needed to satisfy the investment agreement provisions, perhaps with a floor of £10,000., and the excluded period was 10 years.

It is important to stress that neither of the above proposals are looking to reduce the rights of tied pub tenants under the Code, conversely, both proposals are looking to further empower tied pub tenants in enabling them to maximise the opportunity for their pub business.

In addition to looking to empower tied pub tenants about their MRO rights, the pandemic and the rise of inflation has shone a light on some fundamental flaws in the (Significant Increase in Price) SIIP calculations within the MRO parts of the Code.

Stonegate put off price increases during the pandemic to assist their tenants, despite their suppliers' prices increasing substantially. Because the SIIP calculation operates at the date of the 'relevant invoice' (which for seasonal products could be 8 or 9 months after the date of the price increase), Stonegate when setting their prices are unable to ascertain what the CPI rate will be the date of the relevant invoice. The volatility in the rate of CPI has exacerbated the problem. The solution to this, in order to improve business certainty, should be an amendment to the SIIP formula so that the comparison periods for the price rises attach themselves to the dates of the price increase rather than date of individual product invoices.

In addition, the formula also does not exclude extrinsic price rises. Stonegate are facing price rises from their suppliers over and above inflation in some circumstances. A supplier may put the price up for a combination of reasons including tax, increased wage costs and distribution issues (e.g. lack of delivery drivers). These are factors outside of Stonegate's control and it is unfair that they are unable to pass on the costs because of the Pubs Code. The SIIP formula could simply exclude the "extrinsic increases" which are defined already in the Code in relation to trigger events.

Finally, a further problem that persists with MRO concerns the form of the agreement. Tied and free-of tie leases have different provisions (particularly around rent review, rent frequency, deposits and repair). The process of converting a tied lease to a free-of-tie lease is not straightforward. At present the PCA's advice allows two options:

- Deeds of variation ('DOV') which alter the terms of the current tied lease line by line. These are complex documents that can take considerable time and expense to prepare (potentially delaying the process and with cost to the pub-owning business that cannot be recovered); and
- New agreements, which can give rise to Stamp Duty Land Tax ('SDLT') liabilities for the tenant.

Our preferred solution for mid-term MRO events is to grant the MRO agreement by way of a DOV by reference. Such a DOV:

- Deletes the terms of the existing tied lease save for the parties, term and demise; and
- Replaces them with the free-of-tie terms set out in a schedule.

Two tax counsel have advised that the DOV by reference would not incur SDLT.

We have had a number of occasions when tenants and their solicitors have requested MRO using a DOV by reference and a number of such agreements have been successfully granted.

However, the use of such DOVs was curtailed by the decision of the PCA in a case[12] in which it was found to be reasonable, but not common. We believe the test of commonality only applies to the substance of the MRO agreement (the terms), not the mode or vehicle of its delivery, but did not appeal that decision. The PCA followed up with amendment to the Regulatory Compliance Handbook which at paragraph 4.27(b) barred offering such DOVs as alternatives in the MRO Full Response.

We still believe that the use of DOVs by reference represents a sensible solution to the difficulties of converting tied agreements to free-of-tie and would be a sensible step in adopting a lighter-touch regulatory approach given that the number of disputes around MRO terms is decreasing at the rate referenced above. Further simplification could now also be achieved via accredited MRO agreement terms given the clarity achieved via arbitration awards to date.

Summary

In light of the above, we believe that the Pubs Code could be improved by adopting the following changes:

- Lighter-touch Regulation through an extension of the exemption criteria within Regulation 9(2) & (3) for experienced/existing tied pub tenants across Regulations 9 to 14.
- Increased clarity on the non-MRO referral limitation period.

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12 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/971984/Quarter_4_2019_1_Pubs_Code_Statutory_Arbitration_Award_MRO.pdf

- Increasing the ability for both Landlords and Tenants to invest with certainty through empowering Tied Pub Tenants with the discretion to opt-out from the RAP and Renewal MRO rights or enabling Tied Pub Tenant discretion through a simplified version of the Investment Exemption (Regulation 56)
- Increasing clarity through amending the SIIP formula to address CPI fluctuations and exclude extrinsic price increases
- Furthering lighter-touch regulation in the face of reducing disputes on MRO term by endorsing MRO tenancies to be delivered by DOV by reference and improving clarity and consistency via accredited MRO agreements.

Question 2
To what extent do you think the Pubs Code is consistent with the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants? Please provide any evidence you have to support your view.

Comments:

We believe that the Pubs Code is consistent with the principle of fair and lawful dealing. The PCA 2022 survey[13] show that 76% of tied tenants believe that their Business Development Manager has been fair with them in discussions, with only 12 % disagreeing. The low number of non-MRO referrals is also evidence that tenants are not dissatisfied.

We are aware of voices from outside of the tied pub relationship who openly dispute this belief, but also provide no tangible quantification for representation of todays tied pub tenants. Our concern was always that legislation needs to be based on evidence, rather than on anecdote and speculation.

As explained above, it is important to note that a Tied Pub Tenant can make a referral for arbitration on non-MRO matters at any stage in the tied relationship should they feel that their Code rights are being infringed or that the principle of fair and lawful dealings is not being demonstrated. As of 30 July 2022 Stonegate had only 6 ongoing MRO arbitration referrals and 1 non-MRO referral. To have a single live case across an estate of circa 3000 tied pub tenants represents circa 0.03% of the tied population with a grievance reaching the level of arbitration. We are proud of those figures and this, for us, demonstrates a strong indication that the Pubs Code is effective in ensuring the principle of fair and lawful dealing is upheld given that only 1 tied pub tenant out of circa 3000 tied publicans has cause for complaint under this principle.

Question 3
To what extent do you think the Pubs Code is consistent with the principle that tied pub tenants should not be worse off than they would be if they were not subject to

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13 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1080629/PCA_Key_Findings_Final.pdf

any product or service tie? Please provide any evidence you have to support your view.

Comments:

The comparison between tied and free-of-tie models has always been deeply problematic. There has been no research into the experiences of free-of-tie tenants. There are no accepted performance benchmarks to judge one model against the other. The relationship must be judged over the lifetime of the agreement. The pandemic has cast a strong light on the SCORFA[14] that tied tenants receive, which have previously been decried by campaigners as being of little of no value[15].

This problematic nature is also manifested itself in the wider understanding of this principle. Some arbitrators have mistakenly believed that the goal of the Pubs Code was to make tied tenants no worse off as free-of-tie tenants, which shows how confusing the phrase can be[16]. The nature of this principle is to afford a tied pub tenant the opportunity to be no worse off than if they were not subject to a product tie i.e., to put them in a position of parity were they a commercial free of tie pub tenant.

However, in looking to achieve this principle the Pubs Code has effectively created a two-tier free of tie market and has at times been at risk of the 'no worse off' principle actually amounting to betterment.

Across the commercial free of tie pub market there are tenants that took on FOT agreements in the open market as well as those that achieved them via the MRO process. Those who have achieved FOT via MRO are on more favourable terms due to the interpretation of 'reasonableness' being adopted by the PCA, and some arbitrators, as having to reflect to some extent the terms of their existing tied lease. The process of ensuring tied tenants are no worse off than free of tie tenants has led to some MRO tenants being better off than open-market free of tie tenants. We do not believe that this was the intention of this principle, and the concern remains that this problem will increase if Arbitrations and PCA narrative continues to focus on reasonableness in light of the existing lease terms and personal circumstances of tenants rather than what is deemed reasonable in light of the current market.

Part B: The Pubs Code Adjudicator

Question 4
How effective do you think the Pubs Code Adjudicator has been between 1 April 2019 to 31 March 2022 in discharging its functions in relation to the Pubs Code? Please comment in particular on the PCA's performance in undertaking the following:

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[14] Significant Commercial or Financial Advantages.
[15] https://publications.parliament.uk/pa/cm200809/cmselect/cmberr/26/26we30.htm
[16] https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/973576/Quarter_3_2018_1_Pubs_Code_Statutory_Arbitration_Award_MRO.pdf

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

Comments:

a. Advice and guidance

We appreciate that the Pubs Code is a complex and still relatively new piece of legislation and in the main the PCA has coped admirably with the job of communicating its provisions to tenants.

We would single out for praise the PCA's work around:

- Declarations during the Coronavirus pandemic; and
- Explaining the non-MRO parts of the Pubs Code.

We note that awareness of the Pubs Code has risen from 77% in 2017 to 84% in the 2022 PCA Survey[17].

We welcome the PCA's progress in developing a BII advisor panel. There are still many problems caused by non-professional tenant's advisors[18], but the panel should assist in improving the advice received by tenants as to their Pubs Code rights.

Whilst we understand that during the pandemic the PCA was keen to assist tenants in any manner possible, we felt that some of the communications could have given rise to misunderstanding around any credit for the support given by the pub-owning businesses, for instance in her annual report for 2020-21 saying "*I challenged the six regulated pub companies, in doing as much as they were able to support their tied tenants through the emergency, to be clear and consistent about how they did this. That way, individual tenants could know what treatment they could expect. One by one, all of the regulated pub companies followed the lead of Admiral in being public about their support arrangements*" and elsewhere[19]. Whilst the PCA's involvement was generally constructive and well intentioned, it would be a mischaracterisation to state that pub-owning businesses gave support as a direct result of the PCA's intervention. Stonegate are deeply involved with the

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17 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1080629/PCA_Key_Findings_Final.pdf

18 By way of an example, we are aware of one advisor who, for a number of different tenants, missed the deadline for protecting the tenants' rights under 1954 Act.

19 See https://www.morningadvertiser.co.uk/Article/2020/04/06/PCA-probes-how-rent-deferring-pubcos-will-support-tenants-through-Covid-19-emergency https://www.morningadvertiser.co.uk/Article/2020/05/04/New-pubs-code-adjudicator-expects-pubcos-to-make-themselves-accountable-during-Covid-19-pandemic

success of their tenants' business and would have supported their tenants to the extent that they did, with or without the PCA's contribution here.

Again, there is further concern with the PCA looking to become involved in areas outside of the remit of the Code, and already adequately regulated via the established legislation and Court procedure such as notices under the 1954 Act[20]. Attempts at widening the Code should be resisted – instead acknowledging that the Code is achieving its objectives and a move towards a lighter-touch regulatory approach.

In looking to develop clarity and consistency since the inception of the Code, to enable lighter-touch regulation, Pub Owning Businesses have sought the following:

- To have pre-approved forms of MRO agreements; and
- To have 'Golden threads' explaining when the MRO agreement should diverge from the standard form.

It seems to us that the PCA had a choice between:

- Simplicity - the process for an MRO agreement being a standardised process with clear rules for adaptation to circumstance; and
- Customisation - the terms being subject to a large number of adaptations for the circumstances of the particular pub.

The PCA has seemingly chosen the latter, which has necessarily led to delay and complexity. We still find that tenants, tenants' representatives and arbitrators misunderstand the PCA's guidance as to how much influence the terms of the existing tied lease should have on the terms of the MRO lease[21].

We would maintain that the benefits of a simpler procedure, such as accreditation, would outweigh the benefits of full customisation.

Lastly, it is felt that the PCA's ability to communicate advice effectively is hampered by the current website format. Perhaps due to the limitations of the software, the presentation of documents on the PCA's website is poor as it is not:

- Searchable;
- Indexed; and

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20 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060681/Consultation_on_proposals_to_issue_statutory_guidance_-_Summary_of_responses.pdf

21 https://www.bailii.org/ew/cases/EWHC/Ch/2020/1858.html

- Presented in a logical order with cases on similar matters presented together.

Summaries of arbitration awards are sometimes not helpful as they do not provide sufficient detail. Examples of this include one award on a Stonegate pub which made an important finding that downwards rent reviews were not common in free-of-tie leases, but that finding did not appear in the summary[22]. A recent decision for a Marston's pub[23] appears to be important, but it is impossible to draw any real understanding of the issues as the note is too brief. The PCA published awards in full more frequently in earlier years. We do not understand why mainly summaries have been published recently.

b. Investigating non-compliance with the Pubs Code

The PCA's communications generally provide sufficient time for responding, where this isn't the case the PCA office have been cooperative in agreeing revised timings.

The PCA's questions around potential breaches are sometimes confusing, which can lead to difficulties in replying and assumed consistency in response across the 6 regulated POB's.

c. Enforcing the Code where non-compliance is found

The PCA will generally expect the pub-owning business to provide a proposed solution but will not necessarily work with the pub-owning business in the preparation of that solution. It would assist if the PCA were more 'hands-on' in terms of giving some direction as to what sort of solution she believes would be appropriate.

d. Arbitrating disputes

The policy of appointing external arbitrators is welcome. Having the PCA be both regulator and arbitrator gave rise to significant questions of conflict, particularly where the PCA had issued advice on an issue which then came up for arbitration.

There have been some instances where we think the PCA's approach has been unhelpful:

- The PCA's decision on the use of DOV's by reference (see above).
- There is still confusion around the consequences of the PCA's findings on the relevance of the terms of existing tied lease to the terms of the MRO tenancy (see above).

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[22] https://www.gov.uk/government/publications/2021_1_summary-of-pubs-code-arbitration-award_mro/2021_1_summary-of-pubs-code-arbitration-award_mro

[23] https://www.gov.uk/government/publications/marstons-award-summary-march-2022-1/marstons-award-summary-march-2022-1

- In 2020 the PCA introduced an automatic three month stay of MRO referrals to give the parties the opportunity to negotiate the terms of the MRO lease. This was welcome and successful. Many cases were settled in those three months. The PCA then ended that scheme and refused to grant any stays, even when both sides requested the same. Matters were referred immediately to external arbitrators and costs started to accrue. The PCA refused to allow initial stays, even when the Government indicated that it would amend the Code to provide for a similar stay period. The amendments to the Pubs Code have now largely eliminated this problem.

The number of open arbitrations has now dropped substantially. As of 31 March 2022, Stonegate only had 10 MRO cases and 1 non-MRO arbitration case ongoing. Since 1 April 2022, 5 of those MRO cases and the 1 non-MRO case have concluded, the latter with an award which found entirely in our favour[24].

The quality of arbitrators still varies widely. We have had issues with arbitrators who do not respond to correspondence and others who ignore the wishes of the parties. Very few arbitrators are experienced in the Pubs Code or even in landlord and tenant law. We would like to see a specialist panel of arbitrators with some consistency in terms of training and guidance.

It would be better if there were a route of appeal awards through the First Tier Tribunal Property Chamber ('FTT'), as opposed to the High Court. Issuing an appeal to the High Court is slow and expensive. The FTT only deals with disputes involving specific areas such as land registration and service charges, where a statute has given them the power to make decisions. The FTT can look into an issue afresh by way of rehearing. The FTT would not be bound by the limited remit of the High Court on an arbitration appeal. It is an "inquisitorial" tribunal, where the tribunal takes an active role in examining the issues, rather than relying on an adversarial approach between the parties. This will benefit tenants who may not be legally represented. The FTT can be flexible in terms of the procedure to be adopted and may therefore be quicker. FTT hearings are public and the decisions of the FTT although not technically binding precedent, would be helpful in building a bank of informative decisions on key matters. The application fee is cheaper (£100) than the equivalent High Court application (£255). Costs are generally cheaper and the FTT can only order costs if a person has acted unreasonably in bringing, defending or conducting proceedings (unless the statute gives it other powers). There are 5 regional centres of the FTT. The judges at the FTT are more experienced in land and landlord and tenant issues than the average High Court judge. There can be a further appeal from the FTT to the Upper Tribunal (Lands

[24] https://www.gov.uk/government/publications/ei-group-award-summary-february-2022-1/ei-group-award-summary-february-2022-1

Chamber). We believe that the introduction of an appeal to the FTT would need an amendment to the 2015 Act.

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

Question 5
Do you think the regulations relating to costs, fees and financial penalties remain appropriate or should these be adjusted? Please give the reason(s) for your answer and, if you believe these regulations should be amended, please set out how.

Comments:

There needs to be more consistency around fees. The hourly rates charged by the arbitrators varies widely from £175ph to £650ph. There should be a maximum hourly rate allowed in the regulations at say £300ph.

One very experienced arbitrator we asked to issue a concluding award charged nothing for preparing the same. Another very experienced arbitrator charged [Redacted] for preparing a similar final award. We found that there was no appropriate route to complain about the arbitrator's charges. A complaint to CIArb could only be brought on the grounds of malpractice. The PCA has no jurisdiction over the arbitrator's fees. The Regulations should be amended to provide that only the arbitrator's reasonable fees should be payable and there should be an opportunity for a review of the fees claimed by the arbitrator by an independent tribunal, such as the PCA or the FTT.

In relation to the qualified one-way costs shifting, most of the arbitration costs are payable by the pub-owning business unless the tenant can be shown to have been vexatious. The test of vexatiousness remains a high barrier to an award of costs against the tenant. We are only aware of one case in which a tenant was found to have made a vexatious referral. As such there is little disincentive for tenants to bring unreasonable claims.

The Costs Regulations should be amended to apply the test in the FTT, such that the tenant has to pay the costs of the arbitrator if they have acted unreasonably in bringing, defending or conducting the proceedings.

Given that there is now more clarity on both MRO and non-MRO issues, the cap on the amount payable by the tenant under Regulation 3(5)(b) and 4(4)(b) of the Costs Regulations of £2,000 should be removed. There is no reason why the arbitrator should not have a free hand in deciding what an unsuccessful tenant should pay.

Given the level of support provided by pub-owning businesses during the pandemic and the likely impacts of the costs of living crisis, the Permitted Maximum Penalty in Regulation 5(1) of the Costs Regulations should be reduced to 0.5% of annual turnover. The annual turnover that the percentage is applied to should only be that of the pub-owning businesses in the

group, to avoid the penalty unjustly taking into account the turnover from other businesses, such as Stonegate's managed house division or the brewery business of a Brewing Pubco.

Concluding comments

The MRO provisions in the Pubs Code are at risk of making the tied pub model unattractive for both landlords and tenants and have discouraged investment. It should not come as a surprise that the Pubs Code would lead to pub closures as this was predicted in the London Economics report of 2013[25]. The Government's impact assessment in 2015[26] tweaked the London Economics assessment and estimated a likely 390 pub closures causing a loss to landlords and tenants of £16.7m. We believe it would be appropriate for the Government to commission further research into the effects of the current provisions, following the Coronavirus pandemic.

When the Pubs Code was introduced, there were estimated to be 12,000 tied pubs in England and Wales[27] covered by the Pubs Code. On 31 December 2019 it covered 9,126 tied pubs[28]. The number of tied pubs covered by the Pubs Code as in 2021 was 8,275[29].

The MRO provisions of the Pubs Code need substantial reform in order to avoid pub closures and the eventual demise of the tied pub model. The changes we have proposed above are focused on enabling and re-energizing both landlords and tenants to invest into the long-term future of a fair and lawful tied pub model which has already been overwhelmingly demonstrated to be underpinned by a focus on shared sustainable success.

Thank you for taking the time to let us have your views.

At BEIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒Yes ☐No

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25 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/265460/Tied_Pubs_Final_Report.pdf

26 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

27 https://researchbriefings.files.parliament.uk/documents/CDP-2017-0027/CDP-2017-0027.pdf

28 https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/959791/PCA-Annual_Report_2019-20_WEB.pdf

29 Europe Economics Report 2022

Pubs Code and Pubs Code Adjudicator: statutory review

Star Pubs & Bars Limited (part of HEINEKEN UK LIMITED) response to the Department for Business, Energy and Industrial Strategy (BEIS)

We are happy for our response to be published in full.

For further information please contact [Redacted]

About Star Pubs & Bars (part of HEINEKEN UK)

Headquartered in Edinburgh, HEINEKEN UK is the UK's leading pub, cider and beer business and employs around 2,300 people. We own around 2,400 pubs through our pubs business, Star Pubs & Bars. The vast majority of our pubs are leased out to small businesses and entrepreneurs with a supply agreement. 144 of our sites operate on our 'Just Add Talent' model (a low cost of entry managed operator agreement).

The ambition of Star Pubs & Bars is to Build Britain's Best Pub Company – by attracting and retaining the best operators, investing to create great pubs at the heart of their communities and by providing licensees with market leading insight and support.

HEINEKEN UK's unrivalled portfolio of beer and cider brands includes Foster's, Heineken®, Strongbow, Desperados, Kronenbourg1664, John Smith's, Bulmers, Amstel, Birra Moretti and Old Mout, and is backed by a full range of craft and specialty brands.

Since the acquisition of Scottish & Newcastle in 2008, HEINEKEN has invested consistently and significantly in the UK. Over the past five years we have invested more than £150 million in our UK brewing operations (located in Hereford, Ledbury, Manchester and Tadcaster). Over the last decade we've also been growing our pub estate and are investing over £40 million in our pubs this year – creating approximately 700 jobs. Since the introduction of the Pubs Code Legislation in 2016 we trebled the size of our pub estate through the acquisition of 1,900 pubs from Punch Taverns.

Our Submission

Many of the points that we made in our first statutory review submission remain relevant this time around, and therefore we repeat many of the messages that we believe remain true and are still to be resolved. We have, in addition, introduced new examples, statistics and evidence to amplify the most important points in our response.

PART A: THE PUBS CODE

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

Star Pubs & Bars remains committed to the Code, both in word and spirit. However, the current costs associated with the Code have grown exponentially and are now not only significant, but unsustainable. In an Impact Assessment dated 21 January 2015, BEIS indicated that *"The adjudicator's ongoing costs are estimated to be £1.6m per annum"*.[1] By contrast, and following the Code's enactment, the BBPA has calculated that the cost of the Code amounted to £6.4m in 2021 (four times the original impact assessment). Our own fees alone have increased from just under £500k in 2018 to over £1.25m in this latest year. This excludes legal and arbitration costs, as well as the costs of our own FTE colleague base to administer and ensure compliance with the Code for Star Pubs & Bars.

Working with the best pub operators is at the very heart of our business model and we have a good relationship with the vast majority of our licensees. Overall, we believe the Code has been working adequately since its introduction, but there are opportunities for it to work better and as we say, the costs need to be addressed.

As with any new legislation, it has taken time to adjust and implement new processes and, in 2022, this continues to evolve as new guidance and decisions are issued by the PCA, and High Court judgements are released following appeals on issues covered by the Code. The Code has impacted the majority of our colleagues across a range of different job roles, as well as most of our processes and interactions with licensees (this is very different to the Groceries Code which affects a relatively narrow group of Buyers within a retail organisation). It has become more complex and significantly more costly over time.

Taking the positives first, we believe the Code has brought improvements to both us and our licensees. It has given licensees more choice, put additional rigour into processes and created higher levels of transparency. The Code has continued to operate well in the following areas since 2019:

Better recruitment Since 2019 we have continued to improve our recruitment processes and journey with improved transparency on all sides. The Code gives confidence that all parties operate to the highest of standards during the recruitment process.

We are, like many of the Pubcos, currently facing a challenge with recruitment, but this is not directly related to the Code. Whilst the Code has helped with processes, transparency and training in relation to on-boarding, these benefits do not offset the current recruitment challenges the industry faces.

Each applicant looking to take a Star pub goes through a rigorous recruitment process before they are offered an agreement with us. Unless a potential lessee qualifies for a training waiver (as set out in the Code) they must complete appropriate industry training, such as the Pre-Entry Awareness Training (PEAT) module from the British Institute for Innkeeping (BII). **We now fund full BII membership for**

[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 (paragraph 76).

each of our licensees. This means we can signpost prospective lessees to the relevant parts of support and professional advice from the business plan stage.

We also mandate that potential licensees attend our own Innside Knowledge course which is a bespoke two-week virtual training course which gives lessees all the skills and knowledge they need to run a successful business. It is also suitable for multiple operators who want to send their managers. In 2021, we trained 90 people from 80 pubs.

We carefully consider the ongoing training of staff members and are currently u u Stars of the Future masterclass series. As an example of this, we recently upskilled 10 high-achieving members of pub staff with a spirits and cocktails training day in London. Provided for free and in association with Pernod Ricard, delegates learned the theory and practical skills needed to make profitable spirits and cocktail serves within their venues. Further Stars of the Future events will take place this year.

We continue to promote apprenticeships through our partnership with *Remit*. We had two finalists in the most recent BII NITA awards, one of whom won 'The Hospitality Apprentice of the Year' award.

Fundamentally, licensees are now provided with a consistent experience despite the ever-growing challenges associated with the recruitment market. The latest recruitment outlook survey from the British Chamber of Commerce shows that the hospitality sector is facing the most challenging recruitment issues, with 85% reporting difficulties, up from 83% in Q4 2021.[2]

Better understanding of risk and reward the Code creates a framework and licensees are using their right to request an MRO offer as a tool to negotiate a deal that works for them, which may be tied or free of tie. u u u u u u nalysis of the first statutory review where they said that u u u u u u u u u

Additionally, our experience is that many of our licensees are looking more broadly at the relative risk and reward of different models and are able to choose between the benefit of the tied model with its SCORFA benefits (special commercial or financial advantages) and higher risk & reward models such as longer free of tie agreements. As Europe Economics found in their thorough analysis of the impact of the Code[3], the MRO option may be being used by licensees and their advisers as a tool solely to negotiate an improved tied offer. We have also experienced this in many of our own cases.

It is essential though that the operational success of the Code must not be judged by the number of MRO agreements that have been granted. MRO is simply one element of many which seek to ensure that licensees get a fair deal it absolutely does not mean that an MRO deal is the best option for licensees, or indeed something that every licensee would wish to take up. In fact, the Adjudicator said in her recent evidence to the BEIS Committee that *"The MRO process is a very powerful tool for tenants to lever the best deal and to choose what is right for them"*.[4]

The majority of licensees continue to look at the MRO offer and choose the lower cost, lower risk, high support option of continuing their tied lease with a supply agreement. This proves that the legislation

[2] https://www.britishchambers.org.uk/news/2022/04/record-recruitment-difficulties-adding-to-firms-woes-quarterly-recruitment-outlook

[3] u u u u u u uuly2022

[4] https://committees.parliament.uk/oralevidence/10587/html/

is working - as it means that licensees are able to see that they are no worse off and are choosing to remain on their tied lease with us. MRO provides us with the opportunity to explain the benefits of the model and provide tenants with a choice.

We have made BII membership available free of charge to all our licensees, with significant support in terms of consumer marketing and POS support. But during the coronavirus pandemic we gave extra support for tied tenants.

Support given during the pandemic:

A u u u u ų u u u u u u u u u u u u costs, Star Pubs & Bars provided rent reductions to our tied L&T pubs on substantive agreements (c.2,000 of our pubs).

We invested in excess of £62m during the pandemic, supporting pubs with rent concessions. This is the full timeline of our support:

18 March 2020: We suspended the collection of rent, trade debt and all associated charges. This was an urgent and immediate step to support licensees with their cash flow.

23 March: We confirmed we would, at no cost to the licensee, collect any unopened kegs that went beyond their use by date during the pandemic, and would replace them with fresh stock when their pub re-opened. This undertaking was designed to provide further reassurance and was of significant financial benefit to our licensees.

8 April: We provided rent reductions to all our leased and tenanted pubs on substantive agreements. During the initial closure period, we announced over 2,000 of our pubs would get at least 50% off their rent until the end of June (i.e. reduced and cancelled rent, in addition to the deferment announced in March). Two thirds of licensees received a rent reduction of 50% to 75%, whilst one third received a reduction of 75% or more. We maintained our commitment to suspend the collection of rent - so licensees did not have to pay us any of this reduced rent whilst they remained closed.

28 April: We launched the Pub Collective website for all Heineken UK customers which included the latest government advice, support and how to access it. It also guided pubs on how to safely mothball and reopen their business, free learning resources and inspirational case studies from pubs who supported communities.

8 June: We confirmed an extension of rent reductions at the same level as previously announced throughout July and August. So rent reductions continued to apply even as pubs reopened that summer.

June: We announced a further support package which included health & safety guidance, easy to deliver food menus, and £250,000 of safety and social distancing point of sale materials, with a free pack available to every licensee.

12 August: With most pubs open and benefiting from ongoing Government support, we started to taper off our rent reductions with our 50%, 75% and 90%+ rent reductions reducing down to 40%, 55% and 70% rent reductions in September (and then 30%, 35% and 50% in October).

September: We extended our funding of the British Institute of Innkeeping memberships for all our core leased and tenanted estate to give licensees access to additional services, professional impartial advice and sales building support.

15 October: We increased rent reductions for L&T pubs in England with a new structure of discounts u u ų u u u ŀb u u u u ų(un u u u u rent whatsoever and those in Tier 2 (High Alert) regions received a 90% rent reduction. In Scotland and Wales, similar levels of reductions were being applied according to local lockdown restrictions.

5 November: We reduced rent to zero for all pubs on core leased & tenanted from 5th November until 2nd December, the period during which hospitality businesses were required to close in England. Pubs received the concession regardless of whether or not they chose to operate a takeaway service. To be clear this was a 100% rent reduction.

2 December: We invested £5m on tiered rent concessions in England, Scotland and Wales.

7 January 2021: We invested a further £4m in rent concessions in England, Scotland and Wales during January. For the third national lockdown our pubs on L&T agreements only had to pay us 10% rent with a 90% reduction given.

14 March: We invested a further £19 million in lockdown rent concessions to 21 June bringing the u u u u u u ince March 2020 to £62 million.

Pandemic support for our pubs on an MRO agreement

Since 2016 we have always been very clear that commercial leases, such as MRO agreements, mean there is no landlord support with the operator taking all of the trading risk. During the pandemic, our 100 pubs on these agreements have been offered different levels of support consistent with those in the wider commercial property market. For those pubs, we deferred all rent until September, with the March and June quarters to be paid in regular instalments until December 2021. The deferred rent is to be re-paid interest free and we offered tenants the option of moving to monthly payments.

In addition to that offer of interest free repayment, for those tenants who settled their debts with us in full, they were also offered a quarter of free rent a significant contribution.

Further Support – we are now evolving our support further to help licensees cope with cost-of-living increases which are particularly hitting pubs hard. Some licensees are seeing their energy bills doubling, or even tripling. We are therefore using our collective buying power to purchase an entire u u u u u u u u u u u u u u u u u u xed price. We know this means that lessees who are part of our scheme will see rates for electricity which are 55% cheaper than the market, and rates for gas which are 33% cheaper (taken as at 17th August).

Improved governance there is more consistency, rigour and discipline in terms of ways of working, and greater clarity of expectations on all sides. The Code has driven process improvements which have led to a better experience and service for licensees. For example, BDMs are now required to produce business review sheets to document interactions and meetings with licensees which have to be provided within 14 days (although in many cases we send these the following day or sooner). The review sheet states that if the licensee does not agree with any aspect of the record, they should respond to the BDM within 7 days of receiving it. Whilst we completed business review sheets prior to the Code coming into force, the legislation has certainly standardised this process and made it more robust.[5]

Good awareness of the Code over the last three years we know that more and more of our licensees are aware of the Code. This is backed up clearly by a number of pieces of evidence:

- Overall, 84% of tenants surveyed this y ... 2019 and 77% that said so in 2017[6].
- Europe Economics[7] found there was good awareness of the Code when they compiled their report in 2019. It also explains that awareness will increase as more licensees approach contractual trigger points.

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[5] Pubs & Bars, July 2018 (https://www.starpubs.co.uk/sites/default/files/misc_docs/PCAComplianceReportSPB.pdf)
[6] https://www.gov.uk/government/publications/pca-annual-tied-tenant-survey-2022-results
[7] A

More transparency there is greater transparency about the process and all parties can learn from the publication of arbitration awards. In terms of publication of arbitration awards, this brings greater transparency, openness and clarity for pub companies. Most arbitration awards are now made u u u bn u u u u u u u u u u u u u u expect. However, whilst we support publication, there are a number of issues with this as outlined in our answer to Question 4 below.

In addition, the PCA has worked with all pub companies to enhance transparency and the structure of the compliance report has changed since 2019 which in turn has driven further transparency.

While we see positive aspects to the Code, we continue to be concerned by a number of issues as set out below:

Resolution of cases the subjective and inconsistent approach to arbitration decisions and the lack of guidance from the PCA in respect of the interpretation of key elements of the Code. There are areas where the Code could be working significantly better:

Subjective approach and lack of clarity on an MRO compliant agreement - our hope was that the Code and the PCA would provide a clear, unambiguous framework that would support open and transparent discussions between pub companies and licensees. Having engaged with the PCA in an open way, disclosing a copy of our standard MRO agreement repeatedly, we expected that the PCA would provide clear feedback, highlight any changes and ultimately tell us if there were particular clauses or provisions which are likely to be non-compliant therefore avoiding the need for any licensees to dispute or refer to arbitration. This would provide certainty to pub companies and to licensees, speed up the process, reduce conflict and significant costs, and allow the PCA to focus on the more complex cases. Unfortunately to date our efforts to seek to have the PCA u u streamline matters in this manner have not progressed.

Although we have greater clarity than before, the framework is still not clear which is highly inadequate for pub companies and licensees alike. This was one of our key asks of the PCA u and it has still not been resolved. The PCA still cannot tell us what is and is not compliant, and arbitration decisions are subjective and inconsistent, which has led to conflicting decisions on the interpretation of lease terms. Our current understanding is that the PCA will never give us the confirmation and clarity we need. For example, how can a market rent be dependent on the circumstances of individual tenants? It leads to too much subjectivity. Specifically, our view is that standard clauses and explanatory guidance notes would significantly improve this. This would mean that then only the contentious and complex issues would fall to arbitration.

Not only has the PCA refused to provide the clarity needed, but u u u u u even greater confusion. The PCA states that when considering whether an MRO agreement is compliant, the decision will be based on a subjective view of what is reasonable for the individual pub and licensee including their personal circumstances and the terms of their existing tied lease. Whilst we recognise this and look at each case on its own merits when we make offers, it has led to an unsustainable situation where standard MRO terms can be acceptable for one pub, but not for another. This continues to lead to uncertainty, unpredictability, additional cost for all parties and delay.

This very subjective approach has created a situation where it may be impossible for a pub-owning business to issue an MRO-compliant tenancy at the outset, with the associated costs (principally borne by the pub-owning business) and delay in respect of the arbitral process creating a negative experience for all concerned.

The PCA continues to ask pub companies, on a case-by-case basis, to justify to granular levels what are common terms in the market, and what is reasonable for the licensee given their individual circumstances. It means that rather than taking an objective view on whether the MRO offer is in line with commercial agreements available in the market (i.e. fulfilling the test of whether a licensee is no worse off than if free of tie), the PCA can require changes which deliver a more advantageous agreement than would be available to other licensees seeking a commercial free of tie agreement.

This approach creates confusion, significant cost and complexity for all parties. It is also a false reading of the legislation. This approach is quite different to the wording of the Code, which requires (i) that agreements do not contain uncommon terms; and (ii) the objective and logical interpretation of the reasonableness test relating to terms in the context of the market for free of tie pubs which implies a more objective and market-driven approach. An increasing number of our licensees are multiple site operators and may anticipate a similar, if not identical, approach being adopted in negotiations in relation to multiple pubs. We have seen this approach from advisors, who consider in many instances that the same commercial concessions reached through negotiation should apply to all of their clients.

The Act states that a tied licensee should be no worse off than a free of tie licensee. It does **not** state that a tied licensee, who chooses to go down the MRO route, should be no worse off (or better off) than when they were tied. This point is worth reiterating, as we have seen that through the pandemic third parties have suggested[8] that MRO tenants should also be no worse off. However, the nature of the tied relationship means that the vast majority of tied tenants were cushioned from the realities of the pandemic closures.

A subjective pub-by-pub approach may be viewed as attractive. However, it leads to confusion, uncertainty and conflict and ultimately means more cases going to arbitration. It makes it extremely difficult and costly for pub companies to manage their estate and support licensees when individual agreements can vary significantly. Over time it creates an uneven playing field where some licensees benefit from preferential treatment not available to existing tied or other commercial free of tie licensees.

In practice this means that for each MRO request a new bespoke lease and/or deed of variation is prepared by solicitors to be presented to the tenant as part of their request to see their MRO option.

We believe that the PCA should now be in a position to understand the types of terms which are commonly debated between the parties. If the PCA could produce some approved standard clauses and guidance notes, this would assist parties in agreeing these terms and prevent the same issues being raised (and determined) time and again. This would be even further advanced if individual pub company agreements could be considered compliant. As a result, only the truly contentious/complex issues will come before the PCA, which should streamline the arbitration process and reduce time and cost.

[8] Q21 Mr Greg Mulholland - https://committees.parliament.uk/oralevidence/10585/html/

The Property Standardisation Group[9] was formed by four Scottish law firms in 2001 to produce agreed forms of documents for Scottish commercial property transactions. These documents are commonly used in commercial property transactions to reduce time spent negotiating the more straightforward or trivial clauses, thus allowing parties' representatives to focus on the more substantive issues of the contract. We see no reason why a similar approach could not be adopted by the PCA, following consultation with stakeholders affected by the Code. Indeed, the Model Commercial Lease suite commissioned by the British Property Federation with the intention of representing a fair starting point for both parties in an English law lease transaction might be a guideline as to what is usual, and reasonable, in the market.

Unrealistic expectations of some licensees are exacerbated by unqualified and unregulated advisers

the legislative framework and MRO process is complex and technical, and we always recommend that our licensees take independent advice on what the best option is for them. Some licensees are not being well advised as to the content of the MRO lease and the reality of the arbitral process (for example, in respect of time and costs involved). Whilst this situation has been helped by the recent changes to the Pubs Code which provide the parties with a longer resolution period to negotiate an MRO offer before referring any disputes to arbitration there are some advisers who have a modus operandi of simply referring cases to the PCA without making clear what the issue is with the lease.

This is acknowledged by the PCA who said in their response to the 2019 Statutory Review: *"A large proportion of the TPTs with the most protracted arbitrations have relied on support from campaigning groups now also acting as tenant advisers. TPT arguments in these cases have consistently been supported by positions that reflect what those advisers believe the law should be rather than what it actually is."*

We instead support the panel of accredited advisers established by the BII. They understand how challenging trading is for licensees, drawing from their extensive surveys and regular conversations with members. They agree it is essential that vital small businesses get independent, expert advice as they face critical decisions, especially with major commercial lifecycle events.

The BII are now therefore facilitating independent expert panels to accredit professional advisors for the licensed trade for Chartered Surveyors, Accountants & Solicitors. The expert panels, formed of leading professionals in their respective fields set accreditation criteria, oversee the appointment of accredited advisors against these criteria and review complaints which may ultimately result in formal removal of the accreditation from advisors. An independent governance board made up of the Chairs of the three expert panels ensures the accreditation scheme is delivered effectively and deals with any appeals from the independent expert panels.

In the last Statutory Review of the Pubs Code and the Pubs Code Adjudicator, this requirement was formally recognised by BEIS and supported by the PCA. The PCA herself commented on the initiative and said: *"I welcome this industry initiative and I'm pleased to see participating pub-owning businesses seeking to ensure tenants, and prospective tenants, receive good quality professional advice. This advice can be key to tenants using their Code rights successfully throughout their tenancy – including before they sign on the dotted line".*

[9] http://www.psglegal.co.uk/

We fully support this scheme and firmly believe that licensees should have better protection against unaccredited advisers and more support in knowing they are getting good counsel.

Summary for Question One

Overall, we believe there have been some improvements in the industry since the introduction of the Code, but that there continues to be a number of changes which should be made to make the legislation work more effectively and efficiently. Some helpful changes came in on 1st April 2022 however it is still too early to ascertain how effective they have been. The simple fact is that, given the lack of clarity, productive engagement and guidance, we have had to adjust our ways of working, make system changes and increase headcount to adapt to the Code and u bn u u u u in order to manage the complexity, uncertainty and the heavy costs associated with it.

The Code has also created an adversarial environment where legal disputes are the norm - this is unfortunate and cannot be what Government intended.

Despite the above, we have experienced a fundamental difference over the last six months with the establishment of the bn uregulatory team. We now have a constructive level of engagement with this team which, from our experience, has been the biggest positive difference with the office of the PCA since 2016. We very much welcome the continuation of this going forward.

2) To what extent do you think the Pubs Code is consistent with the principle of fair and lawful dealing by pub-owning businesses in relation to their tied pub tenants?

We believe that the Code is indeed consistent with this principle for tied pub tenants. The transparency for incoming and existing licensees at rent review and renewals mean that all licensees have absolute clarity on what is being offered to them. There are clear timetables for decision making points and the obligations on us as a pub company to deliver these. The operating landscape for pubs is vastly different to that of 2016, or 2019 for that matter, and there have been fundamental changes in the nature of the market in which pubs operate. The Pubs Code has played an important role in embedding improvements in governance, transparency and processes.

The principle of fair and lawful dealing was considered by Government to "*be understood as requiring the Pub Company to conduct its relationships with Tenants in good faith, without distinction between formal or informal arrangements and without duress*". [10] We believe the MRO option goes further, in allowing licensees to move to a different agreement at certain trigger points and giving licensees additional negotiating power. The PCA and arbitration routes ensure that a licensee has further recourse if there are any issues, including those in relation to rents and lease terms, that cannot be resolved amicably. These structures are funded by us and other pub companies at significant cost and this should be acknowledged.

The legislation (section 42(3) of the 2015 Act) is clear in providing that the Secretary of State must seek to ensure that the Code is in line with the principles of fair and lawful dealing and that **tied**

[10] ub u u unu ub ut u ua uA vation and Skills, 22 April 2018 (https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/363475/13-718-pub-companies-and-tenants-consultation.pdf)

tenants should be no worse off than if they were not bound by any product or service tie. We consider this to be a clear signpost for the Secretary of State alone to apply in the creation and maintenance of the Code and these are not principles for the PCA (or any other arbitrator) to apply in assessing the reasonableness of any particular lease term.

What is fundamental to consider here is the landscape in 2022 is not the same as 2013 (when the principles were first considered). The industry has moved forward massively, and fair and lawful dealing is the norm now.

The Government needs to take a root and branch approach to the principle of MRO. The concept of no worse off will be different for every operator and this should be acknowledged. In 2013 the then Secretary of State, Vince Cable, was concerned about tenants facing significant hardships, a lack of transparency and fairness, and seeing an end to exploitative financial practices. He was also concerned however for the long-term sustainability of the sector something which is increasingly difficult to guarantee. The Code was conceived to address historic business models in one or two pub companies, but the unfair and exploitative practices that persuaded Ministers to regulate have not existed for years in the industry.

3) To what extent do you think the Pubs Code is consistent with the principle that tied pub tenants should not be worse off than they would be if they were not subject to any product or service tie? Please provide any evidence you have to support your view.

The short answer to this is no because MRO is not consistent with the principle that tied tenants should be no worse off than a free of tie tenant. If we were to grant an MRO tenant a better deal then we would be in breach of the law as the tied tenant would then automatically be worse off. We still maintain that the two things are not compatible.

There are huge numbers of pubs on the open market across the UK whether it be free trade, leased & tenanted or managed pubs[11]. In no other market are there so many different options. There are many budding entrepreneurs out there who have the talent and a vision for how they could build a successful business - but the costs, risks and lack of access to expertise acts as a barrier to entry. Many would struggle to afford the cost of purchasing a free trade pub outright. That is why they choose a leased & tenanted pub or choose to be part of a semi managed property.

The leased & tenanted model allows licensees access to their own pub business for a comparatively small investment, while benefitting from our economies of scale. There is choice in the market. Licensees could choose a free trade pub (and work with a bank) but others would rather work with us. S u u u u u u u they choose to rent a pub with us with a supply agreement. We give them transparency over what to expect and we then provide training, support and expertise to help licensees to grow their business. So, quite to the contrary, in many ways our licensees are arguably much u u u u u u u u u u

The operational success of the Code must not be judged by the number of MRO agreements that have been granted, but rather by the use of the process itself. As the PCA said herself in the recent BEIS

[11] There are over 50,000 pubs in the UK, BBPA data, November 2016 (http://beerandpub.com/wp-content/uploads/2018/03/Pub-numbers-non-members.xlsx)

Committee Hearing: *"The MRO process is a very powerful tool for tenants to lever the best deal and to choose what is right for them. I would like to see more positivity around the process because it is so powerful and is working so much better than it was in the period subject to the first statutory review."*[12]

The MRO is one element of many that help to ensure that licensees can be sure they are getting a fair deal it absolutely does not mean that the MRO deal would always be the best option for licensees - or something that every licensee would wish to take up.

We find that tenants do not always understand the difference. For an MRO option they essentially want the same lease, but without the tie and u u u u u u u u u them. Going free of tie is not the same as removing the tie (as there are multiple aspects of the tied relationship which are interlinked), but often they think that it is.

Fundamentally though, the fact that a number of licensees are looking at MRO and choosing the lower cost, lower risk, high support of continuing their supply agreement proves that the legislation is working - as it means that licensees are able to see that they are no worse off and are choosing to remain with us. MRO provides us with the opportunity to explain the benefits of the leased & tenanted model. That includes:

i) Investment we invest around £40m each year in our pubs with Capex investments from small investments of under £100k to transformational programmes of £500k and over. It is not just about our financial investment support - when making our investments, licensees get the benefit, expertise and skills from our teams of investment managers and third-party contractors and suppliers.

ii) Business help, insight and support our licensees receive guidance and support from their local BDMs to help them grow their businesses. This includes providing advice on the business plan during the bi-monthly call-cycle, retail marketing and product support, informal advice and simply being on the end of the telephone for an opinion.

iii) Training we support our pubs with training. We have hosted nine one day Passion for Quality workshops (covering all aspects of cellar and bar management, such as how to get the best out of cask ales) with 149 people trained from 88 pubs. The most successful of courses however was the one giving lessees access to free social media online training. A total of 1017 people have signed up to this and have completed over 1300 modules this year so far with an additional nine face to face social media courses.

iv) Promotional deals we negotiate deals with larger suppliers u u a ub For example, Sky gives licensees access to the best deals and help them reduce their costs. Our deal with waste management company BIFFA to reduce pub waste management costs saves our licensees an estimated £1,000 each per year.

v) Retail marketing support we provide our licensees with regular hints and tips on how to maximise retailing events throughout the year, from busier trading periods (such as Halloween, big sporting fixtures and Christma u u u u u u% u u u u

[12] https://committees.parliament.uk/oralevidence/10587/html/ - Q92

vi) Legal, compliance and property – we provide licensing support, conduct age verification visits, and support with general compliance (e.g. PCA updates) and advice. We also conduct 'mystery shopper visits' at each of our pubs, which allows our BDMs to have positive conversations with the licensee on how to improve and grow their business.

Vii) - Star Energy Programme – we have launched a new energy supply deal with British Gas to help licensees mitigate the energy crisis. The one-year deal, facilitated by our energy partner, Inspired Energy, bulk buys energy for licensees when the market is lowest to ensure competitive prices.

None of the support outlined above would be provided by commercial landlords. We are confident that the leased & tenanted model has real benefits which can't be found through other forms of tenancy. We are firm believers that, when the model is run transparently and collaboratively, it offers significant benefits to licensees and has a role to play in the broader pub ecology alongside managed and free trade pubs.

It is also true that many licensees do not realise the true value of these benefits - and many lacked an understanding of these potential benefits available to them. The true benefits of SCORFA were brought to life through the pandemic experience. In discussion with the licensee from [Redacted] he said: *"Star Pubs & Bars are very good with their support. There are plenty of forums where lessees meet and exchange ideas, which is great as there is always something to learn. They supply lots of business building information and I'm always downloading insight from their site. We're also given new glassware when new product is brought in... It's a partnership, a symbiotic relationship in which we've both got to make money. If one side isn't making money, the arrangement isn't working. It has to be a balance. We are very well looked after and happy currently..."*

The Code also seeks to meet the principle of a tied tenant being 'no worse off' by providing the MRO option. This clearly provides a mechanic whereby, at certain trigger points, the licensee can consider their current or a new tied deal versus an MRO agreement – before deciding whether or not they are indeed worse off with a tied agreement.

Europe Economics[13] found that the MRO option may also be being used by licensees and their advisers as a tool solely to negotiate an improved tied offer, and that this could have detrimental effects on the tied pub market (insofar as it could lead to lower overall investment in leased & tenanted pubs or shorter-term tenancies). It also claims there is a need to take caution in estimating the 'transfer of value' and how much better off licensees are. This is because it is difficult to quantify the intangible benefits – which are unique to each pub, and unique to the experience and skill of the licensee.

The difficulty is that, in many cases, licensees expect all the benefits of the tie, but none of the costs. The current system leads to tenants wanting all of the advantages of both models at once. We believe this could be better communicated to licensees by the PCA.

[13] 'Impact Analysis of the Statutory Code of Practice', Europe Economics, March 2019

PART B: THE PUBS CODE ADJUDICATOR

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

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

Summary

Firstly, there has been a difficulty with meetings and this has, of course, been exacerbated by the coronavirus pandemic. [Redacted] Star Pubs & Bars) has, in the past, attended meetings twice a year with the PCA to discuss Code issues that affect our business, while [Redacted] attended the quarterly CCO meetings with officers from the other five pub-owning businesses. Unfortunately, the PCA has not instigated these meetings with us since the beginning of the pandemic.

As a business, we would much prefer the idea of face-to-face meetings with the PCA and officials. We feel that this kind of engagement is much better at achieving results than exchanging letters which can often be legalistic in style and simply result in similarly formal letters being sent in return. We strongly believe that face-to-face meetings would help with swifter resolutions to queries. This has worked well for our CCO with more recent dialogue with the regulatory team.

Whilst we consider that the PCA has been doing her job in holding pub companies to account, there remains scope for improvement, and engagement could be more constructive. We noted in the last statutory review that the PCA often takes a long time to come back on our correspondence, then expects responses within exceptionally short (what we often consider to be unreasonable) timelines. This remains true. On some cases and issues, we may hear nothing from the PCA for prolonged periods (sometimes up to a year), before calls and meetings are arranged at minimal notice.

We want to work collaboratively with the PCA to resolve issues. We have been frustrated at times that the PCA has not given us clearer, more specific, detailed and practical guidance. We think there are opportunities for the PCA to give us better quality guidance - and to improve their engagement with us on the implementation of it, both formally and informally. The PCA could be much clearer in terms of what they require and want from us.

u bn u u u u u u u u u uq u u u u u u continues to cause unnecessary issues. The PCA is taking a very subjective approach to decisions and this risks making the process overly lengthy and complex and is ultimately more costly for both pub companies and licensees.

Giving advice and guidance - in some instances, the PCA's guidance effectively creates a Code within a Code or more layers of compliance, when we consider that really it should be about improving culture and behaviours (e.g. the previous Regulatory Compliance Handbook, December 2018 and updated September 2020).

It is also important the PCA does not react to anecdotal feedback and often unsubstantiated arguments and there is a balance to be struck in terms of the cost and benefit in some instances. We believe this has improved, and the PCA has sought to ensure there is good evidence from stakeholders she speaks to. She u u u u u u u u ua' A ub u *I meet and engage with a range of stakeholders. I seek not to have favourites, but what I always do when I am engaging with them is to ask them to provide me with evidence to support general assertions that they make."* [14]

From the outset we have been transparent and repeatedly sought guidance from the regulator on the terms we were offering those licensees looking to take up the MRO option, but the PCA consistently declined to respond to those requests. Instead, it chose to launch a long, costly and unnecessary investigation.

Investigating non-compliance - if the PCA has evidence that pub companies are not behaving within the spirit of the Code, and, despite her warnings, are continuing not to behave within the spirit of the Code, the PCA should take whatever action she believes necessary to call out or end these practices. As outlined above, whether it is naming and shaming, investigating, producing clear guidance or ultimately issuing fines the PCA should use her powers as she sees fit, in a proportionate and reasonable manner which is commensurate with the degree of wrongdoing / impact on tenants.

Scope Creep - Any scope creep by the PCA and any attempts to widen the scope of the Code should be strongly resisted. As the Code matures, a more light-touch approach must be taken forward. Any attempt to counteract provisions of existing statute must be resisted.

Arbitrating disputes under the Code

The appointme u u u u u u u u u u u u u u u ubn u practice to appoint alternative arbitrators in all new referrals since March 2019. This was a departure from the PCA's Factsheet 14[15] which indicated that there will be a presumption that the PCA will arbitrate the majority of referrals. We understand the rationale behind separating arbitrations from the work of the PCA, particularly in helping with the conflict of interest, but this has added significantly to arbitration costs.

Time, Cost, Reserving Position - In respect of arbitrations, the main aspect which has been required to be addressed in the past three years is the elimination or reduction in the need for licensees to make referrals solely to reserve their positions.

We have seen some improvements to this following the changes to the Pubs Code which came into effect on 1 April 2022, however the full impact of this is not yet fully clear. In the past, we have had experience of receiving multiple referrals (and indeed arbitral claim forms) from advisors indicating nothing other than the offer is considered to be non-compliant, with no further detail provided. Whilst the need for such referrals will hopefully be reduced following the implementation of the new resolution period, our view is therefore that further changes need to be made to apply some kind of filter to referrals prior to arbitration commencing. This should be accompanied by a limit on the costs for which POBs are liable, in order to discourage vexatious or otherwise unmeritorious referrals.

[14] https://committees.parliament.uk/oralevidence/10587/html/ - Q74

[15] E u u u ub un u uq u

The arbitration process is long, costly and cumbersome for all parties involved. There is no immediate sift or strike out procedure once an application has been made. Consequently, the likelihood is that each arbitration will still need to run to at least the pleadings stage. This clearly incurs time and cost which is unlikely to be recoverable.

The current process doesn't incentivise tenants to settle - in fact the process itself can encourage some advisors to prolong proceedings knowing the pub owning company will have to stand the costs. We appreciate however, that these reservations need to be balanced with the tenant s right to access arbitration.

Arbitrators Fees, Training & Experience   There is no statutory cap on the amount of the alternative u u u u u u [16]. As the costs are not capped, pub-owning businesses face a wide variety of costs potentially charged in each referral. This hampers our ability to accurately budget costs for referrals. In fee breakdowns we often see certain pieces of work being duplicated and what we would consider excessive periods of time being spent on straightforward tasks. In arbitrations we have seen **rates vary from £180 per hour to £450 per hour**. To address the inconsistency of cost, and to allow us to effectively budget and evaluate the cost to business, we would suggest that the PCA should impose a standardised hourly rate for any alternative arbitrators.

Across arbitration u u u u u u u u u u u u u u £300, u u u u u u u u bn u u u u u u u u u is a substantial rise in the costs ultimately borne by pub-owning businesses. We have also experienced arbitrators requiring deposits to be paid of up to £10,000 in advance of the arbitration progressing. In u u u u u u u u u u u u u u uu u to mitigating uncertainty and inconsistency across the board.

We have also experienced some arbitrators attempting to deny the parties a 'stay of proceedings' to allow for negotiation, even when both parties wish for one. This strikes us as counterproductive and is certainly not in the spirit of reaching an amicable conclusion. We fear this is driven simply by the fee structure, rather than what is best for all parties. The PCA, to its credit, used to grant an immediate 3 month stay on all referrals - this does not happen now that it is outsourced to CIArb. Instead, it is at the arbitrator s discretion.

We would also recommend that the PCA consider the hourly rates proposed by arbitrators at the appointment stage, in order to avoid hourly rates which are (in some cases) nearly triple that of the PCA's.

Our understanding is that there is currently no mandatory or prerequisite Code knowledge or training required for alternative arbitrators. Consequently, additional time and costs are being incurred in respect of arbitrators who are new to this area. We propose that all alternative arbitrators should undertake mandatory, formal training which is supplemented by written guidance. Our view is that this would ensure a consistency of approach, would reduce the initial preparation required and would reduce cost as well as facilitate better decision-making.

Publication - In terms of publication of arbitration awards, Star was one of the first pub companies to call for this to help bring greater transparency, openness and clarity. Arbitration awards are now made

[16] Letter from the PCA to Star Pubs & Bars, 11 March 2019.

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expect. However, whilst we support publication:

(i) In some cases, we have been unable to reach agreement with the PCA on the redactions to arbitration awards that we believe are necessary, prior to publication on the PCA's website, to protect what we deem to be commercially sensitive information. This issue is particularly acute where the u uu uu u u uu u u in the award or its appendices, which we believe is of commercial prejudice in terms of publicising our commercial strategy. Going forward our ask is that a more reasonable position will be taken that appropriately balances the need for transparency against the need to respect commercial confidentiality.

(ii) Whilst we fully support publication, there is a knock-on effect to this in terms of the potential uncertainty of the precedent status of awards. Whilst arbitration awards do not set a precedent, their publication can lead to uncertainty regarding the impact of the decision. Indeed, we have seen a trend towards tenants advisors expecting property-specific arbitration decisions to be implemented on a blanket basis across all of our MRO offers. In addition to this, there has also been inconsistency and contradictions in arbitrators decision making in different cases which can lead to further ambiguity and uncertainty.

(iii) It is essential that, where awards are contrary to the PCA's published guidance or, indeed, High Court decisions which have since the date of the relevant award clarified the application of the Code, this should be specifically called out at the time of publication, for the benefit of both pub companies and tied pub tenants alike.

<u>Appeals</u> - The statutory appeals process arising under the Code requires any appeal to be referred to the High Court under the Arbitration Act 1996. This is a highly adversarial process which involves the licensee (as both Claimant to the initial arbitration and Respondent to the High Court appeal) and is often unnecessary where the grievance subject to appeal concerns the PCA or alternative arbitrator's determination in the referral. It also exposes the licensee to expenses and further strains the relationship with the pub-owning business.

In the eyes of licensees this may be unexpected and, insofar as we are aware, this is not set out as a potential consequence or risk in seeking to exercise the MRO option.

We believe that it would be appropriate to consider an alternative method of review of arbitral awards rather than solely providing the statutory right of appeal under the Arbitration Act 1996. It would be helpful instead to consider whether such decisions could be subject to challenge by a pub-owning business. This could be done by way of a review procedure undertaken by a third-party decision maker, with submissions from the arbitrator and pub owning business (and with participation from the licensee being optional).

Judicial review may offer such a remedy, albeit only insofar as a court considers any award to possess the necessary "public" element to attract such a remedy. While the matter is untested in the context of an arbitral award under the Code, the availability of such remedy may be limited if a court considers such an arbitration to be a private law dispute between the parties, notwithstanding the PCA (or an alternative arbitrator appointed thereby) exercising a statutory function.

The benefit of a third-party procedure over an appeal under the Arbitration Act 1996 (or any uncertainty over judicial review) is that the pub-owning business (or, if launched by a licensee, that licensee) would be the principal party to the proceedings with the arbitrator as respondent. Any involvement on the part of the licensee (or pub-owning business where proceedings are launched by a licensee) would be discretionary.

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

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

Cost to business: There is no doubt that the Code has put significant additional cost on our business through levy fees, legal costs, senior management time, training and Code compliance. For example, we now have five full time employees working exclusively on Code compliance, but we have further colleagues in the business who spend a significant amount of their time on code matters. This is a significant increase on the three that were previously covering PCA compliance. We have calculated the overall costs of the Code in terms of management time and direct costs on our business as **just over £2.45m**.

Since the Statutory Code has come into force, annual costs of the levy paid to the PCA are already rising sharply. The levy alone from all six pub companies in 2016/17 was **£1.5 million** even this was well in excess of £100 per pub. That figure obviously did not include the company costs of compliance, legal fees or increasing fees from alternative arbitrators. This last year the PCA obtained the Secretary u u u u u u u u amount at **£3.27 million** for the financial year 2021-22.

Europe Economics have calculated for the BBPA that the costs of the Code on pub owning companies continues to increase. They calculate that the cost of the Code amounts to **£6.4 million**. To put it in relation to the MRO 2021 activity, this is equivalent to £87,200 per free-of-tie agreement resulting from MRO notices. If both free-of-tie and new agreements are included this would give £37,000 per agreement. Europe Economics admit that not all activity is related to MRO (the Pubs Code Adjudicator also undertakes other activities), but even assuming that just half of these costs are for MRO it would still yield £43,600 per MRO (or £18,500 per agreement). These figures are clearly significantly higher than the average annual rent of a tied pub at circa £26,000.

As highlighted by Europe Economics report - this high cost burden threatens the ability and willingness of pubcos to invest in the tied-partnership model, in turn damaging th u u u u u option for prospective landlords in the long term.

It is worth revisiting the original impact assessment from the Government on their estimation of the cost of the code:

- The Government originally gave a best estimate of opera u u u u bn u u u u million. In fact, operating costs were £2.1 million in 2019/20 and £2.29 million in 2021/22.

- The Government u u u u u u u u bnu u u year. They actually cost £900k in 2019/20 and £700k 2021/22. This is as much as three times what they originally forecast.

- The original impact assessment talked about the cost of complying with the Code (excluding MRO) to be the same as complying with the voluntary Code. We now have a team of five FTEs dealing with legislative compliance and others who spend a significant proportion of their time on compliance matters u u u u under the voluntary scheme). The cost of this to us internally of course does not include the additional legal costs which we pay to third parties and which runs into the hundreds of thousands.

  That same assessment talked about a £30k saving in funding voluntary bodies prior to the Code coming into force. This is objectively u when measured against the other costs on us like our extensive investment in BII membership for all of our pubs so that our tenants get good, independent advice.

We appreciate that there will always be costs associated with a regulatory framework such as the Code, but we firmly believe that some of this could be avoided by removing complexity and ambiguity.

MRO opt-out option - An MRO opt-out should be a serious consideration if both parties willingly agree to this, to reduce the uncertainty on both sides and incentivise greater investment. This would benefit tenants as well as companies as it would provide for an additional benefit of significant potential value whilst maintaining all existing Code rights. The MRO element was never intended by Government to be part of the Code when bringing forward the initial legislation. It is now a drag on investment and business growth, incurs significant costs, and creates conflicts which would otherwise no longer exist. Over 85% of arbitration referrals to the PCA are MRO-related.

Costs in arbitration In circumstances where a subjective approach to reasonableness means that any proposed MRO-compliant tenancy is unlikely to be compliant, this means that in effect the pub-owning business will always be required to meet the tenant's costs, and those of the arbitrator.

A tenant can only be required to meet a pub-owning business's costs where a referral or the notice u u u u u u u u u u u u u u u u in an unreasonable increase in the costs of the arbitration. These are high thresholds and do not act as a disincentive to speculative or spurious referrals made by a tenant / their advisers as part of a commercial negotiation strategy. In such instances, the cost burden remains with the pub-owning business.

In addition to our comments above in respect of Part B (Question 4) as to the alternative u costs, there is no mechanism for a party to dispute or challenge an ucosts, particularly when there are questions about how reasonable these may be in practice and work undertaken by the arbitrator.

Fines - Our view is that the current maximum penalty of 1% of turnover [17] should remain as the permitted maximum. This allows for a significant penalty if required. **We would also like to point out that the Adjudicator is able to impose a smaller penalty where they consider this appropriate**.

As currently set out in the Regulations, where the business is part of a wider group with other divisions and operations (such as Star Pubs & Bars), then the percentage applies to the annual turnover of the group, not just the turnover of its leases and tenanted financial activity. Consequently, the penalties which can be imposed on pub-owning businesses varies widely due to the size of their group and associated turnover. Our view is therefore that the 1% of turnover maximum penalty should be adjusted to apply to the turnover of the leased and tenanted pub-business only and not its wider group turnover which would have no causal role in the circumstances giving rise to the enforcement.

[17]Section 58(1) of the Small Business, Enterprise and Employment Act 2015; Regulations 5 & 6 of The Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016