



# FW: To see - ALMR Views on Code

04 August 2015

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Subject	<b>FW: To see - ALMR Views on Code</b>
Attachments	 draft new i...   Draft Pubs...

[redacted]



## Draft Pubs Code – ALMR Commentary

The ALMR has worked extensively with all stakeholders on the development of the current Industry Framework Code and potential revisions to it. In particular, over the early part of 2014, we brought together all lessee groups on the Pub Governing Body to refine the Government's proposed draft code published for consultation in 2013. We tried, but failed, to get the BBPA to discuss this document in April 2014. The outcome of this work is attached.

The Government has since published a post consultation revised code and we have provided a commentary on its provisions below:

### **Definitions:**

- We are concerned about the proposed definition of a BDM as this is widely drafted and could be taken to apply to anyone in the pub company who has ongoing contact with the tenant eg sales people taking calls about beer deliveries. We need to ensure that this is focused on those "responsible for the Pub Owning Business's interactions with the tenant *In respect of rent or future business planning purposes*". Alternatively, it may be possible to refer to middle management staff who are responsible for substantive business negotiations
- Micro business – I can't see a definition for this within the Bill, but I think it would be sensible to ensure it relates to FTE employees, rather than a pure headcount and that clarification is provided as to the staff which are to be counted ie those in the pub owning business. The proposed micro business definition may not work otherwise. This wouldn't affect any of my members at present as brew pub operations tend to be managed.
- Temporary agreements – I think it is wrong to include these in the legislation and to do so will impose unnecessary costs and provide no additional protection. Exempting them would also mean that no individual tenant was exposed to risk. Tenancy at Will agreements are always temporary in nature and usually fixed in term – they are a short term, expedient measure to keep a pub open when there has been an exceptional event eg death or bankruptcy. In these cases, the temporary agreement is usually offered to a management company which specialises in such situations and provides a stop gap service. This relies on a low cost, quick fix and the professional management company is well versed in assessing the risk. Occasionally, a TAW will be offered on a temporary basis to an existing lessee pending the arrival of a new long term tenant. It is extremely rare for a TAW to be offered to a new tenant and there is no possibility of a TAW being rolled into a longer term agreement without the Code's due diligence being applied. One agreement ends and the other takes over. At present, under the Industry Framework Code, due diligence checks are taking around 3-4 months to process

### **Interpretation of the Code**

- At the moment, the overarching principles of the Code apply to all – we note the suggestion that the principle that a tied tenant be no worse off than a free of tie should only be applied to tenants of large pub companies. This seems a little odd. Surely an overarching principle and one which is designed to allow the Code to be interpreted purposively, should apply to all. The way in which this is demonstrated or the compliance required to achieve it may well be different for different types of companies, but the principle should apply to all.

- Does 2(a), when read in conjunction with 36(3) and 38(1) of the Bill mean that the SoS has the power to determine individual clauses are unfair or unlawful?
- The Framework Code also includes references to transparency of business dealings and charges in particular and disclosure as its key principles and it may be worthwhile including reference here to explain how the principle of fair and lawful dealing will be delivered eg ***“companies agree to act at all times within the spirit of the Code, with integrity, honesty and full transparency, particularly with regard to terms of business and charges made or costs passed on. The Code exists to promote transparency by requiring full disclosure of all relevant and appropriate information to ensure both parties are equipped to enter into a commercial negotiation”.*** ***“Fair and lawful dealing will be understood as requiring the Pub Company to conduct its relationships with Tenants in good faith, without distinction between formal and informal arrangements and without duress”*** – this latter phraseology has been particularly important in recent cases before PICAS where pressure has been exerted on tenants.

### General Provisions

- Bullet point 7 – is this only restricted to exercise of rights through the Adjudicator or through any form of independent redress eg arbitration, courts, PIRRS? It may be helpful to include reference to ***“wherever or however the tenant chooses to do so”*** ahead of , shall constitute a breach of the Code.

### Qualified Person Requirements

- Bullet point 8 – the current voluntary code requires the Pub Owning Business to carry out its due diligence ***“before a substantive agreement is offered”*** and we continue to believe that this is preferable to ***“Before a Tenancy is agreed”***. The latter is quite late in the process – effectively at the point the keys are handed over - and the Tenant may have made commitments and based their business, financial and personal planning on discussions held with the Pub Company without either side entering full disclosure or satisfying themselves fully as to suitability.

The purpose of this section is to ensure that the applicant has a degree of knowledge and competence before entering a detailed commercial negotiation – but as drafted would only effectively kick in once that commercial negotiation on a specific property and terms of agreement have been concluded. That cannot be right - It would be sensible therefore if the requirements were pushed further back in the process and the wording amended to either ***“Before a substantive agreement is offered”*** or ***“Before a tenancy is offered”***

### Business Plan

- As per above, this should be ***“Before a tenancy is offered”*** not ***“agreed or renewed”***
- 12 (a)(i) preference is to refer to independent professional advice ***“from an accredited professional with relevant experience of working in the licensed retail trade”***
- There is a need to include a reference to a requirement for a prospective lessee to demonstrate that they have taken such advice and for companies to retain evidence provided of this. This is as per existing Code and was inserted in light of the fact that companies were telling tenants to do something and taking no due diligence measures to ensure that it had been eg you must prepare a business plan, but I don’t need to see it. As currently drafted, there is no requirement for the pub owning business to satisfy themselves that this has been done and no obligation on the lessee to demonstrate it has been.

- 12 (b) insert ***“and matters to which they should have consideration”*** after market comparisons

### Information Requirements

- Again, vital that this is provided before a new agreement is offered or discussed, not just at the point of commencement. We introduced the requirement to provide the information at an earlier part in the process precisely because pub companies were providing the info needed to carry out a commercial negotiation or assessment of the business at a very late stage. The Code wording would allow them to hand over material information at the same time as the keys.
- Although this point is picked up in later sections, I do think it worthwhile including a new **13 (c) at rent review** for the avoidance of doubt
- 14 – there are a couple of points I could see which were missing – ***terms on which gaming machines were supplied and arrangements for the distribution of income; outline trading, payment and credit terms*** (should be in 14(iii))
- 14 iv – Again, I know it is dealt with in later sections, but for the avoidance of doubt, this should make clear that ***“unless otherwise specified in the lease, all provisions should be considered to be ‘keep’ not ‘put’***. It may also be worth including reference here to the procedure for authorising improvements, including a properly documented licence to alter and procedures for dealing with these matters when negotiating rent.
- 14 (vii) – these are in effect SCORFA and form part of the terms on which the tenancy was offered. We are increasingly finding that these are removed or altered without any forewarning and no consideration of the impact that this has on rent. For tenants of large Pub Owning Companies, the Code should make clear that any specific support services detailed under 14(vii) and indeed contractual discounts offered under 14(iii) form part of the terms of on which the lease is offered and should not be capable of unilateral alteration – this could be a trigger for an exceptional rent review request under 25. Perhaps a wording along the lines of ***“any such services offered at the start of the tenancy will be considered to form part of the terms on which the agreement was concluded”*** at the end of 14(vii)
- 14(xii) may want to make reference to decorating or maintenance funds and require these to be ring-fenced
- 15(b)(v) include ‘put’ and ‘keep’ reference here too for avoidance of doubt
- 15(f)(i) experience suggests the timeframe be altered to 12 months
- 15(f)(iv) inserted ***“by the landlord”*** after conducted

### Rent Negotiations

- 15 – assumptions in the rental assessment model ***“must be reasonable”*** and supporting evidence will be ***“provided and must be”*** fully justified. I know these are minor semantic points, but they were areas of significant debate in V6
- 16 – delete - we do not like the timetable for information to be set by the Pub Companies and believe that doing so would be a retrograde step and could leave some lessees worse off. Under the industry code, all information must be provided 6 months before a rent review or renewal falls due and the negotiation should be concluded within 3 months of that date unless the timetable is extended by mutual agreement. Tenants have a right to go straight to PIRRS if the 3 month timetable is missed and no agreement to extend it is reached. These timetables are important new protections which must be replicated in the Code. We suggest para 16 is revised to include reference to these dates. This clause also appears incompatible with para 24 which does seem to refer to the industry best practice.
- 18 – there is increasing evidence that UORR clauses are being replaced by minimum purchase obligations to deliver the same effect of UORR, and these should also be outlawed.

- 19 – insert ***“In particular, the level of detail provided should be sufficient to allow the prospective lessee to take proper professional legal advice on the terms, conditions and effect of the tenancy being offered”***
- 20 – insert ***“is fully justified and explained”*** at the end of that clause
- 20(b) – insert ***“all”*** ahead of volumes – would be tempted to delete “where available” as if purchased by the company renders this void
- 20(K) – required to identify which Benchmark used
- 21(b) – delete ***“seek to”*** – this was very hard fought in V6 of the industry code and seek to comply gives too great a latitude not to provide information in our experience.
- 22 – delete “Made” so the onus is on the pub company to make it available and to only fail to disclose if the information is not available or if they have a legitimate commercial reason. Suggest that there is a reference inserted here to third party determination This mirrors the existing Industry Code. So this clause would read ***“If any information is not available the Pub Owning Business must disclose and explain the reason for this. Information which may be used in third party determination of rent should not be unreasonably withheld and should be shared on request, subject to appropriate confidentiality agreements”***. I know that the latter point is included later in the Code, but it was such a difficult point to get agreement on in V6 negotiations, that our preference would be for it to be reiterated here.
- 24 – insert at end ***“and the parties should aim to complete negotiations within 3 months after the due date, unless an extension to this timetable is mutually agreed”***. This mirrors existing Code
- 25 (iii) (iv) new test – ***if there is a change of owner; if the contractual terms on which the agreement was offered made have been substantially altered***

#### **Parallel Free of Tie Rent Assessments**

- Do tenants always have to go to the adjudicator to get a rent assessment? Clause 26 reads as if this is the case. Is there not a step before this where the tenant has the right to request a free of tie assessment to be made as the new basis for rent negotiations. This request could be lodged with the adjudicator as a notice but the matter would only be referred up if the pubco refused or failed to produce a proper assessment and negotiate on the basis of that.
- 31(a) – 5 week failure to respond to a counter offer is a very long time period indeed and is arguably too long, bearing in mind the aim is to conclude within 3 months of rent review date. Standard terms would be 21 or 28 days
- 33 – include reference to ***“reasoned and fully justified assumptions”***

#### **Business Development Managers**

- 37 – can we require this training to be accredited and for them to have a qualification before carrying out a rent negotiation

#### **Assignment**

- 39 – industry recommended best practice is for requests for assignment to be responded to within 28 days of receipt of request. Can this be reflected in Statutory Code?
- 41 – there are some practical difficulties in delivery of this. Whilst we agree that the Pub Owning Company should ensure that an assignee has the relevant professional advice and experience required for a new lessee under part 4 &5 of the Code, this is a requirement on the Pub Owning Company not the assignor. This is missing from the current draft and should be reinstated. In terms of the information requirements, the assignor will often not have this information and may not have been provided with it by the landlord (assignments will tend to take place well in the life of the lease and some will relate to agreements entered into before industry framework code refinements). Our preference would be for this

requirement to rest with the Pub Owning Company. For the sake of clarity, it would also be helpful if this section referred to the assignee or assignor rather than Tenant. Para 40 should therefore require the Pub Owning Business to provide the assignee with information and para 41 should read ***“the Pub Owning Business must provide the information at Part 6 of the Code to the assignee within 28 days if requested by either the assignee or the assignor.”*** The alternative would be to make clear that this clause only related to assignment requests for leases first taken out after the Code took effect.

- Given that clause 41 only requires information to be provided if requested specifically, it seems odd to reference a requirement to provide it in all cases. Suggest that this is reworded to replace ***“the information at Part 6”*** with ***“all relevant information requested by the assignee”***

#### **Codes of Practice**

- 48 – insert ***“and will form part of the tenancy and contract terms on which the agreement is reached”***

#### **Compliance**

- 49 – although we do not believe that this will be a substantive or onerous requirement, we nevertheless accept that the intention in the Industry Code was for these compliance requirements to apply only to those businesses with more than 100 leases. We therefore recommend that the requirement to nominate a compliance officer and produce a compliance code should only apply to Large Pub Owning Companies

#### **Dispute Resolution**

- 57 – we believe it would be helpful to refer to external independent dispute resolution process, arbitration or legal proceedings





There will need to be agreement as to who this code applies to. Our preference would be for it to apply to all companies, irrespective of size, who issue tied agreements. Certain provisions would only apply to specific types of agreement, and these are listed within the document.

## INTERPRETATION

1. In this Code:

**"Business Development Manager"** means those employees of a Pub Company whose role includes from time to time responsibility for interaction with, managing the relationship with or otherwise being responsible for the Pub Company's interactions with the Tenant.

**"Free-of-tie Tenant"** means a Tenant of a pub company who is not bound by any purchasing obligations.

**"Tenant"** means the person to whom the pub is assigned under a lease or tenancy agreement, and includes a lessee or other classification and in relation to a prospective lease or tenancy agreement includes the prospective Tenant;

**"Pub"** means any premises as defined in the Licensing Act 2003 which has a premises license authorising sale by retail of alcohol for consumption on the premises.

**"Pub Company"** means a company who issues tied tenancy or lease agreements

**"Premises"** means the property and structures which are the subject of the tenancy or lease agreement.

**"Lease or Tenancy Agreement"** means an agreement for the lease or tenancy of premises, created out of the freehold, which are occupied by the Tenant for the purposes of a business that he or she carries on and will be considered to be such an agreement irrespective of alternative nomenclature.

**"Tied Agreement"** means a lease or tenancy agreement which includes exclusive purchasing or supply obligations.

**"Tied Tenant"** means a Tenant who is bound by purchasing obligations.

**"Rent Assessment"** means the pre-contractual assessment of rent and any reassessment of the rent payable at one or more points during the life of the lease or tenancy.

**"Contracted out" Tenancy Agreements** means a fixed term tenancy agreement which has been contracted out of the Landlord and Tenant Act 1954. Such agreements provide that tenants or the pub company may give notice during the course of the tenancy and the agreement can be granted anew at the end of term, but there is no obligation to renew.

**"Temporary Agreements"** means an agreement of one year or less which are terminable on short notice and used to cover interim arrangements whilst longer term agreements are finalized. This type of agreement will not be covered by the following provisions

## PART 1

### OBJECTIVE OF THE CODE

1. \_\_\_\_\_ Companies which are bound by this code agree to:
  - a. act at all times within the spirit in which it has been compiled
  - b. act with integrity and honesty at all times and conduct business in a fair, professional and legal manner
  - c. be transparent about their terms of business and other dealings, particularly any charges made or costs passed on and the way in which rent has been assessed
  - d. deal with complaints speedily and fairly, in accordance with a clearly defined internal dispute mechanism and with access to independent dispute resolution where appropriate
2. The Code exists to promote transparency by requiring full disclosure of all relevant and appropriate information to ensure both parties are equipped to enter into a commercial negotiation and upon which tied tenants can rely to make a considered business decision.
3. All provisions of the Code should be interpreted purposively in accordance with the objective that:
  - a. Tenants should be treated fairly and lawfully; and
  - b. Tied Tenants should ~~not~~ be no worse off than Free-of-tie Tenants.
4. Fair and lawful dealing will 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.
5. The Pub Company must keep a written record evidencing compliance with this Code and where they issue more than 100 leases should produce an annual statement of compliance, audited by the Pub Governing Body
6. The Code will be displayed on pub company websites as well as publicized and promoted by the Pub Governing Body and the organizations comprising the Board of Directors.

**Comment [k1]:** I know that there have been some concerns regarding this – do we refer to comparable free of tie tenants with the same pub company landlord?

## PART 2

### PRE-CONTRACTUAL NEGOTIATIONS

7. Before a substantive lease or tenancy agreement is offered the Pub Company must be satisfied that:
- a. the Tenant is a suitable and properly qualified person; and
  - b. the Tenant has a sustainable business plan.
8. In order to demonstrate that the requirement at para 7 has been met the Pub Company must:
- a. **ensure that the Tenant:**
    - (i) is aware of their obligations under the Licensing Act 2003;
    - (ii) has completed accredited pre-entry training which meets the Qualification Curriculum Authority's standards; pub operating companies are under an obligation to ensure that this training is completed by written proof of certification from the prospective tenant a minimum of 5 days before the final terms are agreed
    - (iii) has taken proper independent professional advice from an accredited person with relevant experience working in the licensed retail trade in the preparation of their business plan, including business, legal, property and rental valuation advice; and this must, to be confirmed in writing<sup>1</sup>
  - b. ensure that the Tenant has independently produced a business plan, having received the above independent accredited professional advice. The business plan must include:
    - (i) estimations of incomes and related costs;
    - (ii) a sensitivity analysis examining the business performance on an increase /decrease in business income and the effect of those increases/decreases on costs and profitability; and
    - (iii) the impact of indexation if appropriate.
  - c. advise the Tenant to consult RICS guidance and relevant industry Benchmarking Reports which may assist with market comparisons for the preparation of the business plan;
9. The Pub Company is not required to comply with the obligations at paragraph 8a<sup>2</sup> if the Tenant agrees in writing that the obligations should be waived and the Tenant:
- a. operates at least one other pub; or
  - b. can demonstrate at least 3 years relevant business management experience in the sector; or
  - c. has an existing lease or tenancy agreement with the Pub Company.

All waivers must be recorded by the Pub Company.

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<sup>1</sup> Expenditure on such advice to be considered as relevant and legitimate costs for the purposes of rent assessment

<sup>2</sup> The provisions of 8b are not capable of being waived under any circumstances.

## PRE-CONTRACTUAL INFORMATION

10. Before a substantive lease or tenancy agreement is offered, the Pub Company must provide the Tenant with clear information to allow the Tenant to establish the costs and risks of trading.

11. In order to demonstrate that the requirement at paragraph 8 has been met the Pub Company must:

a. **provide the Tenant with information regarding:**

- (i) a summary of the general terms of the specific agreement under consideration and outline heads of terms
- (ii) the types of alternative lease and tenancy agreements available;
- (iii) The procedures for contracting out of the Landlord and Tenant Act 1954 and the implications of this. All agreements must be offered on the basis of being within the scope of the Act and where an agreement is offered with the option of being 'contracted out', the legal impact on rent of opting out must be fully explained and the tenant should be allowed to choose without any control or restriction

(iv) the period of tenure;

(v) any purchase obligations or product ties;

(vi) current and relevant company price list and outline trading, payment and credit terms;

these will become standard contract terms and should not be unilaterally altered;

- (vii) the procedure for the authorization of improvements carried out at the tenant's expense, including a properly documented 'licence to alter' and the procedure for dealing with these works when negotiating rent
- (viii) the extent to which the lease or tenancy agreement will place obligations on the Tenant in respect of the requirement to maintain and repair the property and the condition in which the pub should be returned to the company at the end of the lease or tenancy;
- (ix) the procedures which Tenants must follow to assign their agreement;
- (x) how they will deal with, and acceptable grounds for any requests for surrender of the lease or tenancy;
- (xi) the range of support programmes and advice which will be available during the operation of the lease or tenancy<sup>3</sup>, on issues such as –

- the capabilities and training needs of the Tenant and the Tenant's staff;
- licences and any relevant training requirements;
- business management advice;
- brand promotion and merchandising;
- provision and maintenance of dispensing equipment;
- pub promotion and marketing;
- procurement benefits;
- rating advice;
- external decoration, signage, building repairs, car parks and gardens.

<sup>3</sup> Any services offered at the start of the lease will be considered to form part of the terms on which the agreement is concluded.

- (xii) how their relationship will be conducted during the operation of the lease or tenancy;
  - (xiii) their policy for dealing with requests for assistance from Tenants arising from circumstances where they experience business difficulties or material changes in circumstance which are beyond their immediate control.
  - (xiv) whether they would be willing to consider amendments to their standard terms.
  - (xv) details of the implications on the rent payable of an agreed capital development project
- b. **provide the Tenant with a full description of the premises, including:**
- (i) details of the premises licence and any licence conditions;
  - (ii) any enforcement action taken during the previous two years, where known;
  - (iii) information about any material changes of commercial or regulatory conditions likely to appear in the area<sup>4</sup> and how these might influence the business opportunity available.
  - (iv) details of any restrictions on the premises use, such as planning constraints on types of trading, hours of trading and use classes;
  - (v) the number of previous lessees in the last 5 years
- c. require the Tenant to inspect the premises thoroughly and provide written confirmation of this;
- d. advise the Tenant to seek independent professional advice on the structure of the premises;
- e. a detailed and current inventory of lessees' fixtures and fittings and advise whether these are required to be purchased, whether the company will buy them back at going concern valuation at the end of the lease term of where the lease is surrendered and, if so, provide information about the arrangements for payment;
- f. clearly set out their policy regarding potential investment opportunities for improvements and refurbishments and any implications for rent;
- g. clarify whether they will maintain and meet the cost of insurances for the premises or whether the cost of such insurance is to be arranged by the company and re-charged to the Tenant. This charge may not include insuring the landlord against loss of income

**ONLY FOR AGREEMENTS WITH REPAIRING OBLIGATIONS AND LIABILITIES**

12. Where agreements have repairing obligations and liabilities additional information and advice is required. This will include:
- a. requiring the Tenant to obtain a survey of the premises, ideally carried out by a professional with experience of the pub market; such expenditure to be considered as relevant and legitimate costs for the purposes of rent assessment

<sup>4</sup>This should include any developments to nearby premises in the Designated Pub Company's estate.

- b. advice on the nature, scope and extent of the pub company's~~it~~ policy with regard to repairing covenants in the lease and the implications these may have on ~~for~~ the tenants' insurance and or public liability.
- c. a schedule of condition identifying the state in which the premises are being provided, the basis of agreement on the repair liabilities of the agreement offered and drawing attention to:
- (i) any specific problems or features
  - (ii) clarifying what, if any, remedial work is required and expected during the course of the lease.
  - (iii) Unless otherwise specified in the terms of the lease as 'put', the assumption will be that the requirement will be to 'keep' or maintain the building in this condition.
  - (iv) the process for agreeing a schedule of wants and repairs in line with the schedule of condition;
- d. a protocol governing the treatment and procedures to be followed in dealing with dilapidations which will specify:
- (i) the timetable for the review and updating of the original schedule of condition (not less than 12 months before the end of the lease or tenancy);
  - (ii) The period (not less than 12 months) before the end of the lease or tenancy when a survey will be conducted to determine the extent of dilapidations;
  - (iii) that any further dilapidations/determinations can be added to the schedule of condition at a later date in exceptional circumstances where there is clear evidence of new material consideration or developments which could not have been taken into account at an earlier date;
  - (v) the process by which any dispute concerning the extent and amount of repairs and making good is resolved<sup>5</sup>.

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<sup>5</sup> In accordance with RICS and PLA Guidance and the Ministry of Justice Pre-Action Protocol

### PART 3

#### RENT ASSESSMENTS

13. All initial rent assessments, rent reviews and renewal negotiations as well as regrants of contracted out agreements must be:
  - (a) accompanied by a Rent Assessment Statement produced by the Pub Company and containing the minimum content set out at **Annex A** to this Code;
  - (b) signed by either a qualified RICS valuer, or a Director of the company as being conducted in accordance with the RICS Guidance at **Annex B** of this Code
14. Rent Assessment Statements are not intended to be nor must they be taken to be projections of profit or turnover. Assumptions within Rent Assessment Statements should be determined by reference to what a Reasonably Efficient Operator (as defined by RICS Guidance) would be expected to be able to achieve: individual Tenants may therefore achieve either higher or lower profits than this. Failure to achieve turnover or profits set out within a Rent Assessment shall not in itself constitute a breach of this Code.
15. The rent assessment statement will be prepared by the pub company in good faith, based on reasonable assumptions and will provide sufficient detail to enable a prospective tenant to take proper professional legal advice upon the terms, conditions and effect of the tenancy or lease being offered. The assumptions included in the rent assessment will be explained and supporting evidence where available will be fully justified.
16. Before a Rent Assessment is agreed a Pub Company must advise the Tenant to obtain proper independent professional rental valuation advice from a suitably qualified provider with experience in the licensed retail sector.
17. The Pub Company must ensure that a responsible officer of the company or its agent involved in obtaining and/or evaluating the supporting material provided in preparing the Rent Assessment will have visited the premises in question within at least 3 months prior to the assessment being undertaken.
18. The Pub Company must provide the information specified at paragraph 9.11 prior to any Rent Assessment provided for the establishment of a new rent, rent review or lease renewal.
19. The Pub Company must seek to comply with any reasonable request for further information from the Tenant and/or their professional advisors relevant to the Rent Assessment. Where such information may be used in third party determination of rent this information should not be unreasonably withheld, subject to agreeing reasonable confidentiality terms. Where such information is not available the reason for this must be disclosed.
20. A Tenant may at any time request a Rent Assessment provided that:
  - (a) a Rent Assessment has not been conducted within the previous five years;

(b) the penultimate day of the lease term;

(c) the Pub Company makes a significant alteration to the price or terms at which it supplies tied products to the Tenant; or

(d) there has been an event outside of the Tenant's control and unpredicted at the time of the previous Rent Assessment that impacts significantly on the Tenant's ability to trade.

21. If a rent assessment is requested by the Tenant and one of the conditions at paragraph ~~20~~16 is met the Pub Company must complete a Rent Assessment within six months.
22. The Pub Company must clearly set out a specific timetable for information, including the Rent Assessment Statement, to be provided in advance of the Rent Assessment. Where the rent assessment is produced for a cyclical rent review, renewal or regrant of a contracted out agreement, this information should be provided a minimum of six months before the Rent Assessment date or no less than three months after the Tenant has requested a Rent Assessment under paragraph 16 above. Parties should aim to complete negotiations within 3 months after the due date unless an extension has been mutually agreed
23. If the lease or tenancy agreement provides that the rent is to be varied by reference to an index the Pub Company must specify:
  - (a) which index will be used;
  - (b) the date on which the rate will be assessed and applied;
  - (c) the frequency of any adjustment;
  - (d) that payments may be adjusted upwards or downwards, according to the movement of the index at the time.
24. Upwards only Rent Assessments or Minimum Barrelage/Purchahse requirements shall be considered invalid and unenforceable.



## PART 4

### TIED AGREEMENTS

25. The provisions in this Part of the Code apply specifically to Tied Agreements. Tied Agreements are also subject to the provisions in the other parts of the Code.

#### Rent

26. In determining rental calculations, the overarching principle that “a Tied Tenant should be no worse off than a Free-of-tie Tenant” should be interpreted as meaning that the projected Post Rent Balance of a ~~Tied~~ Free-of-tie Tenant must be equal to or greater than the projected Post Rent Balance that that Tenant would receive, under the same assumptions and all other conditions of the lease or tenancy being equal, under a Free-of-tie Agreement issued by the same Pub Company.
27. A Pub Company which proposes a Tied arrangement must provide the Tenant with a comparable rent assessment statement ~~shadow profit and loss account~~ which clearly demonstrates what the equivalent rent assessment would be if the agreement was a Free-of-tie Agreement offered on the same premises by the same landlord, and how this has been calculated. ~~The shadow profit and loss account must include the specified minimum content contained in Annex A to this Code.~~
28. The Pub Company must be able to demonstrate by reference to the rent assessments ~~and the profit and loss accounts~~ that the Tenant would be no worse off in the Tied Agreement than they would be in a Free-of-tie Agreement issued by the same Pub Company. The Pub Company has discretion over how this is to be achieved should there be any variance and this will form part of the negotiations between the two parties

#### Exclusive Purchasing Obligations

29. Where drinks are supplied under a tie, details of the range of products available will be provided by the Pub Company to the Tenant, including:
- (a) the national brewers wholesale prices charged for these products;
  - (b) the pub company's current and relevant price list, with notification about imminent changes; and
  - (c) qualifications for discount.
30. Where drinks are supplied under a tied agreement, the Pub Company must provide the Tenant with a 'guest beer' option. This is to be interpreted to mean that the Tenant should be allowed

to purchase and sell one draught beer without any control or restriction being imposed by the Pub Company<sup>6</sup>.

32. Where drinks other than beer are also supplied under a tied agreement, the terms of the purchase obligations attached to these products will be made clear to the Tenant by the Pub Company. An outline of trading terms will also be provided to the Tenant by the Pub Company.
33. No products or services other than drinks may be subject to an exclusive purchase obligation.
34. Information obtained from flow monitoring equipment may not be used on its own for the purpose of determining whether a Tenant is complying with purchasing obligations, nor may it be used or considered as evidence if taken on its own when taking enforcement action on purchasing obligations. Pub companies must provide one or more pieces of supporting physical evidence in addition to this data before a penalty may be imposed.

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<sup>6</sup> This is to be interpreted as meaning that the Pub Company may not take into account hypothetical decisions which a REO may make in selecting a guest beer for the purposes of assessing rent. Only the actual choice of guest beer is a relevant consideration of FMT.

## **PART 5**

### **BUSINESS DEVELOPMENT MANAGERS**

35. The Pub Company must:
- (a) provide Business Development Managers with a copy of this Code;
  - (b) provide training on the requirements of this Code to all Business Development Managers at least once each calendar year;
  - (c) publish their provisions and commitments regarding the competence and future progression of Business Development Managers, including qualifications and on-going training and their commitment to continuous professional development;
  - (d) for companies with more than 100 leases, keep records of the training received by Business Development Managers for inclusion in their Annual Compliance Report as required by the Pub Governing Body
  - (e) provide information to Tenants about the role of the Business Development Managers and the support and guidance they will provide.
36. The Pub Company must ensure that Business Development Managers:
- (a) complete the BII multi-licensed premises manager or receive equivalent accredited training which meets the Qualification Curriculum Authority's standards before carrying out a rental negotiation;
  - (b) abide by the overarching principle of this Code

**PART 6**  
**MISCELLANEOUS PROVISIONS**

**Incorporation of Code into Lease and Tenancy Agreements**

37. The Pub Company must incorporate the Code into all new lease and tenancy agreements, renewals and regrants, and into all existing lease and tenancy agreements at the next rent review or lease assignment following this Code coming into force. Companies may incorporate the Code into existing lease agreements by Deed of Variation where requested by the Tenant.

**Assignment of Leases**

38. The Pub Company must respond to requests for assignment within a minimum of 28 calendar days of receipt of the request and explain the contractual implications for disposal of the business. Pub owning companies may not unreasonably without consent to assignment.
39. Following a request for assignment from the assignor the Pub Company must provide the assignor with information regarding:
- (a) professional support and advice that is available;
  - (b) fees;
  - (c) buy back arrangements (if any);
40. ~~The assignor must disclose information to the assignee as if he were the original landlord and will inform a prospective assignee of their pre-entry obligations as under paragraph 8a. These are capable of being waived under the conditions set out in paragraph 9.~~

**Insurance**

41. Where the Pub Company makes available to the Tenant insurance at cost, the Pub Company must:
- (a) provide the Tenant with full details of the insurance schedule (to include all aspects of cover provided), a summary of cover, the charges payable and any excess applicable;
  - (b) provide the Tenant with any additional information to enable a comparable quotation to be sought; and
  - (c) price-match any like-for-like policies identified by the Tenant by recompensing the monetary difference or alternatively allow the Tenant to obtain their own insurance;
  - (d) include insurance charges clearly and separately in the shadow profit and loss account.

**Premises**

42. Unless otherwise specified in the terms of the lease or tenancy agreement it will be assumed that the Tenant is required to "keep" or maintain the building in the condition set out in the schedule of condition.
43. The schedule of condition should be referenced when preparing schedules of wants or of repair and dilapidations and it will form the basis of agreement on the repair liabilities of the lease or tenancy agreement offered.

44. Where deposits, decorating or maintenance funds are taken, the process of access to them by the tenant must be clearly outlined. All such monies should be held in separate ring-fenced and interest bearing accounts, with annual statements supplied to lessees.

## **PART 8**

### **COMPLIANCE**

44. The Pub Company must appoint a suitably qualified employee to act as the Code Compliance Officer.
45. The Pub Company must ensure that the Code Compliance Officer:
- (a) will be provided with all resources necessary for the fulfilment of their role, including access to all documentation relating to, and availability of the Business Development Managers to discuss issues in connection with, the Pub Company's obligations under this Code;
  - (b) will be available as a point of contact for Tenants and any authority or other body making enquiries in relation to this Code;
  - (c) will be independent of, and must not be managed by, the Business Development Managers;
46. For companies which operate more than 100 leases, the Code Compliance Officer must deliver an annual compliance report to the Pub Governing Body within the deadlines set down by that Body.
47. The annual compliance report must have been submitted to, and approved by, the directors of the Pub Company and must include a detailed and accurate account, of:
- (a) the Pub Company's compliance with the Code in the preceding year, including instances where a breach or alleged breach of the Code has been identified by a Tenant, the steps taken to rectify it and cases referred to PICA Service;
  - (b) steps taken during the preceding year to ensure internal compliance with the Code, including details of employee training undertaken and guidance issued; and
  - (c) disputes between the Pub Company and its Tenants regarding the rental terms of any lease or tenancy agreement, or the application of those provisions within this Code, the outcome of any such Dispute and cases referred to PIRRS or 3<sup>rd</sup> Party determination.
48. The first annual compliance report required for the purposes of paragraph 45 shall cover the period from the commencement of this Code until the end of the first full financial year in which this Code is in force.
49. The Pub Company must ensure that:
- (a) the Code Compliance Officer provides such other reports as are necessary to ensure that the Pub Company's audit committee retains effective oversight over the Pub Company's compliance with the Code;

(b) if the Pub Company does not have an audit committee, the Code Compliance Officer should report directly to the non-executive director of the Pub Company who carries out the functions typically associated with an audit committee, or in the absence of such non-executive director, to the Pub Company's Chief Executive Officer or Managing Director.

50. A summary of the annual compliance report must be included in the Pub Company's annual company report. If the Pub Company does not produce an annual company report, the summary will be published clearly and prominently on the Pub Company's website within four months after the end of the financial year to which the compliance report relates.

## PART 9

### DISPUTE RESOLUTION

51. The Pub Company must take all reasonable steps to resolve any disputes that arise under this Code swiftly.
52. The Pub Company must set out clearly and explain to all Tenants the procedures to be adopted ~~should they where either party feels that the provisions of the Code have not been followed.~~ This should, as a minimum include a requirement to make an initial complaint in writing to their BDM; an escalation of complaint to an appropriate senior manager where resolution is not possible at this level; and, conclusion of the written complaint within 35 days of receipt, unless another timeframe is mutually agreed. ~~Provision should also be made for appeal.~~
53. Where a dispute regarding rent or compliance with the provisions of this Code cannot be resolved to the Tenant's satisfaction by means of the Pub Company's internal dispute resolution mechanisms, the matter may be referred to PIRRS or PICAS Provision should also be made for appeal on matters of law and procedure.
54. A Pub Company may not hinder a Tenant from exercising his rights under this Code. Exercising rights under the Code should be interpreted as including making use of any any reasonable formal or informal dispute resolution mechanism that the Tenant chooses.
55. Information which may be used in any dispute resolution mechanisms should not be unreasonably withheld and should be shared on request, subject to appropriate confidentiality agreements.
56. Any attempt by a Pub Company to cause a Tenant to suffer detriment as a result of a Tenant exercising or attempting to exercise its rights under this Code shall constitute a breach of the Code.

**Comment [k2]:** Do we include reference here to a Statutory Adjudicator as final court of appeal.

**Annex A – Rent Assessment Statement**

(see annexes to existing Industry Framework Code – possibly subject to revision)

**Annex B – Comparable Summary Rent Assessment Statement**

The following assessments are for the same premises let by the same landlord but with different assumptions included depending on the basis on which it would be let. The provision of this information does not interfere with the landlord's right to determine the basis on which the premises is let.

	Tied	Free of Tie
<u>Sales</u>		
Total Drink Sales		
Food		
Other		
<b>Total</b>		
<u>Gross Profit</u>	%GP	%GP
Wet		
Dry		
Other		
<b>Total</b>		
<u>Operating Costs</u>	%TO	%TO
<u>Divisible Balance</u>		
<u>Rent</u>	%Bid	%Bid
<u>Tenant Retained Income</u>		

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# FW: Brief Read Out of D Mountford Session

30 July 2015

15:42

Subject	<b>FW: Brief Read Out of D Mountford Session</b>
Sent	23 July 2015 14:22
Attachments	 Dave Mou...

**From:** [redacted]

**Sent:** 14 October 2014 15:44

**To:** [redacted]; McLynchy Julie (CCP); [redacted]

**Subject:** Brief Read Out of D Mountford Session

Hi

I quick and abbreviated readout of the q and a with Dave Mountford this afternoon. I think you naoted down more?

Cheers

[redacted]



# Dave Mountford

14 October 2014

14:53

My very heavily paraphrased note of the questions on pubs in this afternoon's session.

Sheryl Murray - Do you have sufficient evidence of problems with the voluntary code? Is it with one form of pub company rather than another?

Dave M - We have lots of evidence. He then proceeded to criticise Shepherd Neame including their failure to keep buildings in good repair. Mentioned this is important because Jonathan Neame is chair of BBPA

Toby Perkins - do you believe they (the pubs measures) will achieve what Government has set out to achieve

Dave Mountford - The problem is that it's reliant of a Code of Practice. We have seen that the current code has been largely ignored.

Toby Perkins - Why is it different for tenants in pub companies as compared to managed pubs.

Dave Mountford - Mainly because you pay more for your beer. He then quoted gross profit differences comparing tied to freehouse.

Olive Colville? - does the abuse apply to family brewers?

Dave Mountford - Yes

Andrew Griffiths - So we now have a statutory code and adjudicator. Isn't the remedy there so if they are aggrieved they can take it to the adjudicator

Dave M - The remedy is there but the process will not be long enough for the POB to address the issue.

AG - So the challenge is that adjudicator needs to be speedy.

DM - Yes

AG - London economics - do you accept the conclusions that MFOT would create problems in the industry.

DM - It was deeply flawed.

AG - Do you accept that PMA survey sampling of 10% of tenants which showed 7.2 out of ten were happy, is a reasonable figure.

DM - Don't recognise the survey- I would point you to the FSB survey that said 98% of tenants would rather be free of tie.



# TO Bespoke - Pubco: LSL

18 August 2015

13:05

Subject	<b>TO Bespoke - Pubco: LSL</b>
From	[REDACTED]
To	[REDACTED]
Sent	15 October 2014 10:31



TOSL2014...



TOSL2014...

['CHEERS 2014' REPORT WITHHELD - ALREADY PUBLISHED]

**From:** CABLE, Vincent [<mailto:vincent.cable.mp@parliament.uk>]

**Sent:** 14 October 2014 09:35

**To:** Cable MPST Correspondence

**Subject:** FW: The pub industry, economy and LSL

**From:** [REDACTED]

**Sent:** 13 October 2014 21:50

**To:** [REDACTED]

**Subject:** The pub industry, economy and LSL

Dear MP,

As a member of LSL (licensees supporting licensees) I must take this opportunity to implore you to investigate the the criminal and immoral practices inherent in the pub industry that effect, not just the publican, but the community and local economy as a whole. As a group of over 250 volunteers, with membership growing all the time, we have a wealth of experience and in depth knowledge of the trade.

In response to the 'Cheers 2014 report' which offered fallacy and misrepresentation to the public and members of parliament, we decided to create our own. Using the information supplied and statistics from our own extensive knowledge we offer the reality of the pub trade. This report only scratches the surface of what is happening, but offers a clear insight into how the Pubcos and family brewers, with their influential ties, are strangling the industry and the economy. Government committees have found over and over again MRO (market rent only) is the only solution to boost and save an industry crucial to our economy, communities, societies and most important, culture. The small business bill committee will be meeting Tuesday, Wednesday and Thursday of this week, We can but only plead with you to take action now, there is no time to continue to discuss and investigate more.

MRO (market rent only) MUST be added to this proposal. To eradicate an artificial market based on profiteering and corruption, and create a free market that will allow the industry to boom and finds its own viability. To increase the local contracts and boost local economy and employment. Self-regulation has failed, arguments from the parties

that happily churn 5,000 tenants a year, deliberately bankrupt 'business partners' for their own financial gain are invalid and are purely to serve their shareholders.  
[REDACTED]. Please take the time to read my report and make an informed and correct decision for our industry and our country.

Thank you for your time

Yours sincerely,  
Luke Howell

If you would like more information please contact;  
Luke Howell [REDACTED]  
Val Spencer [REDACTED]

[REDACTED]



Department  
for Business  
Innovation & Skills

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[www.gov.uk/bis](http://www.gov.uk/bis)

Our ref: TOSL2014/22970

Your ref:

15 December 2014

Dear Mr Howell

Thank you for your correspondence of 13 October enclosing a copy of the *Cheers 2014 Report*, about the provisions relating to pubs in the Small Business, Enterprise and Employment Bill currently before Parliament. I have been asked to reply and apologise for the delay.

As you will be aware, during Report Stage of the Small Business, Enterprise and Employment Bill the House of Commons voted to introduce a Market Rent Only option, which would give tied tenants of large pub companies the right to go free-of-tie in certain circumstances. 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 confirmed at Second Reading of the Bill in the House of Lords on 2 December that we accept in principle the introduction of a Market Rent Only option.

The focus now will be on making this option workable, to ensure that tied tenants are no worse off than free-of-tie tenants and that we minimise the risks of unintended consequences. As part of that work, we have been and will continue to meet with tenants' organisations, pub-owning companies and their representatives to make sure that we get this right.

Yours sincerely

BIS MINISTERIAL CORRESPONDENCE UNIT

