The Pubs Code and Pubs Code Adjudicator: A Government Consultation: Delivering No Worse Off

Prepared for: Department for Business, Innovation & Skills
Prepared by: Golden Lion (Brighton) Group Ltd
18 January 2016

EXECUTIVE SUMMARY

This document details the views of the Golden Lion (Brighton) Group Ltd (GLG) in relation to both parts one and two of the governments' consolation into the Pubs Code and a pub code adjudicator.

We have reviewed the consultation documents and chosen to respond to selected areas raised within the documents and also on the wider position as viewed by our Group to be pertinent to the consultation process.

It is the view of GLG that the statutory code and adjudicator are both essential in re-balancing the landlord-tenant relationship within the pub industry and that access to a Market Rent Option is key to ensuring that this re-balancing is in line with the title of the consultation document "delivering no worse off".

PART ONE

1. RENT ASSESSMENTS

1.1. The principle that the tied pic tenant should not be worse off than a free of tie tenant is one that we fundamentally agree with. That free of tie tenant referred to being one that rents their pub on a fair and open market rental basis. This should not be by reference solely to one pub owning business's own free of tie tenants, or indeed solely pubco in general free of tie tenants, doing so would perpetuate the current imbalance.

1.2. We support the right of the tenant to request for a rent assessment in the circumstances noted in the consultation document:

1.2.1. where no rent assessment has been concluded under the tenancy agreement for at least five years; or

1.2.2. where there has been a significant increase in the price at which tied products or services are supplied under the tied agreement; or

1.2.3. where an event has had a significant impact on the tenant's expected trade.

1.3. We agree with the consultation document that a rent review should start a minimum of six months before the due date or following a request from a tenant under the terms noted in 1.2.

2. DELIVERING "NO WORSE OFF"

2.1. We agree with the need to deliver on the principle of the tied tenant being no worse off than the free of tie tenant. That free of tie tenant referred to being one that rents their pub on a fair and open market rental basis. This in no way should be referenced solely to one pub owning business's own free of tie tenants, or indeed solely pubco in general free of tie tenants, doing so would perpetuate the current imbalance. There are already examples of formerly tied tenants agreeing FOT deals with pubcos on excessive FOT rents, because the intial deal was so in favour of the pubco that even an excessively overweight FOT deal worked out as an improvement for the tenant. This has the danger of creating an unbalanced 'open' market.

2.2. It is our view that the Market Rent Only (MRO) option is the cornerstone to ensuring the principle of "no worse off" is met. It is both the mechanic to deliver no worse off and the policeman to ensure it is a principle that is adhered to.

2.3. We strongly support the requirement of the pub owning business providing a parallel rent assessment (PRA) to their tenants during the rent review process. This not only ensures the pub

owning business is benchmarking their own tied offer, but it ensures the tenant (who from experience we know not to be time and resource rich) have all the required information to make an informed decision with regard to their rent.

2.4. Whilst we agree that the MRO option alone delivers on the commitment to being no worse off we do believe that the PRA enables all sides to have the required information to make an informed decision, allowing both parties to move forward. We fail to see the arguments in opposition to a PRA put up by either side. Firstly that of the pub owning business, that a formulaic approach brings an unwarranted intervention into the commercial process, when the rental assessment being one of Fair Maintainable Trade (FMT) being formulaic itself and the only difference we can see between the rent proposal and the PRA being the application of a different gross profit margin % on sales and the valuation of the SCORFA (commercial benefits the pub owning business adds to the tenant), indeed valuing the SCORFA may well be a sensible option for the pub owning business to do, ensuring the tenant realises the benefits they bring. We also fail to see the opposition of some of the tied tenants groups that it may well overwhelm the adjudicator. In our view the PRA (if produced correctly) arms the tenant with the necessary information to make an informed decision, surely this will lead to less cases being brought to the adjudicator's attention.

2.5. We disagree that producing a PRA is a complex procedure. As we have noted in 2.4 it simply requires a change in gross profit margin% achievable and the factoring in of SCORFA. This is not a difficult process.

3. MARKET RENT ONLY OPTION

3.1. We agree that one of the triggers for the right of the tenant to request an MRO will be upon renewal of a lease that is protected under the Landlord and Tenant Act (LTA) 1954. We have concerns that pub owning businesses will seek to provide opted out tenancies as a means to avoid MRO requests and feel that renewals of opted out tenancies should carry the same rights of the tenant and that the request for an MRO should be made following a rent proposal from the pub owning business, this measure to ensure that the MRO request doesn't lead to opposition to any renewal, the pub owning business having already signalled its intention with a new rent proposal. It also ensures the pub owning business doesn't have a long-term tenant on a rolling tenancy that has no access to an MRO.

3.2. Our greatest concern with the entire consultation is the trigger for MRO. We fundamentally disagree with the consultation documents proposal that the right to request an MRO is only triggered when the rent proposed by the pub owning business is higher than the existing. This singularly fails to deliver the principle of "no worse off". Indeed this may well penalise some of the pubs most in need of re-balancing. Where the rent is already too high the tenant will have no right to MRO and will continue to pay too high a rent simply on the basis of the pub owning business keeping their rents the same. It is the very need to re-balance that has brought us to this place, to

deny a tenant the right to request an MRO purely because their rent hasn't risen at review penalises those who are most in need and ensures the failure of the governments intention of delivering "no worse off".

3.3. We agree with the tenants right to request an MRO where there has been an event which has a significant impact on the level of trade that – in the absence of that event - they could reasonably have expected; and where the impact is beyond their control; and where it could not have been foreseen.

3.4. We disagree with the definition that a request can only be made if it is specific to the tenants pub. This is clearly a bizarre situation that enables the pub owning business to avoid any MRO request simply because it has a number of pubs in an area or in a specific circumstance and in so doing fails to deliver the principle of "no worse off", by its very nature it will penalise urban pubs.

3.5. We also disagree with the definition that it shouldn't result in an increase of the expected trade over the following 12 months. Firstly this would be impossible to police as it would require disclosure from the tenant following MRO option being taken and consequently the divulging of commercially sensitive material and secondly penalises good business and hard work.

4. MRO-PROCEDURE

4.1. We agree with the six month maximum timetable for an MRO procedure.

4.2. It is our view that some consideration needs to be given when a tenant requests an MRO and the pub owning business and tenant cannot agree on terms of the MRO, this then going to the adjudicator at the end of the rent review procedure. It will be self evident that the tenant has opted for an MRO feeling that they are worse off under the tie. However during any adjudication process it is likely the tenant will remain worse off until an agreement be made. It is our view that the arbitrator should have the power to compensate the tenant if they feel the pub owning business delayed any agreement or caused the adjudicator to be involved by setting too high a bar in the previous negotiations with their tenant. In these circumstances it should not be the tenant who remains worse off and should be compensated. We don't see the need for this to be applied in reverse as the pub owning business will still be receiving the previous rent and terms until any adjudication is made.

5. WAIVER FROM MRO IN RETURN FOR SIGNIFICANT INVESTMENT

5.1. It is in the interest of both tenant and pub owning business to allow for an MRO waiver in return for a significant investment however we believe this is an area that needs serious consideration with significant being exactly that. This must not be an avenue available to pub owning businesses to deny their tenants a request to go for an MRO following any investment that isn't considerable. This must also be subject to control to ensure a waiver isn't indefinite and that the tenant is in receipt of all information regarding how the waiver results in a return on the investment for the pub owning business in both wet and dry rent. To this ends we believe each waiver should be entered into by genuine mutual agreement for an investment that as a minimum requires planning permission and that a timescale should be applied to the waiver after which the tenant would be again free to make a request for MRO.

5.2. We see the simplest way of policing any mutually agreed waiver to allow for a return of investment of five years during which no further rent review can take place. This which would then allow for an MRO request when the investment has provided a return for the investors and a new rent can be set with the availability for an MRO to the tenant should they feel the new rent levels don't deliver the no worse off principle. It should not be ignored that any investment should still provide a greater return for both tenant and pub owning business long after the waiver period and consequently we see no reason for return periods in excess of five years.

PART TWO

6. MARKET RENT ONLY OPTION AND PARALLEL RENT ASSESSMENTS

6.1. We support the requirement of a PRA alongside an MRO request. This allows for greater transparency and informed negotiations.

6.2. As it is proposed that prospective tenants do not have the right to an MRO initially it is all the more important that the trigger point of upwards only rent review is not adopted. This ensures fairer dealing with the pub owning business who are not incentivised to artificially inflate the initial rent in an attempt to avoid an MRO request at a later review date.

7. AVAILABILITY OF THE MARKET RENT ONLY OPTION AT RENT ASSESSMENT

7.1. It is our view that the removal of the condition that there must be a proposal for a rent increase at rent assessment before a tenant may exercise the MRO option is essential. Firstly, and in our opinion most obviously, if the condition remains then the very basis of the consultation, that of delivering “no worse off” is fundamentally undermined. If a tenant is worse off at the rent review process and their rent is not increased they will still be worse off and no re-balancing has occurred.

7.2. It is our view that the removal of this condition is at the very heart of ensuring the fair system and availability of MRO to ensure the principle of “no worse off “ is delivered. Failure to remove it and the whole process falls down it is that fundamental.

8. ENFORCING THE PUBS CODE

8.1. We support the discretionary powers afforded to the Adjudicator. This is a common-sense approach and allows for a case by case basis to be adopted.

8.2. We believe the fee of £200 to be fair and proportionate and costs awarded against a tenant to be limited to £2,000 to be equally fair with the exceptions as outlined in the consultation document such as a vexatious referral.