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

Name: Chris Lindesay

Organisation (if applicable): Punch Tenant Network

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Email:

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

<input type="checkbox"/>	Pub-owning business with 500 or more tied pubs
<input type="checkbox"/>	Tied tenant
<input checked="" type="checkbox"/>	Interest group, trade body or other organisation
<input type="checkbox"/>	Other (please describe)

Please be aware that the Government intends to publish all responses to this consultation. Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see page 7 of the consultation document for further information. If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

I want my response to be treated as confidential ~~Yes~~/No

The Punch Tenant Network has been actively collaborating with other groups on developing a comprehensive response to this consultation and in general supports the comments made by The Pubs Advisory Service, PAS.

In a couple of specialized areas we would like to add individual comments.

Failure to respond to specific questions should not be regarded as expressing an opinion. Our comments here are additional to those in the Pubs Advisory Service Submission.

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Rent assessments

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

A.1 We concur with the response from the Pubs Advisory Service

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 We concur with the response from the Pubs Advisory Service

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

A.3 *The WSP or Wholesale price for beer is a highly artificial construct designed only to allow Pub Owning Companies to give the impression that their tenants receive a discount from Wholesale price. The reality is that tied tenants pay a significant premium to the "Market Price" – Market being defined as prices paid as a result of competitive negotiation.*

Pub Owning Companies need to be more transparent about the nature of the business model which should make it clear that these prices contain an element of wet rent and compensation for "Countervailing Benefits" which should be disclosed.

In the recently announced WSP increased of several breweries it has been made very clear to me that the announced increases are NOT a true reflection of the view the brewing industry has of where prices should be going but have come about as a result of pressure from the downstream value chain.

As a free of tie trader I have been informed that I will not be asked to pay anything like the announced increase.

If one looks at the historical evolution of the "WSP" one finds that over 10 years WSP for leading beers have increased by approximately 98%. The price to my pub as a tied tenant supposedly on a guaranteed minimum "Discount" increased by 88%, indicating perhaps a "increased discount". However according to BBPA statistics in the same period the "Market Price" of a pint in the pub after removing duty effects has only increased by 58%. This indicates that the tied tenant has become significantly less competitive of the long term.

The principle that a Tied Tenant should be no worse off than free of tie cannot be served without the Pubs Code adjudicator closely monitoring the true state of the market. The only price in the sense that it results in money changing hands that is not subject to "Market Forces" is the contractually enforced price demanded by Pub Owning Companies from their tenants. As is natural in a "Market economy" where opportunities arise to gain advantage these are exploited. It is therefore unsurprising that one finds evidence of exploitation in the "WSP" arrangements between Breweries and Pub Owning Companies.

For BIS to base anything substantive on this highly fictional number is perverse. The Pubs adjudicator need to be in a position to have a truly deep understanding of how this industry has been allowed to exploit its privileges with minimal government intervention for the past decade.

This significant PRICE INCREASE trigger is in any event spurious and ill thought through as any such trigger will be an immediate trigger for the entire estate for a Pub Owning Company to in effect commit suicide by increasing prices in this way would be a monumental dereliction of corporate governance and for BIS to be designing regulations in this area seems to be wasted effort. What would be more significant is the impact of differential pricing from one venue to another.

There are numerous cases of pubs belonging to the same Pub Operating Company, in close proximity having very significant differences in terms of trade, often as a result of a tenant failure, new tenant recruitment, "Investment" and Business Launch. While this might seem good news that a Pub has been "Saved" and "Invested" this is not directly growing the market for a Pubs services so any increased trade at this pub is being transferred from another Pub, frequently one owned by the same company.

In the future, as Pub Owning Companies adjust their business models to a more directly managed, or turnover rent, or other MRO exempt business model the impact on proximate pubs can be devastating, so with no significant price increase a tied tenant will be greatly disadvantaged.

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 *To anyone with a basic understanding of maths actual numbers and percentages can easily be used to mislead. A 5% increase in a price which is double what anyone pays has potential to be misconstrued as to whether it should be passed down as a number of pence or pro rata, . The reality is that a view must be taken of the impact of any price increase on a tenant in his competitive situation in the market, if a free of tie competitor is paying a lower price then a 5% increase from a lower base will result in a lower increase in the price on the bar. The same % increase to a tied tenant results in a higher increase at the bar – this is not going to result in a tied tenant being no worse off.*

As it is well known that the prices charged by Pub Owning Companies contain an element of rent then %age increases imply a rent increase. Pub Owning companies should be asked to justify why they are entitled to increase rents because the wholesale price of trade goods have moved.

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?

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A.5 *It is a cause for significant concern that government announcements for example on minimum wages will impact pubs severely. It is not clear how matters of this kind can result in adjustments to the terms of trade between a Pub Owning Company and tenants.*

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 concur with the response from the Pubs Advisory Service

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 concur with the response from the Pubs Advisory Service

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 concur with the response from the Pubs Advisory Service

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 We concur with the response from the Pubs Advisory Service

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

A.10

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 We concur with the response from the Pubs Advisory Service

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 concur with the response from the Pubs Advisory Service

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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 We concur with the response from the Pubs Advisory Service

We concur with the response from the Pubs Advisory Service

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 concur with the response from the Pubs Advisory Service

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

A.15 We concur with the response from the Pubs Advisory Service

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 We concur with the response from the Pubs Advisory Service

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. Waiver from MRO in return for significant investment

A.17 We concur with the response from the Pubs Advisory Service

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 We concur with the response from the Pubs Advisory Service

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.

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A.19 We concur with the response from the Pubs Advisory Service

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 We concur with the response from the Pubs Advisory Service

Q.21 Do you agree with the safeguards proposed by the Government and the role proposed for the Adjudicator? We concur with the response from the Pubs Advisory Service

or? Are there other safeguards that you consider should be provided? If so, what and why?

A.21 We concur with the response from the Pubs Advisory Service

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 We concur with the response from the Pubs Advisory Service

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

Name: Chris Lindesay

Organisation (if applicable): Punch Tenant Network

Address: The Sun Inn,

Email: m

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

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	Tied tenant
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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 We concur with the response from the Pubs Advisory Service with the following additional comments:

Providing that the information contained in the offer is capable of being validated against reliable benchmarks however, note must be taken of the configuration of the pub and its layout which can make big differences to operational costs. Industry standard % of turnover figures can be very misleading. The factors on pub configuration which have been taken into account should be required data and should be disclosed along with impact on profitability of configuration changes. These factors will include, Layout, length of dispense lines, service areas- minimum levels of staffing for compliance, door staff requirements, and various other factors which should be identified from time to time.

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 concur with the response from the Pubs Advisory Service with the following additional comments:

We have serious concerns over the quality of the benchmarking data series published by the BBPA and ALMR, while they are a step in the right direction as there is a definite lack of reliable information in this area, The data should be subject to much greater scrutiny. The obvious differences between BBPA and ALMR datasets unsurprisingly reflects the different perspective that each organization has on the industry. That this should be the case is troubling. For example, the BBPA seems to believe that 50/50 wet/dry sales mix is normal in rural country pubs while ALMR seems to support 70/30 – The ALMR also recognizes a much higher staff revenue ratio for dry sales than seems to be acknowledged by the BBPA.

Analysis of two of the BBPA cost of running a pub series show how an average pub in one segment is massively disadvantaged 18 months later by the rent bid implicit in the data on an exactly similar pub in the second series.

While the BBPA say comparing series is invalid one wonders why this is the case if a prospective tenant is to make business decisions based on the benchmarks.

A tenant using data from the first series might have proposed a rent on the exactly average pub in a segment by reference to the BBPA published data. The second series now publishes the cost of

running the same wholly average pub 14 months later. To an extent this could be interpreted as a report on the first tenant's outcome. Analysis shows in some cases the tenant seems to have achieved as little as 52% of his planned profit. New tenants using the new data series will make lower rent bids and our original tenant will now be competing with these new tenants with better terms of trade, while his own rent will be increasing by indexation. Any benchmark data with such a high degree of variability should be questioned.

To have such flawed data put into the hands of tenants and prospective tenants can only be described as reckless. There should be much closer scrutiny of these data and they should be open to verification and challenge.

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.

Availability of the Market Rent Only option at rent assessment

A.3 We concur with the response from the Pubs Advisory Service

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 We concur with the response from the Pubs Advisory Service with the following additional comments:

It must be acknowledged that the "Rent" in the tied business model is partially "wet" and partially "dry" the complete lack of surveillance of the prices demanded by Pub Owning Companies and the unrestricted inflation of the "Wholesale Selling Price" allows gaming of the wet rent. A Brewery price increase should not result in a "wet" rent increase.

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.

The Pubs Code - Information requirements

A.5 We concur with the response from the Pubs Advisory Service with the following additional comments:

Only the Pub Owning Companies will be able to provide these details. In our experience in recent months the knowledge that Pub rents have been falling has resulted in an increase of situations where a nil increase has been proposed.

Regrettably many pub tenants are sufficiently detached from support networks other than expensive professional advisers that they would probably see an offer of a nil increase as a blessed relief.

The reality is that the Pub Owning Bodies themselves are the custodians of the data on the rent settlements and in a situation when they know rents are falling, proposing a nil increase is tantamount to exploit their asymmetric position by ensuring that the tenant is worse off. If the adjudicator were to publish a summary index showing the status of current rent settlements and if that index suggested that rents are say, 2% lower than they were a year ago then that data should be seen as highly relevant to current proposed settlements.

This was a major failure of the “Self regulatory system” PIRRS - as this is the only regular direct “independent” review of tied rents but the findings were confidential, so they never “informed” the market.

The RICS guidelines in this area set great store by referencing comparables and recent market transactions, that the most recent, relevant such transactions should be confidential, is perverse.

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

All information should be maintained and kept up to date in a pub dossier available for inspection and including all the relevant certification, licenses and suchlike. The dossier could be held online in a dropbox style repository available to interested and qualified parties. Such a facility could also contain many of the useful reference materials, bench marks and signposts to sources of advice and guidance provided by various industry bodies and support groups.

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)?

The Pubs Code – repair provisions

A.9 *We concur with the response from the Pubs Advisory Service*

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*

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 ***Contractual inconsistencies with the code should not be arbitrable – it should also be clear that the Code assumes compliance with all existing regulations.***

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

A.12 ***We concur with the response from the Pubs Advisory Service***

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: *no*

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.13 ***We concur with the response from the Pubs Advisory Service***

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 concur with the response from the Pubs Advisory Service***

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 concur with the response from the Pubs Advisory Service with the following additional comments:***

There seems to have been an assumption that the topic of Franchise has already been consulted.

It should be noted that the move towards the Franchise model in circumstances where limited unique IP is being marketed is in reality attempting to enjoy the margins and trade terms of a large Pub Operating Company running a managed business but without the staff costs and obligations. It is often the case that a Pub will be seen as too small to be able to support the overhead of a Management structure and the benefit of centralized food offer development etc.

Great care must be taken in evaluating these new agreements to ensure that they are not merely vehicles to avoid National insurance and employee obligations and benefits. As the “Manchisee” will be responsible for NI payments and employee obligations this should be made clear – by fully exempting these arrangements from the Code there is no equivalent governance for this kind of agreement.

The “Market Tested – Business Model” must be significant more substantial than “Stock beer, own glass, open door, serve customer”. If a genuine franchise opportunity exists it MUST in some way differentiate the operation from other pubs and offer a unique selling point which generates added value.

The BFA website presents a lists of 50 questions compiled by Martin Mendelsohn that prospective Franchisees should ask many of these are very relevant and a similar set of questions should be available for the Pub equivalent.

<http://www.thebfa.org/join-a-franchise/50-questions-to-ask-a-franchisor>

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 – the unique intellectual property of the franchise must be tested and proved to add significant value and not be an “optical” construct. The default assumption should be that the business model is subject to the code and an approval sought from the adjudicator. This exemption should be subject to periodic review and appeal, in the event that the model is changed in some significant way.

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 We concur with the response from the Pubs Advisory Service

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 We concur with the response from the Pubs Advisory Service with the following additional comments:

Tenancies at will (TAW) are claimed to be short terms arrangements and as such are acceptable for exemption but Pub Operating Companies should not be allowed to use the agreement as a mainstream business model. In the case of Punch Taverns at the refinancing in June 2014 some 15% of the estate was let on a Tenancy at will basis.

At the same time as claiming to BIS that TAW are short term and temporary, when reporting to the markets the TAW figure is treated as being a “Substantive agreement” it would be our view that any agreement reported as substantive should be subject to the code.

When a Pub Operating company with 3000 pubs report 97% occupancy on substantive agreements there should be no more than 90 pubs identified as operating under the TAW exemption all other pubs must be covered.

It should be a requirement that the Pub Operating Company reports to the Adjudicator on a regular basis which pubs are subject to the exemption. The point should also be made clear to the operator that the pub is presently exempt and when the exemption will expire.

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 We concur with the response from the Pubs Advisory Service – Training has been shown to be a major failure of the “Self Regulatory” system and across the entire tied Pub sector and this must be corrected on an urgent basis..

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 Substantially the same information that is listed in Schedule 1, which should be constantly maintained as a Pub dossier.

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

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 There should be provision for an increased penalty in the event that the Pub Operating Business finds it convenient to breach the code and pay the fine.

