

Dear Pubs Consultation Team

Please find below our response to the consultation, Parts 1 and 2, we are responding representing the views of Justice for Licensees and have sought Council member approval prior to sending.

#### Part One

Considering the proposals set out within the Consultation we remain firmly of the opinion that government will fail to deliver that a tied tenant will be no worse off, as we have made clear in previous meetings and correspondence. We appreciate that Part 7 covers this, however we feel that this is so fundamentally wrong that we must highlight prior to answering questions. Government will never be able to deliver no worse off whilst using current rental levels and pricing structures as the benchmark for further negotiations, current dry rental levels in the tied sector already exceed the cost of rent as a percentage of turnover in the Free of Tie sector, as clearly highlighted in the ALMR's Benchmarking survey for the last 3 years and previous correspondence (as attached for ease of reference). When the wet rent, or the cost of the tie, is taken into account, it would make it impossible for government to deliver 'no worse off' for an unacceptable amount of tenants. We would urge both BIS and government to address this serious imbalance in government proposals. We do not believe that the current proposals will deliver the will of the Houses.

We are also concerned with reference to provision 9.11 which, we believe, means that a tenant who chooses to utilise the MRO agreement must surrender their current contract, despite the fact that the contract may have another 10 years (eg) left on it and be forced to accept a 5 year only MRO agreement. We believe that this is nonsense as it conflicts with 9.5, this is not at all acceptable. At lease renewal, under the L & T Act, the tenants have the right to renew on the same terms and conditions as their previous agreement, MRO included. We must maintain and protect the tenants' rights. 5 year term agreements will circumvent the changes and prevent them from coming into effect, this is not acceptable, we must encourage the changes to be brought into effect.

We do not believe that this should be about delivering compromises or appeasements, but this should be about re-addressing the serious imbalance between pubcos and tenants, including but not restricted to the imbalance between risk and reward. We also believe that this Code and Adjudicator should address the serial abuses clearly highlighted in a decade of investigations, enquiries, communication and finally Consultation, we sincerely hope that the Code and Adjudicator will be able to swing the pub companies moral compass back to a much more acceptable position.

We believe that all pubco contracts should carry a financial health warning, such as those used by endowment policy providers, on the front page in clear and concise language, so that before signing tenants would be fully aware of any financial implications in signing the contract, in our opinion it would provide a level of certainty for both landlord and tenant.

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

- We remain of the opinion that the pubcos skew rental assessments to their own advantage by inflation of Fair Maintainable Trade whilst simultaneously under estimating costs, resulting in a rental assessment skewed to the pubcos advantage leading to misleading rental assessments and therefore misleading potential profits for tenants. We would like to

see factual rental assessments, evidence backed Fair Maintainable Trade, not the current Fantastic Mythical Targets that appear prevalent within this sector of the trade and evidence backed quantified costs, not under-estimation. We would urge government to ensure that previous sharp/bad practice will no longer be tolerated. We are concerned that current proposals are somewhat lacking clarity on the above and hope that government will be clearer in their response.

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

- Not as far as we are aware, however we are concerned that pubcos could be much more honest and transparent with reference to the LTA Act 1954, we would like to see tenants being made fully aware of the implications of signing out of the LTA Act in clear and concise language.

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

- No. The wholesale market price lists issued by brewers have very little, if anything to do with the price of beer freely available on the open market and are in fact much more aligned to the prices charged by the pubcos for beer. The use of the wholesale market price list will only ensure that government will fail to deliver 'no worse off'.

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?

- No. We are of the view that if these proposals are enshrined within the Code, then government have not only supported clear overcharging by big companies, when compared to the prices available on the open market, but have in fact given the pubcos another 5% increase on top. We remain firmly of the opinion that the current status quo is not acceptable, we are bitterly disappointed that government proposals not only support the status quo but also give room for the pubcos to exploit the tie further. We do not believe that this was the intention of Parliament at all.

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?

- Yes
- Not that we are aware of

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.

- We are relaxed on the appropriate way to measure a significant price increase, on the understanding that whatever mechanism is chosen, it must ensure that over-charging for products and services becomes a thing of the past.

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

- We are relaxed about the two tier approach.

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

- No. We remain of the opinion that products and services, as with beer, are excessively priced by the pubcos when compared to the prices available on the open market, we believe that such a high percentage rise, when compared to the price available on the open market, is not acceptable. Our alternative would be a 10% increase over and above the price available on the open market, this allows the pubcos a margin, whilst ensuring that tenants are not being over charged for products and services by the pub companies, this will help to encourage competitiveness within the sector and trade generally.

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?

- No. The differential between pricing in the on trade and the off trade has been clearly highlighted throughout successive enquiries over the last decade, it is our opinion that the cost of the tie does not equate to the benefits of the tie, there is a severe imbalance which clearly needs addressing. The proposal will fail ignominiously to address this imbalance. We believe that government proposals will secure the status quo as good practice, that thought is abhorrent and causing much consternation amongst our membership.

Q.10: Do you have any comments on points i. to vi. above?

- Yes. Point iii please see Q.11

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 recession could clearly have a significant impact on the expected business of a pub and is clearly out of control of the tenant and without remedial action could ensure that the balance between risk and reward is thrown dangerously out of proportion, the tenant will be taking the risk and the pubco the reward and that is why we are here in the first place. It is bizarre that under government proposals at Point iii that a tenant would not be offered protection due to the fact that a recession would affect more than just his pub. We do not

believe that it should be acceptable for the pub companies to take more than their fair share of the risk and reward and cannot understand why this government appear to want to protect the pubcos ability to take more than is fair? We think that point 3 will ensure that the pubcos are protected by government in times of hardship whilst the tenants are offered no protection, we do not think that this fair or acceptable.

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?

- As highlighted above we are concerned with reference to provision 9.11 which, we believe, means that a tenant who chooses to utilise the MRO agreement must surrender their current contract, despite the fact that the contract may have another 10 years (eg) left on it and be forced to accept a 5 year only MRO agreement. We believe that this is nonsense as it conflicts with 9.5, this is not at all acceptable. At lease renewal, under the L & T Act, the tenants have the right to renew on the same terms and conditions as their previous agreement, MRO included. We must maintain and protect the tenants' rights. 5 year term agreements will circumvent the changes and prevent them from coming into effect, this is not acceptable, we must encourage the changes to be brought into effect.

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

- Yes we support the requirement that an MRO-compliant agreement should provide for an open market rent review every 5 years. Rental levels should be assessed every 5 years to ensure that the balance between risk and reward is not thrown out of kilter and that fair rental levels are maintained. The pubcos already have to provide rent reviews every 5 years for their tenants, whether that tenant is tied or FOT should make no difference.

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?

- Whilst the list of documents is a good start we are concerned that it may not be enough to address the serious issues highlighted by successive enquiries. We are concerned that the pubcos may well have inflated FMT and under-stated costs for entire areas and will use this to their own advantage and in so doing will only ensure that rental levels remain over inflated and the balance between risk and reward remains out of kilter with best practice and so failing to deliver that a tied tenant is no worse off. We would suggest that FOT comparisons should also be provided, but also appreciate the difficulty in this, without a national register of rents. We are not sure how this can be addressed, should the problem arise, we are sure that it should be addressed and that the Code must deliver no worse off.

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

- A number of our members are concerned that the pubcos will try to drag out the process, for far too many tenants two weeks can be the difference between solvency and insolvency, they are that close to the breadline. They would like to see some form of protection from the pubcos delaying enough that they are forced out of business before the MRO procedure is completed.

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

- We are relaxed on the proposed circumstances in which the MRO procedure will come to an end.

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.

- No, other than that highlighted at Q.15.

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.

- We believe that the pubcos can and do over inflate the cost of works, when compared to the cost on the open market, for the same works, for example a pubcos 100k investment may have only cost 20k if the works could have been sought through the open market, we can think of no justifiable reason why a tenant should pay for the incompetence or irresponsibility of a pubco. The pubcos should be ensuring that they are securing competitive (with those available on the open market) contracts for their tenants. We believe that the proposed amount of investment must stand up to scrutiny and be as beneficial to the tenant as it is the pub-owning business.
- The cost of both the wet rent and the dry rent should be taken into account, the two together are the cost of the tied tenancy, the two together have been a major factor in reaching this point. Considering that any future potential of the investment is rentalised, we believe that a 500% of the dry and wet rent should be used, we believe that this will set the bar high enough to ensure that real investment, with real benefit to both tenant and pub-owning business will be delivered.

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.

- Yes



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

- We think that it would depend on the decision reached in Q.18 with 10 years for a higher bar and 7 years for a lower bar, in explanation if the level of percentage of rental is set at a lower bar then the maximum length of the waiver should also be set at the lower bar, if a higher bar is set for the level of percentage of rental then it is only fair that the higher maximum length of waiver is also set at a higher bar.

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?

- Yes, with the exception of 12.28
- Yes, we are concerned that the pubcos may breach the investment agreement, we believe that if the pubcos do breach the agreement then that agreement should no longer stand and the tenants should be put back into the position that they were prior to the agreement, with no agreement and no waiver period, meaning that the tenants would be able to request a rent assessment and or MRO offer as per the conditions laid out in the Code. We believe that this would ensure that the pubcos fully comply with their obligations and would provide a sound safeguard.

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?

- Not as far as we are aware

We remain bitterly disappointed, but very sadly not surprised, that throughout Part One government proposals seek to not only support the status quo, but also to ensure further financial burdens can be placed on to licensees, so ensuring that the balance between risk and reward is tilted even further to the pubcos advantage. This is not acceptable in the slightest, Select Committee enquiries have investigated and highlighted that the current status quo is not acceptable, we are abhorred by the government proposals which support and heighten the status quo and do not believe that this was the intention or will of the Houses.

## Part Two

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.

- We are relaxed on the stated MRO procedure, on the understanding that previous bad practice by the pubcos of over inflating FMT and under estimating costs in order to

secure a bigger financial gain is stopped, it is an unacceptable practice that has ensured an imbalance between risk and reward and in part has ensured a growing level of dissatisfaction amongst tenants.

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.

- We believe that a tenant will need to know of FOT offers in their area, in order to make an informed decision as to whether they will be no worse off by remaining tied. We remain concerned that rental levels will continue to be manipulated to the advantage of the pub-owning business and the detriment of the tenants. For example if a pubco has manipulated rental levels (by over-inflating FMT and underestimating costs) for an entire area then those rental levels are not true or just, they are not open market, they are manipulated by the pub owning business to ensure a larger financial gain for the pub-owning business, to then use them as a comparable, is somewhat questionable in our opinion. We believe that it is no good whatsoever using manipulated rental negotiations as a comparable and will only ensure that the balance between risk and reward remains out of kilter.

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

- We wholeheartedly believe that the current proposals suggested will fail ignominiously in delivering the no worse off principle, for the following reasons:
- The cost of tied 'dry' rent is above that demanded by the market for Free of Tie rents, therefore using current tied rental levels as a benchmark cannot and will not deliver the 'no worse off' aim as current tied rental levels are already in excess of FOT rents. Since 2012 the Association of Licensed Multiple Retailers (ALMR) benchmarking surveys\* have consistently shown that the cost of tied rents, as a percentage of turnover, are higher than the cost of FOT rents. It should also be remembered that the ALMR survey will predominately, be about ALMR members, who are, in the main, multiple operators who are in a stronger negotiating position than single operators. Justice for Licensees (JFL) wrote to Kate Nicholls, CEO of the ALMR, asking for confirmation on this survey of whether the tied rents shown were for dry rent or for both dry and wet rent, Kate kindly confirmed that the figures were for dry rent only, this ensures a like for like basis. 8.12 appears little more than confirmation that this government are clearly not only supporting, but also benchmarking the sharp practices of big business, we do not believe that this was the will or intention of the Houses.
- The Wholesale Market Price (WMP) list, published by brewers has very little, if anything to do with the cost of produce available on the open market, and is much more aligned to the cost of tied products, the WMP has been used by the pubcos for a considerable number of years as a benchmark for their own pricing structures. Years of investigation

have clearly highlighted the disparities between the cost of tied products and the cost of the same products on the open market. Clearly using the WMP +5%, in conjunction with 8.12, cannot and will not deliver 'no worse off'.

- Successive government enquiries have clearly highlighted the imbalance between risk and reward, and is one of the reasons for government intervention and legislation. The two biggest factors of that imbalance being the cost of rent and the cost of the tie, this Code as currently drafted, cannot and will not address the clearly highlighted imbalance. This Code, as currently drafted, is merely sanctioning the current practices of the pubcos, ie the status quo and has already been clearly highlighted by government enquiries and tenant representatives and the tenants and government themselves, the status quo is not acceptable.
- With tied rents in excess of FOT rents and pricing structures clearly considerably in excess of prices available to the FOT tenant, this Draft Code cannot possibly hope to deliver that a tied tenant should be no worse off than a FOT tenant. This Draft Code, in its current form, does not, cannot and will not re-balance the imbalance between risk and reward. In essence it is sanctioning the status quo, that is over renting and over pricing of products, that is not good enough and neither should it be acceptable.

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?

- We believe that the removal of the proposal for an increase in rent will go some way to ensuring the no worse off principle, on the understanding that the Wholesale Beer Price has very little to do with the price available on the open market and the proposals will not ensure no worse off. The two are intrinsically linked and therefore must be dealt with as such.

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

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

- 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?



- 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

- Yes
- Yes, all of the Schedule 2 information
- Yes

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)?

- We believe that it should be the tenants decision, we can see no point in enforcing a rent proposal if both sides are in agreement that there is no need for one, however we are concerned that this may create a loophole for the pubcos to exploit, we do not want the pubcos to treat this as they have the L & T Act, the tenants must be fully aware of any implications of agreeing to a no rent proposal.

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?

- Yes

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

- No

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

- No

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

- Our concern remains that pubcos will continue to sell off swathes of tied pubs to companies who fall under the 500 limit and the serial abuses that have been witnessed over the last decade will continue unabated.

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

- No

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.

- Our only concern is that franchise agreements will be abused as tied agreements clearly have, we are hopeful that government proposals will ensure that this does not happen. Anything less than the proposals will leave loopholes for the pubcos to abuse.

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

- 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

- Yes

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.

- We are content with the governments' proposal of 12 months.

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.

- We believe 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, unless they have previously operated tied premises for a reasonable period. We believe that the current pre-entry awareness training package available to tenants is not fit for purpose and requires serious re-thinking, ensuring that all representations made within the training package are factual.

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?

- Previous trading history – the pubcos will have on record previous trading history, they will know exactly how much the previous tenant/s has bought from them, there is no need for any lack of transparency in this area.
- History of previous tenants ie the reason for leaving, the pubcos will be aware of the circumstances that the tenant left, whether they had been struggling, any late payments etc (obviously showing a pattern rather than singular), whether the tenants had just disappeared with no reasoning given, or a structured leaving, the pubcos will have all of this information, we can see of no justifiable reason why they should not share this knowledge.
- The number of previous tenants over the last 5 year period.
- The number of times that the premises has been closed during the last 5 year period and the reason for why it was closed.
- Any pending license/council/fire/police issues.
- Any previous license/council/fire/police issues.
- Rental Assessment with evidence of figures used and full calculation shown and signed off by a qualified RICS member.
- Full profit and loss forecast.
- All other provisions provided for tenant protection under the Pubs Code.

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

- We are relaxed about the £200 fee.

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.

- Yes

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% of 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.

