

British Pub Confederation

Standing Up for Pubs and Publicans



The Pubs Code and Adjudicator Team
Department of Business, Innovation and Skills
1 Victoria Street
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18th January 2016

Submission on the Draft Pubs Code

We are writing on behalf of the British Pub Confederation, our member organisations and the Fair Deal for Your Local campaign.

The British Pub Confederation was formed as a result of and to continue the successful work of the Fair Deal for Your Local campaign. We will work together to ensure that pubs, publicans and pub supporters have a powerful unified voice.

This is our submission to the consultation on the draft Pubs Code, first published in October 2015.

The Confederation is frustrated that the Department for Business, Innovation and Skills has failed to deliver the will of Parliament, as expressed in the Small Business, Enterprise and Employment (SBEE) Act 2015, that a tied tenant should be "no worse off" than a free of tie tenant.

We were dismayed by the first draft of the Code, which undermined the legislation, went back on clear commitments made by BIS Ministers and civil servants and ignored the will of both Houses of Parliament. The draft code has sought to weaken the Market Rent Only option, particularly the condition that the Market Rent Only option process could only be triggered if dry rent increased, effectively neutering it.

The draft Pubs Code was first published on 29th October 2015. **All our member organisations and the Fair Deal for Your Local campaign were horrified at the content - and it was clear that there had been an attempt to not only water down the Act but to negate the all-important Market Rent Only option, as supported by a clear majority of MPs.**

After protests, it was published in a revised form in December 2015. This dealt with some concerns, but it still includes measures that, if left, in would in effect negate the simple right of tenants to proceed with an assessment of their free of tie rent – and would mean that Ministers have broken their commitments made to tenants groups and in both Houses of Parliament.

There are multiple deviations in the draft Code from the SBEE Act 2015, most notable the changes to the Market Rent Only option and the removal of Parallel Rent Assessment (PRA) from Part 1. While we are pleased that some of these issues have been rectified in Part 2, such as the inclusion of PRA as part of the Market Rent Only option process, more strengthening of it is necessary to deliver the "no worse off" principle enshrined in the SBEE Act.

Greg Mulholland MP
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Member organisations

Federation of Small Businesses

Licensees Supporting Licensees

Guild of Master Victuallers

Parliamentary Save the Pub Group

Forum of Private Business

GMB

Scottish Licensed Trade Association

Fair Pint Campaign

Pubs Advisory Service

Justice for Licensees

Punch Tenant Network

Unite the Union

Protect Pubs

The key concerns that need to be addressed are:

1. The all-important **Market Rent Only (MRO)** option (the right for a tenant to pay an independently assessed rent on a free of tie basis) has been seriously undermined – introducing conditions which mean the majority of tied tenants would not be eligible to take it, which distorts the intention of the legislation and defies the clear will of both Houses of Parliament. In particular:
 - *It unacceptably restricts the right to trigger the Market Rent Only option process to situations when rent is increased – which is a clear attempt to negate the right altogether as pubcos would simply increase tied prices instead!*
 - *A waiver for investment is included for BEFORE a tenant has taken a pub, which is wrong, as much pubco investment is spent on empty properties rather than existing tenancies and often is simply pubcos making pubs fit for a new tenant.*
2. The Code has also removed protections from tied tenants who chose the MRO option, actively discouraging them from using it, which undermines the legislation and its intent.
 - *In particular, disgracefully a clause has been inserted that means that tenants opting for a Market Rent Only agreement have to sign away their existing lease (which would be for up to 25 years) and restrict it to just 5 years!*
3. The draft Pubs Code purports to offer provisions that will help protect tied tenants from pubcos charging extortionate prices for beer and other tied products, but in fact will do nothing to curb such behaviour.
4. The draft code also proposes multiple loopholes, allowing for continued abusive and manipulative behaviour of pubcos towards tied tenants to continue.
5. Part 1 of the consultation indicated that Parallel Rent Assessments would be scrapped, despite being in the Small Business Act. This undermines the transparency of information being supplied to the tenant and renders sensible consideration of the Market Rent Only option impractical.
6. The Market Rent Only option process wrongly refers to the initial rent only offer from the pubco as a Market Rent Only MRO offer - it isn't, as it is merely the initial offer from the pubco and not independently assessed as being on the basis of market rent. Calling this an 'MRO Offer' is not only wrong, but also legally dangerous – as, if accepted, it could then become legally the market rent even though it is higher.

Market Rent Only Option

Conditions regarding the Market Rent Only option trigger, once reached, must be removed. The Market Rent Only option was undermined and actually negated in Part 1, particularly through the addition of the upwards only clause, section 8.12. This meant the Market Rent Only option would not apply to tied tenants already paying extortionate rent unless the pubco further raised the rent. This means the majority of tied tenants would be ineligible for the Market Rent Only option, for pubcos would simply avoid raising rent and would increase tied pricing instead.

Our understanding is that this section was suggested or drafted due to the requests of pubcos and their lobbyists. We request confirmation of on whose instruction this clause was inserted. Several of our members have put in Freedom of Information requests regarding this, and we would like to add the Confederation's voice to the call for transparency on this matter.

The condition in Part 1 that a Market Rent Only option agreement cannot be for more than five years, regardless of the unexpired term of tied agreement must be removed, as it forces tenants to sacrifice their lease for a 5 year max market rent option. It also limits the utility of PRA, as comparing the continuing rent of a long term tied lease to a 5 year free of tie lease could be problematic – for example the rent for a lease of 5 years and a lease of 15 years, all else being equal, would probably differ, the 5 year term rent being lower.

The Market Rent Only option process

The phrase "MRO offer", as used in both Part 1 and 2, must be removed and replaced with the phrase "free of tie offer". A pubco and tenant cannot agree what a market rent is without it being independently assessed, they can, however, agree a free of tie offer at any time. Using the term "MRO offer" confuses the definition of the Market Rent Only Option, and calling the free of tie offer, which forms part of the Market Rent Only option procedure, a 'market rent offer' creates evidence of market rent standards decided solely by the pubco, which could be used when judging market rent at a later date, giving pubcos far too much influence over what can be described as market rent.

We are pleased that the process is finite, that is crucial, and we also agree that six months is the right and reasonable total length of time. However, while a clear negotiation period is important, 70 days for the negotiation period is excessive and unnecessary especially bearing the mind that negotiation will actually have started previously. Both parties know that the trigger point is coming and negotiation will happen in the run up to it, as well as in the initial 42 days process.

What is not long enough is the period for the independent assessor to come up with the market rent figure, which appears to be 35 days maximum, 21 days minimum. This should be increased to 42 days, which would require the negotiation period to be reduced to 21 or 28 days to allow this.

Another issue with the procedure is that the tenant only has 7 days to trigger the right to the Market Rent Only option, and can only do so within these 7 days. This is unnecessary and unacceptable in the context of what is a negotiation of terms of a lease and seems to be a deliberate ploy to catch some tenants out, as some could miss this if on holiday etc. So this needs to be more flexible including allow either a longer period in which they have the right to trigger the process, such as 28 days, or the ability to serve notice from before the trigger point is reached.

We have amended the Market Rent Only option process flowchart with the appropriate revised timescales and critically the replacement of 'MRO offer' with 'rent only offer' – please see the separate document also attached to the email (Appendix 1).

Tied product prices – so called 'Wholesale Pricing'

Tied product prices are too high and are a key reason for tied tenants being worse off than free of tie tenants. The draft Code fails to adequately address this, due to its use of the phrase 'wholesale price' when defining what constitutes a 'significant increase'. The so called 'wholesale price' maintained by brewers is not used when selling to pubcos, or in free trade, only when pubcos sell to tied tenants. The 'real' wholesale prices, at which beer is sold in free trade and to pubcos, are not publically advertised, so using what is effectively a pubco decided price as a benchmark fails to ensure that a tied tenant would be "no worse off" than a free of tie tenant. The tied product price list often demonstrate tied prices being more than double the free of tie price, something which has been demonstrated in numerous select committees.

Investment waiver

BIS must understand that in reality pubco investment is really more of a loan, with the money spent by the pubco then added on to rent and tied pricing, to ensure the pubco recoups the amount spent, rather than being simple investment in the real sense. Most investment is also co-investment with the tenant also making a significant contribution.

The investment waiver currently includes one for investment made when a pub is empty, before a new tenant takes it on. This is not acceptable, for it will encourage pubcos to withhold any investment from sitting tenants and rather to only invest once they have gone.

It is the pubcos responsibility to make pubs fit for new tenants and perform maintenance while there is no tenant, and the tenant should not have to pay for this work done before they took on the pub.

Conclusion

We call on the Department of Business, Innovation and Skills to further revise the code to deliver the will of Parliament. To do this BIS must deliver the Market Rent Only option as set out in the Small Business, Enterprise and Employment Act as well as in the Enterprise Bill, due to the amendment passed in the Lords. BIS must also ensure the draft Code does provide genuine measures, not hurdles, to restrain the continued abuse and manipulation of tied tenants, who have been at the mercy of pubcos for far too long.

Key things that must change:

1. The Market Rent Only option must be delivered in the code as envisaged in both the Small Business Act and the Enterprise Bill, it must be an unconditional right to trigger this at the trigger points laid down in the legislation and all additional conditions must be removed.
2. Tenants who take the Market Rent Only option must not be discriminated against and they must be allowed to continue with their existing lease for the existing length of time.
3. The Market Rent Only option process must be amended to ensure that an initial rental only offer by a pubco, which is not an independently assessed market rent, is not described as an 'MRO offer' but as a rent only offer.
4. A waiver for investment can only be allowed if it entered into voluntarily, if is for substantial investment in the pub and it must not apply in cases where a tenant is signing a new lease.
5. Parallel Rent Assessments should be included, as in the Small Business Act, to ensure there is transparency of tied agreements showing the comparison between, including for new tenants.

We look forward to engaging with you further on this, to ensure that the Pubs Code delivers what BIS have said it will and we are happy to meet to discuss this further.

Greg Mulholland MP
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Justice for Licensees

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On behalf of the British Pub Confederation and its members