The Pubs Code and Pubs Code Adjudicator: Part 1 - response form

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Please tick the box below which best describes you as a respondent to this consultation.

	Pub-owning business with 500 or more tied pubs
	Tied tenant
X	Interest group, trade body or other organisation
	Other (please describe)

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WE HAVE AN ISSUE IN SO FAR THAT THE QUESTIONS RAISED DO NOT 100% RELATE TO THE ANSWERS AND RESPONSES WE WISH TO PRESENT SO WE HAVE PUT THEM IN AT WHAT WE THINK ARE THE APPROPRIATE POINTS

Rent assessments

Q.1 Do you have views on the proposed definition of a rent assessment?

A.1

It (rent assessment) is provided so that a tenant has the benefit of a rent assessment every 5 years as a minimum - it should be made clear that this will be superseded where an MRO waiver, in exchange for investment, takes place. We wish to support our answer with reference to the following points laid out in the consultation document:

6.9 - a rent assessment would be expected at lease renewal as well but this has been omitted as a circumstance in which a pub owning business (POB) must conduct a rent assessment.

6.13 - Wording unclear "...a new agreement is concluded..." it is assumed this is to mean the rent assessment will end when a rent has been agreed between the parties - 'new agreement' implies a new lease or tenancy has been agreed between the parties.

6.14 - We consider a 'rent assessment' is anytime the rent is considered for change. We accept that FOR THE TIME BEING rent changes as a result of say indexation increase are not to be considered as 'rent assessments' for the purposes of the Code HOWEVER we believe that it should be made clear that this is not necessarily a permanent definition. It is essential that in the future the opportunity for the Adjudicator to amend the 'rent assessment' definition is made available upon Code review. Issues such as inflationary or indexed annual rent increases could well be the issues of the future and should the necessity arise should be capable of falling under the 'rent assessment' definition in the future. The capability to amend the definition should remain flexible and available to the Adjudicator.

Market Rent Only option

Q.2 Are there any other circumstances where a renewal would arise and which should trigger MRO beyond those we have set out?

A.2

Again we wish to support our answer with reference to the following points laid out in the consultation document:

7.1 The understanding of Parliament was that MRO would be offered, to all qualifying tied tenants of the big 6 POB's at rent review, completely UNCONDITIONALLY. The proposal for MRO to be only available in the event of a rent increase proposal at rent review (see 8.12) was never suggested or considered until Part 1 of the consultation was published and is considered utterly contrary to what Parliamentarians, and indeed the industry, understood to have been agreed. This meeting of minds led to the good faith compromises allowing the SBEE Act to be passed.

7.7 The absence of PRA in Part 1 was met with a huge negative response and we understand that there were issues of different parties having differing understandings of what PRA was. We understand that it is now clarified and accepted by Government that qualifying tied tenants will be entitled to a tied rent assessment and a rent only rent assessment at lease renewal, rent review and trigger points. The parties would be entitled to negotiate on either terms and in the event of dispute refer the matter to the Adjudicator for appropriate resolution. This broadly encapsulates what we expect from PRA.

8.7 LTA 54 Part II protection outlines a tenants rights to renewal of an agreement. The landlord has rights to oppose renewal in certain circumstances (section 30 A-G). The reality is, and it is already

taking effect prior to the Code coming into effect, that a POB will seek to deny renewal if there is any risk of a tenant implementing the MRO option. For this reason a POB will seek to limit new agreements to 5 years effectively denying the tenant any MRO option. This is relatively simply done at the moment by objecting to the tenant's renewal request using the grounds that the landlord (POB) wants the pub back for their own occupation (i.e. a managed house). The truth is any pub incapable of achieving a weekly level of sales of in excess of c£8,000 would be unsuitable for a managed portfolio but that would not stop a POB using the objection vexatiously and simply to intimidate the tenant into agreeing a shorter term and confirming they will remain tied. Few tenants would have the knowledge or financial resources to fight such an action.

8.11 The commencement of rent assessment should be the same as proposed in existing legislation (LTA 54 Pt II allows for lease renewal negotiations to commence between 12 and 6 months before the renewal date). The Reg's seem to indicate that 6 months is a minimum but it should be made clear the process could begin up to 12 months before hand).

8.12 MRO should be available to tied tenants at rent review unconditionally, not only in the event of a proposed rent increase. POB's can implement rent only terms at any time - tenants are not asking for the same rights at this moment in time - only at 5 yearly intervals, again this should be capable of alteration by Adjudicator should the necessity arise. The cooperation of Lords, MP's and tenant groups was requested by Government in order for the bill to be passed and it was taken as read that MRO would be available to qualifying tied tenants at rent review regardless of the rent proposed. MRO option is an opportunity for tied tenants to consider the circumstances and behaviour of their POB in respect to their entire agreement not just their rent. Therefore we insist you remove clause 15 (b) from Part 4 of the Statutory Instrument as it fails to meet the stated objectives of "no worse off or levelling the playing field"

Q.3 Is the wholesale market price for beer the appropriate baseline for determining a significant price increase?

A.3

No - as it's not available to tied tenants it can be "gamed" far too easily, again we wish to support our answer with reference to the following points laid out in the consultation document:

8.18 The process outlined here for MRO option in the event of significant increase in price is basically the methodology we were expecting for all rent assessments - a tied and rent only proposal to be presented to the tied tenant for consideration in order to consider a meaningful comparison of terms.

8.20 Government claim to be seeking a proportionate approach to balancing the rights of the parties to rent assessment - consider that a POB already currently have the right to implement rent only terms upon a tenant AT ANY TIME. Tenants are not demanding the same rights at this time, they are seeking their rights should include the opportunity to implement rent only terms at 5 yearly intervals (unconditionally at rent review). Again this should be capable of review should it not have the desired effect of curbing poor POB behaviour.

8.21 What wider regulatory environment and trading conditions offer protections to tied tenants ? A price increase of any kind can be implemented upon a tied tenant who essentially is a captive customer. Unfair contract terms legislation does not apply and competition laws are avoided with the presence of block exemptions for vertical agreements.

8.23 There is no such thing as a national wholesale price list. Many brewers and POB's have a tied price list available to their tied tenants, which amazingly all display roughly the same level of price to

all their captive tenants but has never been picked up by competition authorities, but the 'real' wholesale prices in the open market are not openly advertised. For this reason using a tied wholesale price list, that is already capable of manipulation by the POB's, as a benchmark is folly.

Q.4 Is a five percentage point threshold above any increase in the wholesale price of beer (which will reflect any increases in inflation, taxation and other input costs), the appropriate measure?

A.4

It should be at best a cash increase not a percentage of the price being charged. e.g. FOT price rise £5 per firkin then the tied tenant firkin should be £5 too. A percentage increase encourages a widening of the already massive gap between tied and open market prices, e.g say open market price is £70 for an 11g barrel of lager, tied it might be double £140, the difference is £70. A 10% increase in open market price results in £77 a barrel, but tied increases to £154 - the difference is now £77. The open market and tied price gap is widening under the proposed measure.

Q.5 Do you agree that the calculation of a significant increase in price for tied products and services other than beer should exclude any increase in the wholesale price that results from rises in tax, duty, regulatory compliance costs or inflation (RPI)? Are there any other factors that should be excluded?

A.5

Yes should be excluded - open for review when Pubs Code reconsidered

Q.6 Is this the appropriate way to measure a significant price increase for tied products and services other than beer? If not, please explain the alternative you would recommend.

A.6

We wish to support our answer with reference to the following points laid out in the consultation document:

8.24 There may be no obvious baseline but in instances of services, such as insurance, there is a 'price matching' possibility. In the event the same product or service can be obtained in the open market (established by the tenant ?) the significant increase in price on other tied products and services could perhaps be measured against it.

Q.7 Is a two tier approach appropriate? If so, is the proposed threshold of contributing to 20 percent of the pub's turnover the right one?

A.7

We wish to support our answer with reference to the following points laid out in the consultation document:

8.25 The highest cost paid by tied tenants (and quite possibly rent only tenants) will be for products and, in the case of tied tenants will amount to upwards of around 50% of turnover. Rent will probably be the next highest cost and can be up to 20% of t/o. We can think of no product or service that at present, individually represents more than 20% of a pub's turnover.

Q.8 Are the proposed percentage increases in price (30 percent and 40 percent) appropriate? If not, please explain your reasoning and an alternative.

A.8

We consider the proportion of turnover should be irrelevant and a significant price increase should be considered in the context of market prices. 40% increase amounts to almost doubling an existing price and seems overly generous negating this trigger ever being close to useful.

Q.9 Do you agree that a significant price increase should be calculated by reference to the price paid by the tenant at a previous point in time? If so, should that be six months ago?

A.9

Yes - annually.

Q.10 Do you have any comments on points i. to v. (significant impact trigger events) in Chapter 8?

A.10

We wish to support our answer with reference to the following points laid out in the consultation document:

8.35

i) 'Trading conditions' - In the event of dispute of trading forecast Adjudication should be possible.

ii) in the event of a dispute on an appropriate reduction in the tied rent to alleviate the impact by the POB - referral to Adjudicator possible.

iii) Closure of a large factory in a small town could affect numerous pubs

iv) Agreed

v) 'increase in wholesale tied price of goods supplied' seems contrary to other parts of the legislation

vi) the measure of 'level of trade' is not defined - does 'trade' amount to turnover, gross profit or net profit ? We would suggest that 'trade' should encompass net profit. Some impacts could have little effect on sales but great impact on profitability, particularly where we might be considering increase in wholesale tied price of goods supplied. It is tied terms and the ability to manipulate and abuse the power of price variation that forms part of the foundation for the necessity for legislation.

Q.11 Can you suggest any other circumstances that would be likely to have a 'significant impact' on the expected business of a pub; and that you believe would not be covered by the proposed definition in the Code?

A.11

The restriction of key drinks and or brands may result in such an impact, i.e. POB ceases to keep an account going with the nearest brewer and the products from the brewer form a significant part of the existing drinks offer and customer demand. Consideration should also be given if the nearest competitor pub is trading in a demonstrably unlawful manner such as failing to pay for commercial SKY / BT Sports which again is a key pub offer for many and expensive when supplied lawfully.

MRO-compliant agreements

Q.12 Do you agree with the distinction drawn between an MRO compliant agreement that arises from a request for MRO at renewal and an MRO compliant agreement that arises from a request for MRO during the course of the tenancy?

A.12

We wish to support our answer with reference to the following points laid out in the consultation document see points 9.5 & 9.11:

No. Put simply, say a tenant, having taken a 20 year tied lease, hits their rent review (after 5 years) is able to consider a new MRO agreement, paying a rent only and severing the tied terms. This provision (see 9.11) then means that despite having 15 years to run on their tied agreement they must surrender this protection, if they take MRO option, and be forced to accept a 5 year only MRO

agreement. This conflicts with 9.5 - in offering less protection - and raises the additional question of lease renewals. We propose a tied tenant faced with a rent review, allowing them to consider MRO option, should be entitled to the same terms and conditions, the revised term in their proposed new MRO agreement being **equal to** their unexpired term. There should be nothing to restrain the pub owning businesses offering alternative tied terms at any time during the remained of the MRO term for the tenant to consider. In view of the above 9.11 should read "...the new agreement must be for a minimum of five years or the remaining term of the existing tied tenancy WHICHEVER IS THE GREATER, for a maximum of 15 years..." this emulates existing legislation concerning lease renewals (LTA 1954 Pt II).

Assuming a tenant is at lease renewal, which is at the end of their term of their agreement (as opposed to rent review which is periodic, 5 yearly, throughout the term) it is proposed they are entitled, if they are protected tenants, to renew on the same terms and conditions as their previous agreement AND have a MRO option.

Following a tenant's application to renew the court can, and usually do, determine a new agreement either equal to the old agreement term or 15 years whichever is **the greater.** There are circumstances where a court may vary this decision but that would very much depend on the pub owning businesses objection to renew according to the tenant's usual legislative rights. We would suggest the assumption should be that a tenant's rights to renew remain unchanged and that they are entitled to a 15 year term (assuming they previously had a 15 year + term) unless a court decides to the contrary having considered the respective rights and objections.

We do not consider 5 year maximum term MRO agreements will see the changes come into effect that we are seeking to encourage.

Our concern is that POB's will be using the flexibility offered in the current proposals to create agreements with no MRO opportunity. 5 year agreements with no rent review, or longer agreements with a waiver at the outset.

Q.13 Do you support the requirement that an MRO-compliant agreement should provide for an open market rent review every five years? Please explain the effect of such a requirement on the commercial relationship between the tenant and the pub owning business in an MRO agreement MRO procedure

A.13

Yes - every 5 years would be normal, as it is in any tied agreement. Existing free of tie agreements have periodic rent reviews as do most normal commercial agreements - 5 years is typical but other periodic review periods do fairly rarely exist (e.g. 3 years and 7 years but usually in older agreements due to differing agreement terms, 14 or 21 years). The POB should be entitled to rental increases where circumstances dictate they are appropriate just as they do in any normal commercial agreement.

The problem is that POB's will resist offering a MRO agreement that exceeds 5 years at renewal and if 9.11 is permitted a tenant at review choosing MRO will have a maximum term of 5 years also - the Pubs Code proposals are creating loopholes which will result in few MRO agreements having terms of more than 5 years so no rent review will occur.

If MRO agreements were of more than 5 year term the effect of this requirement would enable the relationship between the parties in an MRO agreement to have more equal terms, presenting a more level playing field for negotiation. The only downside being that rent only pub agreements may be subject to indexed annual increases AND upward only rent reviews which may not reflect the

actual rental value (as inflation may not reflect profitability which is the foundation of pub rent valuation).

Q.14 Does the list of required documents set out in paragraph 10.23 provide the independent assessor with all the appropriate information to make an independent assessment of the MRO rental figure? Should any other documents be added?

A.14

We wish to support our answer with reference to the following points laid out in the consultation document:

10.23 iii. POB@s may be restrained by data protection laws from disclosing some or all of this information for this reason we would propose vii. below.

Information provided to the tenant should also include:

vi. the POB's shadow profit and loss on which they calculate the rent (effectively their rent assessment). vii. As rent assessments are not confidential (as they are estimates and assumptions based upon a hypothetical tenant) the POB should provide their rent assessments on other pubs, in their ownership, considered comparable by the tenant or the IA. By so doing rent assessments of the pub in question and comparables, all of which are hypothetical, can be considered. viii. This includes the provision of historical flow monitoring reports or documents and a written indication as to whether the data has been changed or subject to manual input after it was recorded. This applies even if the monitoring equipment has been removed or no longer used.

10.11 By new form of agreement we assume Government simply mean a commercial agreement in which product and service ties are severed (with the exception of insurance that can be reconsidered in Pubs Code review if necessary) but all other agreement terms remain as before. In accordance with 9.5 new MRO agreements should offer no more or less protection.

Q.15 Do you have any comments on the timescales for the MRO procedure proposed for the Code?

A.15

10.12 Diagram 1 (referred to) outlines a timetable for MRO procedure - time appears to be of the essence therefore if a tenant misses a deadline they lose their MRO opportunity, the consequences for a POB missing the deadline are not likely to be of such comparative importance which seems disproportionate. The latter said an intended timetable is welcome BUT we feel should be capable of flexibility where necessary, either with both parties consent or by Adjudicators discretion following application by one of the parties.

10.18 We consider a fixed term of 70 days 'negotiation' is too long. The negotiation period could be 70 days maximum but either party should be able to notify the other of intention to go to Assessor at any time during the process and bring the process to a conclusion well before the 70 days is up - notification of deadlock would be the best form to apply here. Application would not restrain the parties from reaching an agreement at any stage during the procedure and indeed may promote a swifter settlement.

10.24 21 days for the IA is not enough time. In existing dispute resolution mechanisms the IA would issue directions and timescales for, inspections, the presentation of a statement of agreed facts, respective submissions and counter submissions. Directions would include what information may

and may not be submitted (e.g. without prejudice documents). Typically once appointed an IA process may take around 45 days.

Q.16 Do you have any views on the proposed circumstances in which the MRO procedure will come to an end? MRO disputes

A.16

No

Q.17 Do you have any concerns about these proposals for the resolution by the Adjudicator of disputes related to the MRO procedure? If so, please explain your concerns.

A.17

The biggest one is the 14 day deadline - no normal rent review is concluded in such a short window infact many take at least 6 months from the due date to be started by the tenant as they know from historic trading negotiations that the results are backdated. The code proposal to fix the cut off for complaint at 14 days is unwarranted and flies in the face of industry accepted timescales.

We very much approve of the apparent 'appeals' procedure outlined in 11.6. This has been an obstacle in existing dispute resolution mechanisms. Given the amount of conflicts of interest amongst industry professionals an appropriate higher authority (the Adjudicator) as a last point of appeal should be a useful reminder upon prospective IA's that their decision is also under scrutiny but where appropriate will be supported. In the main we consider these are appropriate at the outset of this legislation - the important point is to retain a power to amend or adjust the Adjudicators resolution powers.

Waiver from MRO in return for significant investment

Q.18 How do you believe the "amount" of investment for the purposes of "qualifying investment" should be defined? Please explain your view by reference to the type of rent payment and percentage which should be used, with evidence to support your response.

A.18

Dry rent and wet rent are variable depending on the type of operation of the pub in question - a wet led tied pub 'should' have a low dry rent and a comparatively high wet rent, a food led pub, tied on beer, might be the opposite. For this reason we prefer the concept of the combination of dry and wet rent as a baseline (as outlined in 12.14) and that we consider the qualifying amount should be at least 200% of the combined rents. There may be dispute over the amount of wet rent as POB's will claim a lower wet rent than the tenant perceives to be the case but we are hopeful, as waiver for investment is not mandatory, that should be ironed out in the negotiation process.

If the decision were made to use dry rent only then we consider the amount should be at least 400% of dry rent.

The reason being that the tenant is being asked to forego MRO option which means, by the Government's estimates, the tenant is relinquishing the right to around £10,000-11,000 a year. Assuming this waiver is for a period of say 5 years the average tenant (paying an average rent of £27,000, has lost over £50,000. The investment whilst offering a ROI to the POB needs to at least be seen to anticipate the tenant does not lose out.

(see 12.17) A significant danger area is the practice of over estimating investment works and is witnessed time and again on dilapidation claims. The schedule of investment and amount need to be

agreed between the parties but we foresee manipulation will be rife and this will be one of the earliest investigations undertaken by the Adjudicator. Ordinarily we would expect a schedule of work to be prepared and the tenant being offered the opportunity to price match - if lower estimates can be established the waiver period could be reduced. it is worth noting that POB's rarely make defensive investments - see expanded answer to Q.19

Q.19 Do you agree with the proposed definition of "qualifying investment" in terms of the "type" of investment? If not, please explain why not, and suggest an alternative definition, with evidence to support your response.

A.19

PubCos rarely will engage in "Defensive Investment" i.e. maintaining the capability of the Pub to continue to achieve what it is in a developing market. This is not dilapidation which is about maintaining an existing state of repair but, for example, the modern requirements for this type of venue vs what they were 15 years ago. Defensive investment maintains the ability of a Pub to deliver its current performance so should not attract any rent increase or reduction of other tenant rights.

By way of example 10 years ago an airline might have purchased an aircraft of the most modern design to meet then current market demands. The aircraft has been maintained scrupulously and still meets all current airworthiness requirements. But it has had no defensive investment, so its sound systems, in-flight movies and wifi capabilities are still of the era of 2006. This aircraft is now unattractive and people want to travel on more modern aircraft which are up to date.

In the Pub context a tenant can be assiduous in meeting his obligations to eliminate dilapidation but without unrented defensive investment he cannot maintain his market attractiveness and market share in particular in a flat or contracting market this is a major problem.

PubCos "investing" in pubs locally do so with the objective of transferring a flat quantum trade from one venue to another – the invested venue benefits and, may be able to pay the increased rent– providing the required ROI, if the tenant benefits is questionable. But that trade has been taken from other local pubs, frequently in the same estate, who are now disadvantaged, while the other pubs survive, the PubCo continues to enjoy the dry rent from the un-invested pub while the wet rent is transferred to the invested pub. The un-invested pub has no recourse and may fail owing HMRC large debts or must subject itself to a rented, MRO exempt, "Investment" in order to try to bring the lost trade back. That this kind of investment should attract an MRO waiver is perverse because of the concentration of the various Pub estates, it amounts to betterment by stealth and partner bankruptcy.

Cash is preferred type, the investment which is pre-supplied by pub owning companies via their tradesmen or design team is often "marked up" and not of good value if the tenant was free to source it themselves.

Q.20 What do you consider should be the maximum length of the waiver period (a) 7 years; (b) 10 years; or (c) another option? Please provide an explanation for your answer and any evidence to support your case.

A.20

7 Years. Rather than waive the next rent review a deed of variation can postpone it.

12.20 There should be a maximum period by which the investment works have to be undertaken. A POB could agree with a tenant a waiver in exchange for investment, denying the tenant's MRO options, and thereafter simply not undertake the work. If the works are not commenced/completed by a certain agreed deadline then the tenant's MRO option is re-implemented.

Q.21 Do you agree with the safeguards proposed by the Government and the role proposed for the Adjudicator? Are there other safeguards that you consider should be provided? If so, what and why?

A.21

Agreed but in addition tenant's should be made aware of the likely earnings they may forgo if they waive MRO rights (by the provision of a rent only rent assessment by the POB and be clearly directed to all information resources (on Adjudicators website ?) in order to establish alternative views of such an assessment.

(see 12.25) In addition to that stated, the waiver should have no effect if the investment is not undertaken by an agreed date outlined in the waiver agreement.

Q.22 Do you believe that there are any unintended or undesirable consequences of the proposed definition of "qualifying investment" or of other conditions referred to in this chapter on the MRO investment waiver?

A.22

Yes by far the biggest issue is that the investment proposed by the pub owning company (as a waiver to MRO) would be lower in cash terms than the projected transfer the Government had identified, when taken over the period of the waiver they are seeking, see transfer to tenants in the Government impact study. (London Economics report)

Investment in pubs already occupied by existing tied tenants is, in our experience, rare. We foresee this as an opportunity for POB's to claim to have conducted investment, on recently vacated property, and present new agreements, which have no MRO opportunity, for the maximum waiver period. Given the level of churn this could become prolific and as a result the definition of qualifying investment and amount is paramount. We perceive POB's will undertake a 'sparkle' refurbishment allocate an inflated investment value to it and claim the works fall within the definition of 'qualifying investment' by so doing they will claim to be entitled to offer a new 10 year lease with a waiver of the first, and only, 5 year review.

Do you have any other comments that might aid the consultation process as a whole?

A. Significant increase is unworkable as the wholesale price for beer is artificial and disconnected from the "street price" of beer

B. Overall Government have to remove the concept of MRO simply leading to a reduction in term to just 5 years – it was not in the SBEE bill and makes the whole process unworkable

C. Our members have also submitted individual responses and where they didn't answer may have indicated that the answers given above infact reflect their views as members of the PAS

The Pubs Code and Pubs Code Adjudicator: Part 2 - response form

Name: Chris Wright

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Please tick the box below which best describes you as a respondent to this consultation.

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I want my response to be treated as confidential No

Market Rent Only option and Parallel Rent Assessments

Q.1: We believe the stated MRO procedure, that will give tenants a free-of-tie rent offer alongside a tied rent review proposal, will enable tenants to make an informed judgment as to whether they will be no worse off by remaining tied and fulfils the objectives of a Parallel Rent Assessment. If you believe that this does not achieve the goal, please give your reasons why.

A.1

It would if MRO option was being offered unconditionally at rent review - the proposed condition that MRO option is only available at rent review where a rent increase is made ensures that the goal can not be achieved. We welcome the clarification in Part 2 that it plans to ensure that its approach

to the MRO option (set out in Part 1 of this consultation), along with the requirements to provide information in relation to a tied rent offer (set out in Part 2), fulfil the objectives of a PRA.

see 6.21 There is an issue where Regulations refer to a 'MRO offer' it should read 'rent only offer' or 'free of tie offer'. Market rent is defined in the SBEE Act, it does not follow that an offer from a POB, accepted by a tenant, would be market rent. Either party could have acted without necessary knowledge, possibly imprudently or even with compulsion. Therefore this must be amended in the Pubs Code in order that any ill advised acceptance of a rent only offer put forward by POB's are not later inappropriately used as 'Market Rent' evidence against other tenants in rent review or lease renewal proceedings.

see 6.27 Part 2 see 9.11 of Part 1 there is an unacceptable proposal that the new MRO agreement can not be more than 5 years, regardless of the unexpired term of the tied agreement. In order to effectively compare the rents of tied and free of tie offers the duration of the agreement term should be equal where at all possible, e.g. the rent for a lease of 5 years and a lease of 20 years, all other provisions being the same would probably differ (the 5 years term rent being lower).

see 6.28 (bullet point 2) Is the tied tenant, who considers their tied rent is unfair, being offered no remedy (assuming the proposal for conditional MRO option at review were adopted) ? What is the remedy at rent review if a MRO option is not offered and the existing tied rent leaves the tenant worse off than if FOT ? It appears that the tenant can refer their tied rent offer the Adjudicator where they feel there is a breach of the code. Given that the code's primary objectives include ensuring a tied tenant is no worse off, if the tenant can establish using the PRA/MRO procedure (despite not having a MRO option) that their tied rent is leaving them worse off than if they were free of tie then they presumably can refer the rent to the Adjudicator - this has the potential to create a huge burden on the Adjudicator and will necessitate the Adjudicator determining 'no worse off' tied rents. It was understood that the purpose of an open, unconditional, MRO option at rent review was to be the remedy if tied rents left a tenant no worse off, allowing market forces to control tied rents, NOT that the Adjudicator should have the added responsibility of determining tied rents.

see 6.29 The process as proposed only allows tenants with a proposed rental increase to make an informed choice between the tied rent figure and a free-of-tie rent figure and ensure they are no worse off under a tied rent. This is not acceptable and does not reflect the will of parliament or the spirit of what has been understood by all, even the POB's to be the legislative intent.

see 6.31 distinction needs to be made between 'new tenancy' and a 'renewed tenancy', which may also inadvertently be described as 'new'. A new entrant to the industry agrees a new tenancy but has no MRO option whereas an existing tenant at renewal may agree a renewed tenancy AND has the MRO option.

Q.2: We would welcome your comments on whether, in addition to the other information requirements of the draft Pubs Code, the documents provided for in Schedule 3 of the draft Code and described in paragraph 10.23 in Part 1 of this consultation are sufficient and appropriate for calculating a meaningful free-of-tie market rent that will allow tenants to make an informed judgment as to whether they will be no worse off by remaining tied.

A.2

We would also request that the POB provide flow monitoring data reports for the previous 5 years and an indication given as to whether this is in fact raw and unchanged data or if it is data that has been changed via manual input or editing by the monitoring company collecting it and a reason why it has been changed if requested. Insert at Schedule 3 - 1(i) This includes the provision of historical flow monitoring reports or documents and a written indication as to whether the data has been

changed or subject to manual input after it was recorded. This applies even if the monitoring equipment has been removed or no longer used.

see 6.20 It has recently come to our attention that the issue of saleable content needs to be addressed. Most POB's have consistently advised both new and existing tenants that the yield from a 9 gallon (72 pint) container of cask ale is 72 pints of saleable beer. In our experience this is not true and is confirmed by the duty paid by brewers on these containers (duty typically being paid on c68 pints). With the latter in mind information provided to tenants needs to include 'realistic' yield information from containers in order to establish a more accurate level of gross profit for the purposes of rent assessment.

see 6.32 What is lacking for new entrants is information ensuring they are aware of what they may earn, and pay in rent, in respect of both a FOT and tied agreement. PRA was proposed for new entrants and should be maintained in order they can make informed business decisions and/or seek professional advice.

Q.3: If you believe that the combination of current proposals will not adequately deliver the no worse off principle or does so in a disproportionate way, please give your reasons and, where relevant, provide evidence.

A.3

The question that needs to be asked is 'how could a POB circumvent the key objectives of the legislation ?' As the proposal stands it's fairly easy - A POB can obstruct lease renewals using the grounds that they may want the pub back for their own occupation - forcing a horse trading deal where the tenant surrenders to a short 5 year term with no MRO option (as there is no rent review). Then at rent review rely upon inflationary annual rent increases and monopolistic control of tied product price increases instead of proposing rent increases at review. We foresee that as proposed few tied tenants will ever get the opportunity to consider a MRO option, lease renewal tactic is already being used. Frankly the POB's are well ahead of the Government proposed legislation and already negating the impact.

see 6.15 PRA is an essential tool regardless of whether a tenant has the right to a MRO option or not. In order to be able to establish they are, or are not, worse off than if they were free of tie. Just because a rent proposal at rent review does not request a higher rent it does not follow the existing tied rent is either fair, reasonable or leaves the tied tenant no worse off. <u>This is one of the primary reasons that ALL tied tenants (of complying pub owning businesses (POB's) should be offered a MRO option at rent review (or every 5 years) regardless of the rent proposal made.</u>

see 6.18 If the MRO option at rent review is to be conditional (such as only in the event of a higher rental proposal) then the TIED rent needs to be subject to scrutiny by an independent assessor authorised by the Adjudicator. Again this is why there should be no conditions on MRO option at rent review, the mere presence of an open MRO option at this time to tenants is the catalyst to encourage fair and reasonable tied rents <u>using market forces.</u> If the tenant has no MRO option then the pub owning business (POB) can simply rely on the inflationary annual rent increases and their total control of the tied product prices. Making MRO option unconditional negates the necessity for a tied rent assessment adjudication system to be in place and reduces the burden on the Adjudicator.

There appears to be no proposal in the code to deliver the no worse off principle to tied tenants where unless the rent proposed at review is higher than rent passing - this appears to be based on the false assumption that the existing rents (perhaps inappropriately set in the past or increased by inflation) are already 'fair' and is quite incorrect. A review of previous consultations and select committees highlights the issue of existing rents very clearly.

Q.4 What would be the effect of removing from the draft Pubs Code Regulations the condition that there must be a proposal for an increase in the rent at rent assessment before a tenant may exercise the MRO option?

A.4

It (upward only rent offer) renders the whole code unworkable and only a very small number of pubs would trigger MRO if left as proposed, the POB's would simply rely upon RPI from an already high dry rent to maintain the unfairness and keep the status quo. Therefore we insist you remove clause 15 (b) from Part 4 of the Statutory Instrument as it fails to meet the stated objectives of "no worse off or levelling the playing field"

The effect (of removing it) would be to deliver the legislative intent and what was expected by the House of Lords, Commons and industry. This condition, apparently slipped in without any consultation, was met with outrage by us and practically negates the purpose of the Act. Following the release of the FOI's it appears no POB or any other party suggested such a negative condition which begs the question where did it come from. Both Ministers (Baroness Neville Rolfe and Jo Swinson) assured the respective Houses that MRO option would be delivered at rent review. Indeed even the Government's own fact sheets expressed :

"The Government's amended MRO clauses also provide tenants with the added protection of the right to a Market rent Only agreement at certain trigger points :

- *At rent review (or every 5 years after the tenant's latest rent review, which ever is the sooner)"*

At no time was there any mention of conditions indeed the power to impose such we believe is not conferred by the SBEE Act and if permitted opens the opportunity for judicial review. Tied agreements already contain provisions where a POB can sever the tied terms at any time, for any reason, requiring a rent review to reflect the new FOT terms (no other changes to the agreement are allowed for and there is no necessity for a new agreement). Essentially, POB's have an unconditional MRO option which they can activate at will. To be truly proportionate (and levelling the playing field) the MRO option should be operable by tenants on the same terms. In order to deliver no worse off in a measured and controlled way tenants groups have at this time agreed to a compromise whereby the MRO option is offered at rent review. Tied tenants are seeking an unconditional, open, MRO option at 5 yearly intervals.

Q.5 It would be particularly helpful to receive evidence of the percentage of rent reviews that have resulted in a freezing or reduction of the rent over the last three years; of the prevalence of annual indexation provisions and other inter-rent review arrangements in tenancy agreements; the typical increase in the amount payable by the tenant that they result in; and the way in which these are exercised by the pub-owning business under the terms of the tenancy.

A.5

The amount of rent reviews resulting in a nil or reduced rent is low as the rent has increased over the term by annual inflationary increases. The majority of occasions, we are aware of, where rent has been reduced is where a tenant employs the services of a professional to act on their behalf. Typically, as this is a negotiation, the POB will commence with a proposal of an increase or nil increase, even where they recognise the pub is over rented. Offering a loophole where a POB can simply rely on inflationary increases and propose no 5 yearly increase is without merit and simply encourages existing unfair tied rents to increase annually by inflationary measures. What we are seeking to achieve is a rebalance of risk and reward for existing tenants and not leave them in the

same position they are already in, a position that ironically led to the necessity for intervention being brought in.

Q.6: Do you agree that these are appropriate conditions to be met before it becomes mandatory to provide specified information to a prospective tenant?

A.6

Yes

Q.7: Do you agree that a pub-owning business may not require a prospective tenant to submit a business plan unless the tenant is a qualified person to whom it has provided the specified information?

A.7

Yes

Q.8: Do you agree that where a change in the tied rent is proposed during the course of the tenancy agreement, the tenant should be provided with a revised rent proposal? Should all of the Schedule 2 information be required; or only those elements that have been changed? Should all of the Schedule 1 information be provided at the same time?

A.8

Yes - Everything in Schedule 1 & 2 information should be provided.

Q.9: Should a rent proposal be required in all cases where there is a change in the rent during the tenancy? Would there be any merit in excluding changes that are automatic or agreed in advance (for example, annual indexation provisions); or that are of a temporary nature (such as rent 'holidays' to provide short-term relief to the tenant)?

A.9

We consider that rent proposals are only made where the rent is open to negotiation. In view of the latter we do not consider, at this time, there is a necessity for a rent proposal in connection with an annual indexation provision but there may be a necessity where a rent of a temporary nature were proposed as these kind of offers typically have other terms attached.

Q.10: Do you consider that these measures on repair obligations provide an appropriate balance between the rights and duties of pub-owning businesses and those of their tied tenants?

The Pubs Code – arbitrable provisions

A.10

Yes. Also in terms of 8.27 of the consultation, the [correct] requirement for a pub-owning business to obtain statutory safety certificates to allow trading to take place needs to specify that this means trading for food, where promotional material advertising the pub specifies that significant food income is obtained from the site. The site needs to be fit for purpose.

Q.11: In the draft Code are there any provisions that you consider should be specified as nonarbitrable? Please explain the advantages of doing so.

A.11

We consider breaches of any element of the Code should be capable of referral to the adjudicator for consideration and arbitration where necessary.

Contractual inconsistencies with the code

Q.12: Do you have any comments relating to the proposals for void and unenforceable terms?

A.12

Yes. Change Part 12-41 (3) A flow monitoring device and its ancillary equipment means a device which is attached to the beer lines at the tied pub, this device may be owned, rented or installed by the pub owning business or its appointed contractors.

a) to measure the volume of BEER being sold by the tied tenant. - (remove the word alcohol and amount) Then insert: c) that is prescribed under the Weights & Measures Act 1985 d) that the device is installed in such a way that it is fully accessible by the Food Business Operator and that they are not being prevented from inspecting or accessing any part of the device or that its installation reduces access to their food equipment e.g. beer lines or fob detectors. This is in order that the FBO can carry out manual cleaning and to confirm that hygiene is not compromised by the device and ensure that the weekly line cleaning regime is effective and supported with visual analysis, thereby ensuring that the FBO can fully comply with HACCP, Safer Food Better Business Regulations e) that the device meets Regulation (EC) No 1935/2004 f) that all the device's CE documentation and declarations of conformity are left on site so they can be inspected by the Food Business Operator in the formation of HACCP or other FBO policies and to assist insurers and or any statutory bodies.

In general the high standards found in FOT pubs should not be reduced in tied pubs because POB's want to measure beer. The BIS should raise standards not reduce them through an unintended consequence as they risk forcing FBO's to breach ever stringent food laws. The highest possible conditions of flow monitoring device operation must apply if POB's are to introduce equipment that piggy backs onto the food equipment already found in a pub, the reasons should be obvious - it is a continual desire by FBO's to reduce risk to the public health in accordance with lawful and correct procedures and to keep beer quality in a tied pub symmetrical with beer found in a FOT pub. No-one has to die the consumer simply has to experience difference and Pubs are increasingly aware of how high this standard needs to be in a pub as witnessed in the case of "Rare or Medium Rare Burgers". We request you read the following from leading brewing industry microbiologist Karin Pawlowsky who covers the risks we have highlighted:

One of the main reasons for unsatisfactory beer quality is microbiological contamination. Although the drink itself has a significant antimicrobial effect, a small number of bacterial and yeast species are resilient enough to survive and grow under the conditions in beer

"One of the most significant challenges for the brewer is with draught product. Beer for draught dispense is generally packaged in keg format and transported to the dispense outlet (the bar or pub). Here the keg is connected to the dispensing system where beer travels from the keg in the cooled cellar, through dispense lines (typically 40 to 50m long), to the tap in the bar area. Even though the brewer delivered an immaculate beer, the drink at the tap may be unacceptable to the consumer if the dispense equipment has become contaminated with spoilage organisms.

Contamination control

Contaminated equipment in the pub **has the potential to significantly damage the drink's quality, thereby risking loss of consumer loyalty**. When beer is sold in glass all the equipment in contact with the product, such as beer lines and taps, should be microbiologically clean in the first instance and should be kept clean by regular cleaning regimes which, in the case of cask conditioned beer, should be at least weekly. Additionally, it is critical that pub managers and their staff are suitably trained to raise their appreciation of the effect of poor hygiene on beer quality and to improve their understanding of the correct procedures to follow." Source:
http://www.campdenbri.co.uk/news/brewery-dispense-hygiene.php

see 9.5 In addition to the express items considered fundamental breaches of the Code should be breaches of the Codes (and legislations) primary objectives. Contractual terms that are found by the Adjudicator to be contrary to the objectives, "to ensure fair and reasonable and tied tenant is no worse off than if they were free of tie", should be void and unenforceable. The Pubs Code should clearly express the same.

Extension of code protections

Q.13: Do you have any views on the extent of the extended protection that is proposed? Group undertakings

A.13

Government knows that tenant groups proposed that all protections should be extended including MRO in the event of a sale to an alternative POB that fell under the legislative threshold. It has always been our view this it is the tied terms in the wrong hands that provide the opportunity to undertake bad practice and abusive behaviour. The ability to restrict tied product choice and increase tied product price remain the weapons of choice to developers seeking to effectively evict tied tenants in order to undertake redevelopment and prove the site was unviable. We strongly believe that the absence of this protection will prove to be a mistake.

Group undertakings

Q.14: Are there any elements of these proposals regarding group undertakings that you think would not work as intended or that require amending?

A.14

We are of the view that s.71 of the SBEE Act should have offered the power to not just exempt but to include new and novel types of pubs models and individual companies. This way, in the event of situation like what we are seeing with emerging pub companies like New River Retail, then the Adjudicator could require they must comply with the legislation.

Exemptions from the Pubs Code – genuine franchise agreements

Q.15: Please comment on the key characteristics of a genuine franchise agreement as set out in Table 1. Where you think a characteristic should be amended or removed please set out your evidence as to why. Similarly if you think further characteristics should be added please set out your justification as to why as well as an explanation of what should be added.

A.15

We are not aware of any commitment to exempt genuine franchises, that there was simply a commitment to consult upon whether they should or should not be exempt. We are naturally very concerned that a new "doorway" will be opened and manipulated and remain strongly of the opinion that protections should be offered to franchisees too. POB's will seek to convert agreements that clear the definition hurdle and thereby avoid MRO.

Q.16: Do you agree with the Government's proposals for 'reasonable piloting' of the pub franchise model. If not, please explain your answer.

A.16

Yes.

Q.17: Do you agree that the Pubs Code information requirements that are indirectly related to rent such as the signposting to sources of benchmark information and the provision of historical trade

information should apply to genuine pub franchise agreements? If you disagree please clarify which requirement(s) is of concern, suggest any deletions and/or amendments and justify your arguments.

A.17

Some information may still be appropriate. Anything that will ultimately reflect upon the tenants earnings should be disclosed, e.g historic trading information we would consider may be a necessary information disclosure.

Exemptions from the Pubs Code – tenancy at will and short-term agreements

Q.18: For how long should tenancy at will or other agreements be granted exemption from the Pubs Code? Please explain the rationale for your answer and provide any evidence to support your case.

A.18

TAW's are often the first to step an inexperienced tenant taking on a long term agreement. Once committed, moved house, maybe even put children into local schools and planning their resources and funds. The eventual longer term agreement when presented is then very difficult to refuse, despite it having potentially onerous terms that were not appreciated or discussed at the outset.

Given the above we would support a 6 month maximum exemption period. In the event the TAW is 6 months and is renewed then on renewal the tenant should automatically be offered protection.

Q.19: Do you think it is appropriate that a tenant entering into a tenancy at will or short-term agreement with a pub-owning business should have completed pre-entry awareness training prior to being offered the agreement? Please explain the rationale for your answer and provide any evidence to support your case.

A.19

Yes as the new inexperienced entrant to the trade might move from a short term agreement into a long term agreement having never done the training - then getting a waiver to training later on via the virtue of now being considered an "experienced" operator. The course content should be approved by the Government (BIS) as suitable and not misleading or too selective on key areas to be of any real use. The information incoming entrants to the trade receive is of such a crucial nature it must not be left to the trade to provide and accredit one, as seen recently some of the "awareness training" fails to give enough clarity on the simple issue of achievable sales from cask ales. The course providers are in some situations either unable or unwilling to point out that cask is subject to duty disclosure notices and how a new tenant would use them in setting your pricing or planned profit that goes into a business plan. No awareness course should caveat the content and be shying away from being transparent by saying things like "you must get further independent advice of your own" as it then fails to make people "aware" and becomes an "signposting" brochure with no higher knowledge on offer and that other people will give you that knowledge if only you seek them out. Further, any signposting may mean they never get the correct advice at all, clearly if the advice exists then the Government should ensure it is added to the awareness training and not remain a "treasure hunt" for new entrants run around obtaining it. The awareness training needs to have an agreed set of facts that can be relied upon when making a sound and informed decision to rent a pub.

Q.20: What sort of information do you consider would be useful and desirable for a new tenant to receive from the pub-owning business when entering into a tenancy at will or short-term agreement?

A.20

The same information that is listed in Schedule 1

Enforcing the Pubs Code – fee for arbitration

Q.21: If you do not agree with the proposed £200 fee please explain why and give the rationale and any evidence in support of an alternative amount.

A.21

We agree with the proposed fee.

Enforcing the Pubs Code – costs of arbitration

Q.22: Do you agree with the Government's proposal that the maximum costs that tied tenants could have to pay a pub-owning business following an arbitration should be set at £2,000? If you do not agree, please suggest an alternative level of fee, explaining the rationale for the alternative and provide evidence to support your case.

A.22

Yes. The proposed level will also encourage both parties to seek a mutually agreeable resolution

Enforcing the Pubs Code – proposed maximum financial penalty

Q.23: If you do not agree that the maximum financial penalty the Adjudicator should be able to impose following an investigation should be set at 1% the annual UK turnover of all group undertakings of the pub-owning business, please explain why and give the rationale and any evidence in support of an alternative amount.

A24

The penalty should be increased by a further 1% for further breaches of the same, in order that a penalty acts as a deterrent, changes behaviour and is not simply a tax on the business that they pay from time to time. A review of the level of penalty should be undertaken in any case.