BRITISH BEER & PUB ASSOCIATION

Pubs Code and Pubs Code Adjudicator: A Government Consultation - Parts 1 and 2

British Beer & Pub Association response

Contact information

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

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

The BBPA has no objection to this response being made public.

Introduction

The British Beer & Pub Association (BBPA) is the leading organisation representing the brewing and pub sector. Our members account for 90 per cent of beer brewed in Britain today, and own around 20,000 of the nation's pubs. A full list of our members can be found here. We have five of the six companies within membership covered by these legislative proposals.

Whilst we remain of the view that this legislation will introduce cost and complexity to the pub sector, we welcome the opportunity to work with BIS and other stakeholders to make the regulations as proportionate, low-cost and workable as possible and hope our views below are taken into account to achieve this. Our views on both parts of the consultation are within this document, part 1 begins on page 3 and part 2 on page 11.

Where references to the regulations are made, these are based on the version circulated with Part 2 of the consultation.

Key points

- The BBPA urgently requires clarity regarding implementation timescales for the legislation. This includes the appointment of an Adjudicator and the drafting of their guidelines, independent assessors, clarity over when MRO triggers practically come into effect, and the financial arrangements and timeline for companies to fund the new system;

- The tied pub models allows tenants access to their own pub business for a comparatively small investment, and pub companies benefit from the economies of scale that the model brings. It is one of the best small business partnerships, for shared investment, shared business development, and job creation, which makes it good for the pub sector, and for Britain's pubgoers. The legislation must be workable to allow the above to continue;

- The ability for pub companies to invest in their estates for the benefit of tenants must be protected via a flexible waiver;

- Red tape and regulatory burdens must be kept to a minimum – this includes rationalising the information requirements, and ensuring that franchises and temporary agreements can continue.

Consultation questions – part 1

Parallel Rent Assessments

We support the original published position in part 1 of the consultation document, and expanded in part 2, namely that Parallel Rent Assessments (PRAs) should not be taken forward as part of the legislation in light of the introduction of the Market Rent Only (MRO) option. As set out in our response to the original consultation and subsequently during the passage of the legislation through Parliament, there are insurmountable difficulties in both quantifying the value of the many benefits of a tied agreement for rent purposes and directly comparing these to a free-of-tie (FOT) agreement. With the advent of the MRO process, the need to carry out a separate PRA to ensure a tied tenant is 'no worse off' than a FOT tenant has fallen away and the case for these to be retained unjustifiable and would be totally contrary to better regulation principles. We welcome the clarification published in part 2, which we expand upon in the relevant section below.

Rent assessments

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

1.1 We agree with the definition of rent assessment set out in the consultation document, and the treatment of the assessment as a procedure rather than a fixed point in time. We are supportive of the rent assessment triggers outlined in the consultation document at section 6.9, and we comment in more detail regarding their operation later in this response. We agree with the decision to exclude other contractual terms and formal/informal negotiations from the scope of the rent assessment definition, including

annual indexation provisions, ad hoc support arrangements and general business reviews, as outlined in section 6.14.

1.2 Regulation 10 (9) states that a 'suitably qualified valuer who is registered with the RICS' must confirm that a rent assessment has been carried out in accordance with RICS guidelines. A RICS registered valuer is not the appropriate person to be carrying out such a task (as they deal with asset valuations under 'Red Book' rules which is inappropriate for what is being dealt with here) - instead the regulations should state 'a Member or Fellow of RICS' should confirm that rent assessments have been carried out under RICS guidelines.

1.3 Regarding consultation section 8.12, the new proposal that only a rent increase at rent review will trigger the MRO option, we can see the benefits this clause provides for both tenants and landlord companies. In our reading of the regulations, this clause does not apply to any of the other trigger mechanisms (protected agreement renewal, significant price increase or change in circumstance). So for example, in a ten year agreement, the tenant reaches the five year rent review and the pub company proposes no increase in rent, or even a decrease. This helps the pub company who knows that unless one of the triggers is breached they have a ten year agreement which gives much more certainty for investment in that business, but it also means that the tenant knows that they are unlikely to face any increase in rent for the whole of the agreement. The tenant still retains the right to go to the adjudicator if they feel that their rent is too high. However it is important to record that neither the BBPA nor its members specifically called for this addition or were consulted on it.

Market Rent Only option

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

2.1 We agree with the principle of MRO on renewal as set out in the consultation document, namely that the MRO option is triggered on statutory renewal of an agreement under the Landlord and Tenant Act 1954 (hereafter referred to as the 'LTA').

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

3.1 Yes. We believe that the wholesale market price for beer is an appropriate baseline. However, the calculation should be simplified and only apply to those products available to purchase under their agreement. We would also strongly suggest that weighted averages for beer (and for other tied products in question 5 such as cider, wine, spirits, and RTDs) are used to simplify the calculation of price increases.

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?**

4.1 Yes. The formula set out in the consultation is acceptable in terms of the 5% threshold and taking into account all factors outside of the pub company's control such as duty, regulatory and raw material costs.

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?**

5.1 Yes, this is crucial and would be grossly unfair otherwise.

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.**

6.1 We agree this is an appropriate measure

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?**

7.1 Yes, however the question mentions a threshold of tied products (non-beer) 'contributing to 20 percent of a pub's turnover' – which contradicts the consultation document and regulations which state that the threshold is based on the 'cost to the tenant...as a proportion of the pub's turnover'. Having clarified with BIS, we believe the latter interpretation is correct and support this approach.

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

8.1 This does not match with the regulations - which state the percentage increases are 20% and 30% respectively. Please clarify which one is correct, we feel the consultation document suggestions are appropriate amounts.

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?**

9.1 Yes.

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

10.1 We agree with the definitions set out in points (i) – (vi). at section 8.35 of the consultation document.

10.2 As above, the proposals seem sensible and measured, however there is a potential difference between the consultation document at 8.35 (an event which brings about a permanent change in trading condition for the tenant's specific pub) and the fact that this does not seem to be reflected in the regulations as drafted. Also with regard to this point, S. 2 (vi) states that an event that increases trade cannot be an MRO trigger – which is correct – however it should make clear that where there is a negative drop in trade that triggers MRO this should be proven for a period of 12 months or more and cannot be related to a short-term drop in trade.

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?

11.1 We believe the consultation document captures the definition of 'significant impact' for the purposes of the Code, with the amendments highlighted in answer to Question 10.

MRO-compliant agreements

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?

12.1 No. We have a number of concerns around how MRO at renewal is structured – including the legality of what is proposed and the interaction of the Small Business, Enterprise & Employment Act (SBEE) legislation with the LTA.

12.2 We have been assured throughout this process, and believe it is BIS's intention, that MRO compliant agreements should reflect standard commercial free of tie agreements that currently exist in the marketplace. We are concerned that, as written, the regulations could allow for agreements to be created at renewal that do not reflect this principle. Section 9.4 of the consultation document states that 'the Government does not propose to prescribe a model form of MRO-compliant agreement in the Code. Rather, we expect MRO agreements to be modelled on the standard types of commercial agreements that are already common for FOT tenants'. However, this is contradicted later in the document at section 9.13 which states that: 'Where the request for MRO occurs at renewal...the provisions of the LTA will instead apply.' Where a tenant is contracted-in under Part II of the LTA, the tenant will already have the safeguard of applying to the courts to set the terms of the agreement under the LTA – at which time the tenant may argue that they should not be subject to terms that are

not applied in other FOT agreements. In those circumstances, it would not be appropriate to give the Adjudicator jurisdiction that cuts across that of the courts under the LTA.

12.3 One reading of this proposals is that a LTA protected tenant, at the renewal of their agreement, has the right to request a similar agreement to their previous agreement but one which contains provisions such as FOT (as is their right under this new legislation). An example of this would be a three year LTA protected tied tenancy. When the agreement comes up for renewal after three years, the tenant can elect to exercise their MRO right by demanding another three year agreement, but can set the terms of this agreement to exclude elements such as product ties etc. therefore creating an agreement type that does not currently exist in the FOT marketplace. This would make the tenant in this situation significantly better off than a free of tie tenant on a FOT agreement currently existing in the market, as they would have the benefits of a short term FOT tenancy without the commitments and responsibilities of a long term fully insuring commercial lease – which as stated cuts across the principle outlined in 9.4.

12.4 This is a critical point for our members and we do not believe that this is what BIS intends. Instead what can only be offered at LTA renewal is the commercial FOT agreement referred to at section 9.4. Our reading of the LTA right to renewal is if the tenant wishes to renew a similar agreement to that previously agreed with the landlord. Our view is it is clear that by wishing to go free of tie by exercising the MRO option, the tenant is fundamentally changing the agreement and therefore the landlord is not obliged to offer a renewal under the LTA. Instead in this situation, the landlord should be able to accept the surrender of the previous tied lease and re-grant a commercial FOT agreement (minimum 5 years) to the tenant to fulfil their obligations under the pubs code legislation. The tenant would still have security of tenure as the legislation stipulates that their new agreement must be protected by the LTA.

12.5 There is also an issue around the consultation's reference to court involvement in setting the terms of an MRO agreement when renewed under the LTA. Our reading is that the LTA does not allow the court to set the terms of two different lease offers in parallel (tied and FOT) so the tenant could choose between them, which is what is ultimately suggested at section 9.13 of the consultation document.

12.6 Therefore, as drafted the regulations are unclear and potentially unworkable when it comes to offering MRO at protected lease renewals. Our proposal is that the process should be amended so that at a protected renewal if the tenant wishes to exercise their MRO option, then their existing tied lease is surrendered, and a commercial MRO-complaint lease is granted. Rather than involving the courts, the tenant would have the option of consulting the Adjudicator if they feel the pub company has not granted an MRO-compliant agreement.

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

13.1 No. As stated in section 9.4 of the consultation, MRO-compliant agreements should take the form of what is available in the open market. This proposal would also make the MRO FOT tenant better off than other FOT tenants and we would agree with the statement in the consultation at section 9.14 that this would represent an unjustified intervention in the commercial dealings between landlord and tenant.

MRO procedure

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?

14.1 We would question the practicality of point (iii) under section 10.23 (and schedule 3 of the regulations), which states that the evidence should be provided regarding 'relevant comparisons with similar tied pubs in the local area'. Neither tenant nor landlord would have access to such information.

14.2 Point (iv) and schedule 3 of the regulations stipulate that evidence should be provided that analyses 'the market value of any special commercial or financial advantage provided to the tied pub tenant under the terms of the tenancy or licence'. As stated above with regard to PRA, SCORFA is a relative concept – the market value of which is extremely subjective in attempting to quantify and almost impossible to 'rentalise' as determined by RICS. The same benefit may have considerably greater value placed on it by one licensee versus another. We would therefore strongly advocate that in place of SCORFA, the requirement should be to outline the range of benefits available to the tied tenant, but not assign a specific market value to them.

14.3 Clarity is also required on whether the independent assessor is an 'expert' or qualified arbiter for the purposes of this legislation.

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

15.1 The timescales are tight as drafted, however we understand that the MRO process should proceed in a timely manner. We set out a number of observations on the MRO procedure below:

- Electronic delivery of notices is imperative - as if not, proof of receipt will be impossible;
- The timescales for the MRO procedure and the tied rent procedure must be aligned, so the tenant can compare the two offers in parallel. The negotiation period for a

normal tied rent review is normally 6 months plus a few weeks (e.g. 200 days) whereas timetable for notification and negotiation for MRO is only 112. This forces the independent assessment process on MRO (if not agreed) ahead of the tied settlement.

- Clarification is required on whether the procedure refers to calendar days or working days;
- The timescale to agree an independent assessor is too short;
- On a broader point around timescales, there needs to be clarity regarding transitional arrangements and practical steps, (i.e. when and how does this legislation come into effect). There is also the issue of the fee for the adjudicator system with regard to how much/when will this be calculated and companies be liable to pay. This is an important issue in terms of forward financial planning.

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

16.1 Yes. As currently drafted, the regulations seem to allow the tenant to continue with an existing MRO claim after completing the relevant tied rent review by accepting the tied rent. It seems to be entirely up to the tenant to decide, under 34 (b) (iii), whether to terminate an ongoing MRO application, excepting only that if the tenancy or licence "ends" that automatically ends the MRO procedure at the same time. Clause 24 (4) in the regulations states that the tied tenant 'may' notify the pub owning company of its intention to terminate the MRO negotiations. There is no specific provision for this to be done if or when the tied rent is agreed and leaves the tenant with the option of continuing the MRO negotiation indefinitely. Therefore, the removal of the term 'may' would resolve this by removing the ambiguity. It appears that there is a disparity here between the procedural diagram in the consultation document and the regulations. It appears from the diagram that there is an intention to allow for the MRO process to be terminated where a contractual rent review is concluded, but this is not accurately reflected in the drafting.

MRO disputes

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.

17.1 We support the proposal at 11.4 that both tenants and pub owning businesses should be able to refer MRO disputes to the adjudicator.

Waiver from MRO in return for significant investment

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.

18.1 We agree with the proposal that there should be no fixed amount in legislation as to what qualifies a 'significant' investment in a site, as each pub is different and the levels of investment will differ depending on the operating model of the pub. There is the very real danger that without such flexibility, investment by pub companies in the sector will reduce dramatically – and as this is the primary (and in many cases only) source of investment available it will lead to pub closures and prevent tenants who wish to take up pub company investments from doing so.

18.2 As above, we are strongly of the view that the amount of investment should be agreed on a case by case basis, agreed with the tenant following professional advice and overseen by the adjudicator's office.

18.3 However, if it is decided that annual dry rent figure is used to set the level of investment then the percentage used should not be less than 50% of the dry rent to qualify as 'significant'.

18.4 We also believe the legislation should take account of new tenants who may not have occupied the pub or paid any rent (or entered a pub where no rent has been paid by any tenant in past 12 months). This should be added to the definition so that waiver agreements can be agreed with brand new tenants. As a waiver can't be based on previous rent, a suggested level would be based on the agreed rent for the 12 months following the investment

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.

19.1 We agree that pub company's contractual obligations should be excluded from the definition of a qualifying investment, although if the pub company takes on investment obligations that are the contractual obligation of the tenant (i.e. the tenant cannot afford new works and the pub company offers to fund it) these should be included for the purposes of the waiver. In simple terms this is any spend on a pub other than that for which the Pub Company is contractually obliged by the terms of the contract with the current tenant.

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.

20.1 Answer (c). We believe that there should be maximum flexibility and, as above, the length of any waiver should be agreed on a pub by pub basis. However, if a maximum is to be introduced it should be for a minimum of 10 years with provision for the Adjudicator to allow for longer periods where the payback on the investment can be demonstrated to be greater than 10 years and both parties are in agreement in relation to this). Also, if the lease is assigned by the tenant to an incoming licensee, it must be

the responsibility of the tenant to make the new lessee aware of any waiver in place (and this pre-agreed waiver should not be affected in the case of lease assignment).

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?**

21.1 Yes.

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?**

22.1 See above in answer to Questions 18 and 20. If pub companies are restricted from investing in their estates by an over prescriptive waiver this will lead to more pub closures and under-invested pubs (as tenants may not be able to fund improvements themselves). We believe it is crucial that the waiver is structured in such a way that allows this much needed investment to continue.

Consultation questions – part 2

Market Rent Only option and Parallel Rent Assessments

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.**

1.1. We believe that the MRO procedure as outlined in the draft regulations does deliver the no worse off principle by allowing the tenant to see a tied and FOT rent proposal side by side, allowing them to view the risks and benefits of both and assess these based on their own particular circumstances. We expand on why there should not be a separate PRA process or a formulaic calculation of the costs of the various tied and FOT features and benefits in answer to Question 2 below.

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.**

2.1. Schedule 3 of the regulations stipulate that evidence should be provided that analyses 'the market value of any special commercial or financial advantage provided to the tied pub tenant under the terms of the tenancy or licence'. As stated above in our answer to part 1 of this consultation, SCORFA is a relative concept – the market value of which is extremely subjective in attempting to quantify. We would strongly advocate that in place of SCORFA, the requirement should be to outline the range of benefits available to the tied tenant, but not assign a specific market value to them.

2.2. However what has now finally been recognised is that a traditional tied supported tenancy is very different to a standard commercial property lease with a very different risk and reward profile. Indeed for these types of tied agreement, there is no like-for-like free-of-tie model with which to compare rent assessments. Therefore for an independent valuer to determine whether the proposed rent under one model leaves the tenant better or worse off than under another model, and critically by how much, is simply not possible.

2.3. There can be no fixed formula as the comparables are not the same, as RICS have consistently made clear. Indeed, each pub is unique and valuation is not a precise science. However the rental value will ultimately be guided by the market reflecting the demand and availability of that particular type of agreement in the market at a point in time and the availability of similar properties in the area.

2.4. A tenant, if offered the two options (as they must be under the MRO option), will need to make a judgement based on many factors including their access to capital, the level of risk they are prepared to take and the level of pub company support they would like or need. Individual tenants or lessees will therefore place differing values on the individual elements of the different agreements. This again demonstrates why it is simply not possible to place a single quantifiable and fair value on every tangible and intangible benefit and ultimately determine how much rent should be adjusted up or down to equalise the benefit to a licensee of two very different agreements.

2.5. Schedule 3 also specifies documents that 'provide a comparison between the tied pub's level of trading and that of other pubs in the area that are not subject to a tie'. Practically, this would be impossible to achieve as neither the tenant nor the pub company would have access to the trading records of other pubs in the vicinity to allow for such a comparison to be made. Even if this information is available, there may be a data protection issue in releasing such information, as it requires documentary evidence of trading levels.

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.

3.1. We believe that the combination of proposals as set out, which allows the tenant to choose between a tied agreement and a FOT agreement with a list of the benefits and features of each, does deliver the 'no worse off' principle. It is crucial that the MRO

and tied rent processes 'dovetail' to allow the tenant to have both offers between which to choose.

Availability of the Market Rent Only option at rent assessment

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?

4.1. Please see part 1 response, paragraph 1.3. As noted the inclusion of this proposal came as a surprise to us. Whilst such a condition could benefit both licensees and pub companies, we understand the concerns expressed by some, including of course the House of Lords, that this would be contrary to the spirit of what was previously agreed.

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.

5.1. Data received from members suggests that there is a relatively even split between those rents that increased and those that decreased or were frozen. Responses received suggest that some companies operate annual RPI or CPI increases (except in the year of a rent review) for significant numbers of agreements whereas other companies do not use indexation as part of their core agreements.

The Pubs Code - Information requirements

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

6.1. We have always believed that providing information to tenants at the correct stages ahead of taking on a pub agreement is essential for both the tenant's understanding of the obligations of running the business and ensuring the company gets the right tenant for each site. Similarly, pub companies should have the ability to establish whether tenants are suitable candidates via credit checks, right to work information, etc.

6.2. However, the information requirements as set out in the Code are far too onerous and go into a level of detail unnecessary in legislation. We are of the view that the provision of information to prospective tenants (and when the full protections of the Code become active) should be subject to a staged approach, in order to make such a requirement workable in practice for both companies and tenants.

6.3. Currently, different companies will provide different levels of information for prospective tenants (dependent on their own commercial recruitment strategies) – with the minimum set out in the IFC. We envisage a similar approach for the Statutory Code. However, the issue remains that if Code protections, requirements, etc. are applied to tenants at too early a stage (and crucially ahead of the pub company/brewery itself deciding whether an applicant is suitable for a specific pub site), this would result in an extremely high and unreasonable administrative burden for companies. When advertising pubs to let there can often by a very high level of interest and enquiries.

6.4. The triggers for information requirements set out in the consultation document, and at regulation 5 (5) (a) and (b) of the draft Code, are too broad. The visit to the pub by the prospective tenant and confirmation of interest in the pub site is too low a bar. There is also the issue that the company would have to provide detailed and potentially commercially sensitive information to casual enquirers who have no intention of taking on the pub.

6.5. We believe it is unreasonable for a prospective tenant to benefit from the Code protections in relation to information provision, ahead of developing a full business plan and proceeding to the final interview stage with the pub company. At this stage (and with heads of terms drawn up) protections in relation to information provision would commence. The incoming tenant would have recourse to the Adjudicator if, having signed the agreement, they had not in fact been given all the information required during final negotiations. Thus, we would envisage a system working as below:

Letting process	Information requirements	Code protections
Stage 1 – initial phone call enquiry into site, visit to pub in question.	None	No
Stage 2 – prospective tenant remains interested in site and makes a formal application to let AND pub company satisfied tenant is suitable for the site.	Information provided to prospective tenant to help formulate business plan. This may include types of tenancy, period of tenure, details of purchasing obligations, summary of repairs, price lists, contracted in/out etc.	No
Stage 3 – business plan developed and approved. Final interview/heads of terms drawn up, credit checks undertaken etc.	The remaining information as set out in the Code over and above that needed to develop business plan.	Yes – at this stage the prospective tenant becomes 'protected' under the Statutory Code in relation to the upfront information

		requirements set out in schedule 2, i.e. upon signing an agreement the new tenant would then have recourse to Adjudicator if not in fact provided with all required information during the final negotiations.
Stage 4 – Agreement and commencement of new letting	Access to all code provisions	Yes - Full Code Protection

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?

7.1. We are of the view that a tenant should carry out a business plan for each individual pub letting. There is also an issue here regarding a potential conflict between the Pubs Code legislation and the LTA – if the tenant does not submit a business plan (and it is decided they must do under the Statutory Code) how does this fit together with their statutory right to renew if they are contracted-in under the LTA?

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?

8.1. The concept of a 'rent proposal' as distinct from a 'rent assessment' is confusingly drafted in the consultation document, and in the regulations. By 'rent proposal' we are taking this to mean an event that results in a change in the amount of rent paid that does not fall under the legal definition (and therefore MRO triggers) of 'rent assessment' under the SBEE Act. As currently drafted, these proposals create a significant regulatory burden if a rent proposal and Schedule 1 and 2 information is required at the occasion of a previously agreed indexation or stepped annual rent increase.

8.2. Therefore rent proposals will reflect where rent changes because of ad hoc support arrangements, indexation, tenant going FOT on a certain line etc. If these are subject to the extensive information requirements as set out in the draft regulations (in the same way as a formal rent review or new tenancy) then this will be extremely onerous and detrimental for both company and tenant. By having to go through the bureaucratic exercise of proving extensive information for instances mentioned above such as rent concessions, it will be much more difficult for companies to offer these to tenants. This is surely not what the legislation is trying to achieve.

8.3. Other than a renewal (if this is not classified as a rent assessment?), we would propose that 'rent proposals' be exempt from the information requirements, as such detail would not be needed by the tenant – and if they had an issue with the process they are still able to report the company in question to the adjudicator. Such tenants will already be in occupation of the pub and have a copy of the agreement and knowledge of trading levels for their business.

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)?

9.1. As above in answer to Question 8, we are strongly of the view that such provisions should be excluded from the information requirements in the legislation – as excessive and unnecessary regulation around these areas will lead to such rent concessions and ad-hoc agreed arrangements being discontinued. If there is to be any additional requirements this should certainly not be in relation to indexation provisions, rent holidays or temporary discounts.

The Pubs Code – repair provisions

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?

10.1. In our view it is imperative that the regulations require tenants to take their own professional advice in respect of repairs and dilapidations as part of their own due diligence when taking on a tenancy, as it is vitally important that the prospective tenant undertakes their own survey if they have repairing obligations. This would also reflect the current situation under IFC 6.

10.2. However, with regard to the breach of repairing obligations being a code issue referable to the adjudicator, we would hope the Adjudicator's guidance reflects the differences between minor and major breaches of repairing obligations and takes a proportionate view, i.e. there should be some measure of reasonableness perhaps based on whether the repairing breach resulted in a threat to the business.

The Pubs Code – arbitrable provisions

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

11.1. Any provisions of the Code that do not affect the profitability of the tenant's business or would not form a breach of the contractual agreement or Statutory Code on their

own. The Adjudicator should draw up a list of provisions (in consultation with stakeholders) that will be considered nonarbitrable for the purposes of the Code legislation.

Contractual inconsistencies with the code

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

12.1. We agree with the proposals as drafted – however at S. 41 (1) (b) (i) the company must retain the right under the Code to initiate a unilateral rent review for use in specified circumstances (for example the abolition of the tie).

12.2. With regard to the IFC, where mentioned in current contractual agreements, these will become void once the Pubs Code legislation comes into effect.

Extension of code protections

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

13.1. The regulations at Part 9 do not make mention of the MRO option being suspended for pubs sold to non-statutory companies. We are certain this is the intention, however we would welcome clarity as to why this is not specifically mentioned in the regulations. Clause 10.2 of the consultation (part 2) document states that the tenant has no right to request an MRO, however 10.9 (a) states that the tenant is entitled to a rent assessment – which under the legislation triggers the MRO option. Clarification is required on this point.

13.2. We would also highlight that a number of the information requirements, such as the need for a Code Compliance Officer and BDM training and related provisions, would be particularly onerous on smaller companies acquiring pubs from the larger companies and so should not apply. We would also propose that the requirements are suspended for the purposes of rent assessments/rent proposals on those pubs who have extended protection as the protection ends at the next rent review or renewal point – however they would still have access to the Adjudicator for the other aspects of the Code. The simplest way to ensure a level of protection is similar to the current IFC 6, whereby any pub sold by a statutory code-protected company must have a deed of variation to ensure it is covered by the voluntary code. We are aware that a number of companies operating under 500 pubs, including those represented by Independent Family Brewers of Britain, have committed to continuing self-regulation and a voluntary code for their tied tenants and lessees – along with a dispute resolution system.

Group undertakings

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

14.1. We believe that the proposal whereby the maximum financial penalty for companies breaching the Code is based on turnover from all group undertakings is excessive. It should only be based on turnover derived from agreements covered by the code and adjudicator (i.e. not breweries, managed houses etc.). Please see Question 23 for more detail.

Exemptions from the Pubs Code – genuine franchise agreements

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.

15.1. We welcome the decision to exclude genuine franchises from the MRO provisions of the pubs code legislation. Agreements where there is no rent payable or the price paid for goods does not affect the tenant's profit share should be exempted from the Code. We leave it to members to explain how these proposals will impact on their specific franchise models, given the variety of models currently operating in the sector but certainly the current proposals set a very high bar (e.g. we do not believe that genuine franchise should have to be assignable) and would severely limit the number of pub franchise models excluded from the MRO provisions. On a general point however, there is the real risk of stifling innovation in this part of the sector by the regulations being drawn and enforced too tightly and Government should be aware of this when looking at this new and growing part of the pub sector.

15.2. BIS is looking to define a genuine 'pub' franchise. Therefore, we believe that such franchises should not have to be assignable in order to allow this new model to develop. In respect of the requirement that there should be no additional payments for the supply of goods or services that the tenant may wish to take advantage of (such as marketing support from the company), this goes against virtually every other recognised franchise and leaves the pub sector with a very constrictive framework within which to develop and operate. Without doubt, many of the concerns voiced around this general issue in the past have been caused by lease assignments – it would be a backwards step to insist that all franchises have to be assignable.

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

16.1. Members have indicated that this proposals seems reasonable.

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.

17.1. These information requirements are not relevant to franchises. We are of the view that information requirements relating to franchises should be treated differently to that for tied tenancies, and as such should be included in their own schedule and exempted from Part 2 of the Code in it is entirety. An example of what a separate franchise schedule of information contains is listed below:

Proposed Schedule 4 Information Requirements for Genuine Franchise

1. Where available 5 year trading history of the outlet.
2. Copy of the Premises Licence
3. Details of any known planned investment in the area.
4. Details of initial set-up fee
5. Detail of any ongoing fee
6. Details of franchisee's turnover share
7. TUPE information, where relevant
8. Demographic report
9. VAT and machine game duty information
10. Historic Enforcement Information, where relevant
11. BFA Code of Ethics, where relevant.
12. Copy of the Pubs Code Regulations 2016
13. Whether contracted in or contracted out of Landlord & Tenant Act 1954
14. Details of Tie
15. Length of term
16. Repairing obligation, where relevant.
17. If the agreement is assignable or can be sold.

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

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.

18.1. We support the Government's proposal for 12 months defining a temporary agreement for the purposes of code (and MRO) exemption. It is vital enough time is given to find, recruit and train new tenants/lessees for substantive agreements and anytime shorter than 12 months is likely to lead to an increase in temporary closures that are extremely detrimental as outlined in previous responses.

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.

19.1. Temporary agreements are used to keep a pub open and trading while a longer-term tenant is being sought and due diligence is being carried out – for example, if the previous tenant has left at short notice or has died. In addition, it is agreed that by their very nature, these agreements require more flexibility than longer-term agreements.

19.2. To introduce pre-entry awareness training for temporary agreements will slow the procedure down and will result in pubs closing in the short term whilst potential tenants are asked to take a course that concentrates solely on full tenancy and lease agreements – which often the relief tenant has no interest in taking forward. Therefore such agreements should be exempted from the full PEAT training.

19.3. However, a solution could be a temporary agreement specific short PEAT course. It should be much shorter (approx. 30 mins) and focus on explaining what a temporary agreement is and what it means in practice. As noted above, the full PEAT course would be a deterrent to the type of individual who takes on temporary agreements, and would risk temporary (and the risk of permanent) pub closures.

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?

20.1. As in our answer to Question 19, excessive information requirements to temporary tenants will slow the process down and lead to pubs being boarded up between full time tenants rather than open and trading. Information requirements for temporary agreements should be agreed between the temporary tenant and company, and not subject to statute if the time period is less than 12 months. We suggest a temporary agreement specific PEAT course as described above to minimise red tape, this course should be valid per temporary tenant for a certain length of time, rather than for every agreement (which could be taken in short succession).

Enforcing the Pubs Code – fee for arbitration

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.

21.1. There is no mention of how much a pub operating company will pay to refer a dispute to the adjudicator – presumably this will also be £200. We believe it is right that there should be a referral fee as set out in the consultation in order to defer frivolous or vexatious referrals.

Enforcing the Pubs Code – costs of arbitration

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.

22.1. Under the provisions of the Arbitration Act 1996, the arbitrator has the power to decide on the awarding of costs and how these are split by the parties – taking all factors into account. We feel that this is the correct way to deal with such costs, as the independent arbitrator sees all the facts and information submitted in each individual case and as such is better informed to decide on cost awards, rather than setting an arbitrary limit in legislation.

Enforcing the Pubs Code – proposed maximum financial penalty

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.

23.1. We are of the view that any penalty should be calculated based on the pubs covered by this legislation operated by the business in question (i.e. those that are subject to this legislation). The Groceries Code applies to large supermarkets who have a homogenous business model – whereas a number of the companies affected by this legislation have diverse managed and brewing interests in addition to their tied pubs. Therefore in the interests of fairness, the 1% should apply to the turnover derived from their tied estates.

Specific issues identified in the draft regulations:

- General – list of contents does not match with regulations after Part 3 – this needs to be amended.
- S. 4 (5) (b) references pre-entry training being accredited by OfQual or Qualifications Wales – it should be noted that the current PEAT pre-entry training is not OfQual accredited. As such all new agreements will be in breach of the Code unless this clause is removed or amended. There are currently no training providers offering an OfQual accredited pre-entry training course, although it should be noted that BIIAB is itself an OfQual accredited body. Amend to alternative wording that the course should be provided by an OfQual registered body, rather than the course itself being accredited.
- S.5 (2) (a) the business plan should be allowed to be prepared prior to PEAT if agreed between the tenant and pub company.
- S. 7 (1) (a) insert 'rent' before 'amount payable'.
- S. 7 (3) RICS registered valuer is the wrong terminology. Also seems to contradict BDM section where BDMs are responsible for preparing rent proposal (at S.42 (3) (a).
- S. 8 (2) – this currently states that 'a tied pub tenant may request a rent assessment.....if such an assessment has not been concluded within 5 years prior to the date of the request'. This could create a situation whereby a tenant has, in the past, refused to sign a rent review memorandum at nil change or even for a rent reduction, it is inequitable that the tenant should have the chance to trigger a new rent

assessment when the previous cyclical rent review is capable of being resolved instead. This would be resolved by changing the wording to 'the tied pub tenant has not had the opportunity of a rent review within the 5 years prior to the date of the request'.

- S. 8 (5) (a) delete all after the word 'rent' (as this part of clause does not make sense).
- S.10 (5) – why does the company representative have to visit the pub three months after the rent review proposals is delivered, surely this should be three months prior to the rent assessment being drawn up.
- S.10 (9) and elsewhere – RICS qualified valuer is the incorrect terminology.
- S. 11 (2) & 11(3) (i) – it is our reading that this means that a new rent under a rent review will not come into effect until the date that the pub owning company and tenant agree the new rent in writing. This will delay implementation of any rent reductions for tenants as well as rent increases for pub companies, the contractual terms of leases already provide the correct basis for backdating overdue rent reviews, with interest. There is also a different rule in this same Code which applies when the MRO FOT terms are agreed or determined late. See Regulation 10(7).
- S. 12 (2) (b) (i) and (ii) – the 'amount payable' should read 'rent amount payable'.
- S. 12(5)(a)(i) – this reads that the pub company has to provide the tenant with their expected return on the investment. If this is the case, this would be completely unacceptable as that is commercially confidential and would also impact on the negotiation of the rent and investment agreement.
- S. 14 (3) regarding the contracted out renewal 'on the day the tenancy may be renewed under the terms of the tenancy' - unless there is a specific contractual provision, there is usually no date.
- S. 20 (3) (b) Is this a heads of terms, or a copy of the proposed agreement?
- S. 22 (1) (b) In part 1 of the consultation this references S. 15 – 17, in Part 2 this now references S 14 -17 – it is assumed that Part 2 is correct.
- S. 22 (2) (c) should be amended to read 'terms which are not standard terms of business and standard lengths of term between pubs which…' in order to ensure hybrid agreements cannot be created.
- S. 24 (4) to be amended to remove 'may' to ensure MRO process cannot continue once tenant has accepted tied rent offer.
- S. 25 (1) and 29 (2) – the independent assessor should be a qualified member of RICS with relevant experience.
- S. 26 (d) references a S. 24 (7) which does not exist.
- S. 30 (9) (a) gives the tenant the right to reject the independent assessor's assessment of the MRO within 7 days – if this person is independent and qualified it seems inequitable that only one party should have the right to reject the assessment if there has been no breach of procedure. If the tenant is the only party that has the right to reject the initial assessment, it would be only fair and equitable that they pick up the additional costs of appointing any second assessor as a result of this process.
- S. 34 (b) (v) and S. 34 (b) (vi) reference the same wording and some of the same clauses – is (v) older wording that should be deleted?
- S. 36 (2) (c) Contracted-out agreements on the date of expiry needs to be added here.
- S. 38 (2) (iii) – It is the assignees' responsibility to undertake due diligence when entering into an assignment. They should take professional advice, to ensure they fully understanding the repairing obligations they are taking on. They should also have a

building survey of the premises to establish its current condition any repairs required. This is the normal process in commercial lettings in other property transactions.

- S. 40 (1) This should include Part 8 – end of MRO process.
- S. 40 (2) (c) Clarification here to ensure payments such as business rates, utilities etc. are not caught in definition
- S.42 (b) Are these BDM training requirements likely to be stipulated in the regulations or left to Adjudicator guidance or based on current practice?
- S.42 (3) (a) sets out that BDM is responsible for conducting rent assessments, but this conflicts with earlier regulations that state it should be carried out by a RICS qualified surveyor?
- S. 42 (4) (b) 7 days is too short to provide minutes, should be longer e.g. 21 days.
- S. 42 (6) (b) this suggests that the definition of BDM will apply to anyone in the company who has dealings with tenants rent repairs, business plans – this would include member members of pub company staff who are then subject to annual training etc. This BDM definition must be tightened.
- S. 50 (dilapidations) – breaches of schedule between both parties. An assignment of a lease is an arm's length property transaction between the tenant and prospective assignee – and cannot in most circumstances be interfered with by a third party. Interference can result in litigation by the tenant or assignee against the third party. Any interference by the pub company in the assignment process as a result of S.50 (8) (b) could result in legal action against the company for the reasons sated above. Also the clause states 'whether' the tenant is responsible for contractual dilapidations – if they are in breach then they are responsible.
- S. 53 regarding notification of tenant when freehold is sold – as drafted this excludes Plc companies but not Ltd companies. This would cause major issues for those then required to notify the tenant. We are strongly of the view that this requirement should not be included in the Pubs Code. Where the company owns the pub outright, information on the sale of pubs (which are often sold as a package) is commercially sensitive information, and the requirement to inform tenants of an intention to sell would adversely affect such a sale. The status of an existing in-situ tenancy would not be affected by the sale of the pub. If the pub in question has a superior landlord to the pub company, they would not always inform the company of their plans to sell and therefore the company could not pass notification on to the tenant. This requirement does not appear in any other sector where properties are bought or sold with tenants in situ (retail units, residential etc.) and would make the pub sector unique in this requirement, affecting companies commercially.
- S. 53 (2) (b) should add 'if known' as such information may not be available,
- Schedule 1 – s.10 (e) A schedule of condition is a document used to record the condition of the premises at a certain point in time (and will include photo evidence). These are attached to leases to clarify or modify repairing obligations. Therefore, the schedule is not a building defects survey as intimated by s.10 (e) and an ingoing tenant should be required to undertake their own due diligence and commission a building survey.
- Schedule 1 s.15 (c) – this is already stipulated in the regulations as 6 months at S. 50 (7) (b).
- Schedule 1 s. 15 (d) – this is detailed in the RICS Dilapidations Protocols (6th edition).

- Schedule 3 – as highlighted above (3) is impossible to achieve as company will not have access to other local pub trading levels and (4) should refer to 'listing the benefits and features of the tied pub agreement' rather than a costed SCORFA which as highlighted above cannot be achieved for many reasons. Also data protection issues.

BBPA
18.01.2016