

BEIS Select Committee Inquiry on Update on the Pubs Code Adjudicator

Response from the Campaign for Real Ale

June 2018



**CAMPAIGN
FOR
REAL ALE**

1. Executive Summary

- CAMRA is calling on the Committee to press the Government to undertake an urgent review of the Pubs Code.
- This is because two years into its operation, POBs are continuing to exploit gaps in the legislation and operation of the Pubs Code and are not abiding by the spirit of the Code.
- Urgent changes are needed to the Pubs Code Regulations to allow delivery of the aims of the Code as embedded in the Small Business, Enterprise and Employment Act 2015.
- The urgent review must be carried out as soon as is practicably possible and include a full public consultation to allow for the collection of evidence of the workings of the Code so far from TPTs and other key stakeholders (including groups representing TPTs and other industry experts).

2. Introduction

- 2.1. Thank you for the opportunity to submit written evidence to the committee. CAMRA, the Campaign for Real Ale is a UK consumer group that acts as the independent voice for real ale drinkers and pub goers. Our vision is to have quality real ale and thriving pubs in every community.
- 2.2. CAMRA has campaigned over a number of years for the introduction of the Pubs Code and Adjudicator in order to address the imbalance of power that had emerged as Pub Owning Businesses (POBs) developed a monopoly over the supply and cost of tied products to their tenants, and imposed increasingly high rents on their Tied Pub Tenants (TPTs), preventing them from selling a wide range of products and threatening the viability of their businesses. A CGA survey commissioned by CAMRA found that 80% of TPTs were reporting personal earnings of £15,000 per year or less, suggesting that POBs were extracting more than was fair or sustainable from the profits of TPTs.
- 2.3. It is clear that the first eighteen months of the operation of the Code was plagued by delays and the Pubs Code Adjudicator (PCA) was too slow to respond to emerging issues. There was evidence that the PCA had struggled with a significantly under-resourced office and deficiencies in the Pubs Code, leading to POBs challenging the interpretation of the Pubs Code. Implementation of the Code was delayed as the necessary regulations were not in place in time resulting in no transition period. A large backlog of arbitration cases quickly built up leaving TPTs with rising costs together with uncertainty as to the future of their tied contracts. Some of these resulted in pub closures as TPTs were left with no option but to walk away with what they felt was an impossible business relationship.

- 2.4. Limited improvements have been made in the last 12 months, with the appointment of the Deputy Pubs Code Adjudicator (DPCA), a start has been made on clearing the large backlog of arbitration cases, and emergence of further advice and information to tenants. However there are still serious issues which must be addressed by the PCA in order to assure TPTs that the Code is working. Meanwhile POBs still enjoy access to a much higher level of legal resource than TPTs, and this appears to be reflected in a number of cases where TPTs have been forced to accept inferior or suboptimal settlements for fear of legal costs that would bankrupt them.
- 2.5. CAMRA is concerned that two years into its operation, POBs continue to exploit gaps in the Pubs Code or issues covered by the Code that remain unresolved, and are not abiding by the spirit of the Code. This, coupled with poorly drafted and imperfect legislation, and a lack of precedent forthcoming from arbitration cases means that a full review of the Code is required immediately. Urgent changes are needed to allow delivery of the aims of the Code as embedded in the Small Business, Enterprise and Employment Act 2015, particularly the overarching 'core principles'.
- 2.6. Our response will focus on the operation of the Pubs Code Regulations 2016, and make recommendations for amendments that should be made as part of an immediate and full review of the Code.

3. Is the Pubs Code providing clarity and fairness in the relationship between pub owning companies and tied tenants? If not, what changes are required?

- 3.1. CAMRA is calling on the Committee to press the Government to undertake an urgent review of the Pubs Code in order to identify the necessary improvements required to deliver the core principles of the Code. This should happen as soon as is practically possible. This review must include a full public consultation to allow for the collection of evidence of the workings of the Code so far from TPTs and other key stakeholders (including groups representing TPTs and other industry experts).
- 3.2. Over the last two years, multiple instances have come to light where it is clear that the Code has failed to provide clarity and fairness for TPTs. Our recommendations for changes can be found in Section 5 of this submission. This submission will aim to address the issues that have arisen since implementation of the Code, and provide the committee with recommendations which provide an equal playing field in terms of information available to TPTs who are navigating the Code.
- 3.3. Key to the failure of the Code to provide fairness is that while the PCA's office struggles to provide clarity on key aspects of the relationship, some POBs have continued to act as if the Code had simply never existed; and typical complaints in everyday business practice have continued unabated. It

is also of concern that POBs are challenging some decisions made by the PCA through the courts in a manner that breaches CI Arb rules, using their disproportionate legal powers to overrule the Code in a manner that is intimidating and removes the Code's protection from the TPT.

3.4. It is clear that POBs are exploiting gaps and loopholes in the Code to varying degrees. Further issues identified by the PCA, CAMRA and others include:

- TPTs' low levels of understanding of the Market Rent Only (MRO) process, as found in the PCA's Pub Tenant Survey.¹ This found that only 35% of TPTs understand their right to request MRO - a key feature of the Code designed to deliver on the no worse off principle.
- The results of the PCA's MRO Verification Exercise², which found that POBs were attempting to frustrate the MRO process through a variety of methods including serving of dilapidations and seeking to include new and draconian provisions in new lease agreements rather than relying on a simple Deed of Variation.
- A CAMRA fact finding exercise that uncovered reports of obstructive tactics deployed by POBs when TPTs were attempting to break free of tie. This included the use of Calderbank letters and reports of Code Compliance Officers targeting TPTs who had expressed an interest in the MRO option.
- A constituency survey by Rishi Sunak MP that found a widespread lack of awareness amongst publicans of the Pubs Code, nearly 18 months on from its introduction.³
- Data released from the PCA makes it clear against which pub companies the largest number of cases for arbitration are being brought.

4. How effectively has the office of the Pubs Code Adjudicator ensured compliance with the Code and arbitrated in cases of dispute?

4.1. It is difficult to assess fully how effectively the PCA has arbitrated in cases of dispute. This is due to the arbitration process being bound by Chartered Institute of Arbitrators (CI Arb) rules which impose confidentiality unless both parties to an award agree to waive the right. This means that POBs have refused to waive anonymity, preventing principles being established from awards being made public and denying tied tenants access to vital information.

4.2. CAMRA is concerned that the PCA could be doing more to ensure compliance with the Code. Despite a statement from a Minister that POBs are most likely flouting the Code, the PCA is yet to conduct any

¹ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/686944/10752-PCA-Tenant_Survey_A5_Leaflet_UPDATED.pdf

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/639282/PCA_MRO_Verification_Exercise_Final_Report_August_2017.pdf

³ <https://www.rishisunak.com/news/rishi-sunaks-pub-survey-results>

investigations and impose a single financial penalty on a POB for failing to comply with the general principles of the Code. The PCA's office has also omitted to report on POB behaviour in avoiding or 'gaming' the code, as required in the Enterprise Act 2017 (S71A of the Small Business Act 2015); examples of this taking place will be found among this and other evidence. While we welcomed the publication of the Regulatory Compliance Handbook last year, the document is only five pages long and has not been updated despite further statements from the PCA on what is expected from POBs in terms of Code compliance. This is indicative of the need for the publication of further advice and guidance to both TPTs and POBs to allow the effective functioning of the Code.

- 4.3. Furthermore, attempts by CAMRA to access data that will allow fair scrutiny of the Office of the PCA have been rebuffed. CAMRA submitted a Freedom of Information request in June 2016 requesting information from the PCA on the number of cases referred for arbitration, broken down by broad theme of the referral and by POB. This was to allow identification of key issues arising with the Code, and also provide TPTs with clarity of what practices were potentially standard across POBs. Key parts of the request were refused. The matter has since been referred to the Information Commissioner's Office.
- 4.4. CAMRA welcomed the announcement by the PCA that POBs are being urged to waive confidentiality to increase transparency, however little progress appears to have been made. It is vital that a solution is found soon to ensure a level playing field in the accessibility of information to POBs and TPTs; the alternative may otherwise need to be for a time-consuming and costly process of mediation to precede adjudication, and this could further financially disadvantage TPTs. CAMRA's recommendations for changes to the Code to remedy this are found in the following section.

5. CAMRA recommendations for changes to the Pubs Code Regulations

- 5.1. As part of a full public review of the Pubs Code before the end of 2018, CAMRA is proposing the following changes to the Pubs Code Regulations. These recommendations seek to secure the future viability of the tied pub sector, and allow the realisation of the no worse off principle, as enshrined in the Small Business, Enterprise and Employment Act 2015:
- 5.2. The Code should be amended to require POBs to waive confidentiality under CI Arb rules for cases deemed to be of significant importance. While the PCA has made efforts to encourage POBs to waive confidentiality, little progress has been made and therefore principles being identified through arbitration cases are not yet forthcoming. The actions of POBs in this respect appear designed to frustrate the provision of clarity under the Code. It is vital for TPTs to be able to compare circumstances in cases where principle are being established as POBs currently have an unfair advantage where they

have knowledge of multiple awards that have been made in relation to their TPTs, whereas TPTs will only have the details of their own case. CAMRA would suggest that the individual identity of POBs and TPTs should remain confidential but key principles and details of important cases should be released. Furthermore, the Code should be amended or clarity given to prevent leave to appeal being given by the courts to challenge arbitration decisions.

- 5.3. A provision should be added to the Code to require independent rent assessment decisions are published. Decisions relating to the outcomes of independent rent assessments are not governed by CI Arb rules, and therefore not bound by confidentiality agreements. These decisions should be published to allow TPTs access to information on rental decisions which they can use to support their own rental negotiations. Currently, individual TPTs will only know the results of an independent assessment relating to their own pub, whereas POBs will have access to all decisions from across their tied estate.
- 5.4. The Code should be amended to prohibit POBs from unreasonably denying to issue an MRO agreement in the form of a Deed of Variation. The MRO Verification Exercise found that the main frustration preventing TPTs from accessing MRO was the refusal of POBs to deliver MRO agreements through a Deed of Variation. Instead, some POBs have been found to be demanding that MRO is delivered through a new tenancy containing new and draconian terms.⁴ The PCA has since issued guidance to partially clarify this, but as an important principle this should now be written into the Code to ensure compliance by POBs.
- 5.5. The Code should be amended to prevent POBs seeking to impose any increase in tied rent whilst a new MRO rent is being negotiated. Data released by the PCA shows that from July 2016 to December 2017 over half of all arbitration cases had been open for over 6 months.⁵ Increasing rent for this period of time could be detrimental to the TPT while they are trying to seek redress.
- 5.6. The Code should be amended to impose a duty on POBs to negotiate MRO offers. CAMRA has been made aware of instances of POBs providing an inflated MRO offer and subsequently refusing to negotiate with a TPT. This is blatant gaming of the Code, and does not comply with the principle of fair and lawful dealing. Furthermore a key finding of the PCA's MRO Verification Exercise was that the low conversion rate of MRO Notices served to MRO

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

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/675195/PCA_quarterly_data_release_Oct_-_Dec_2017.pdf

tenancies agreed⁶, therefore the Code must be strengthened to prevent POBs exploiting the absence of a specific clause prohibiting this obstructive behaviour and allowing TPTs to access MRO fairly.

- 5.7. The Code should be amended to change the current restrictive time limits which are preventing tenants from properly accessing MRO. CAMRA would like to see all timescales in the Code reviewed as feedback from TPTs and professionals involved in providing specialist advice to TPTs has stated that the current time limits are too restrictive and are preventing tenants from accessing and properly considering MRO offers. Currently TPTs have 21 days from an MRO even to serve an MRO notice of their POB, and just 14 days to consider a full MRO response and whether to refer it to the PCA. This is preventing TPTs from seeking full independent advice in respect of such offers.
- 5.8. The Code should be amended to prevent POBs enforcing dilapidations as a means of discouraging TPTs from taking up an MRO option. POBs are currently enforcing dilapidations on TPTs following receipt of an MRO Notice, as a means of discouraging TPTs from going free of tie.
- 5.9. The Code should be amended to prevent POBs issuing Calderbank letters⁷ during rent reviews. The PCA has already raised concerns that Calderbank letters are still being used by POBs despite assurances otherwise. Calderbank letters have been used in the past to place unnecessary pressure on TPTs, which the PCA has stated does not comply with the principle of fair and lawful dealing. This should now be enshrined in the Code and the PCA should take firm action against POBs who continue to do this.
- 5.10. The Code should be amended to place a temporary moratorium on POBs taking action to evict or until the MRO process is exhausted. This would prevent POBs seeking to frustrate the MRO process by seeking to evict TPTs after they served an MRO Notice.
- 5.11. The Code should be amended to require POBs to publish tied price lists. A tenant seeking to take on a tied pub or negotiating a tied rent does not have access to information on tied beer prices from all POBs so that they can decide which POB is likely to offer the most favourable deal. POBs should also be required to publish which of their pubs have access to beer distribution systems such as SIBA Beerflex or Flying Firkin. This information asymmetry reduces the ability of tenants to negotiate fair rents. It also prevents any competition between pub companies on their tied prices. A simple amendment to the Code would compel pub companies to publish their tied price lists.

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

⁷ A Calderbank Letter contains an offer of settlement made on a "without prejudice save as to costs" basis.

- 5.12. The Code should be amended to require POBs to produce a public register of tied and Market Only rents of their properties. TPTs are at a significant disadvantage in rent negotiations because they do not have access to rents on comparable pubs. This creates a situation where POBs have data from their whole tied pub estate for comparison, surveyors have other information from previous clients, but TPTs navigating the system do not have access to rents on comparable pubs. A public register will level the playing field in terms of the information available to all parties and will also be an important source of benchmarking for TPTs when negotiating rents.
- 5.13. Performance standards should be implemented to track the performance of the PCA and ensure that TPTs can seek redress in a timely manner. It has been clear from the periodic releases of data relating to the number of open arbitration cases that a number of cases are taking a significant amount of time to resolve. Data released by the PCA in January 2018 showed that from July 2016 to December 2017 there were 71 arbitration cases open for longer than six months, whereas from April 2017 to December 2017 this reduced to 24 suggesting an improvement. We believe it should only be in exceptional circumstances that a case is open for more than six months.⁸ CAMRA is advocating for performance targets that require 90% of cases not related to MRO to be concluded in three months, and for 90% of cases relating to MRO to be resolved within six months. In addition to this, the PCA should be required to carry out an annual Tenant Survey to track awareness of the Code among TPTs and measure the effectiveness of efforts to increase understanding of the Code and MRO process. The PCA has already carried this out on one occasion, but a tracking method will ensure that the effectiveness of the office is more transparent.
- 5.14. The Code should be amended to give the PCA the ability to award punitive damages to TPTs. It has now been established through data released from the PCA that arbitrations are taking longer than anticipated, and that POBs have sought to use a variety of tactics to frustrate the functioning of the Code and keep TPTs tied. Therefore the PCA should be given the power to award punitive damages to compensate tenants in the case of mistreatment or deliberate stalling by the POB during the MRO or arbitration process. This will be a powerful deterrent to discourage POBs from seeking to game the Code.
- 5.15. The Code should be amended to require POBs to publish their self assessments of compliance with the Code in full. This amendment is required to deliver transparency and allow scrutiny of POBs own assessments of their compliance. It would enable third parties to highlight

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/675195/PCA_quarterly_data_release_Oct_-_Dec_2017.pdf

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inaccuracies and gaps in compliance reports. It would also allow TPTs and prospective tenants to make an informed comparison of the performance of POBs against Code requirements.

6. Contact

6.1. Please do not hesitate to contact CAMRA if you have any further questions:

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