Pubs Code and Pubs Code Adjudicator Consultation

The ALMR is the national trade body and the BII is the professional body for licensed retail – together we represent over 30,000 businesses, from individual tenants and lessees to small businesses and large national chains. Just under half our members businesses will be pubs, and 1 in 5 of our members' outlets being tied industry leases[1].

Both organisations have been actively engaged in dialogue with the pub companies and their representatives for over a decade in an attempt to resolve issues of concern arising from the relationship between landlord and lessee. We have also driven efforts at self-regulation, drafting the industry voluntary code, establishing PIRRS and PICAS, promoting pre-entry training and providing practical advice, support and assistance to our members. Both bodies are board members of the Pub Governing Body and are committed to promoting and delivering effective self-regulatory solutions for those companies not affected by the statutory regime.

As such, we are well placed to comment on the issues and concerns arising from the Government's consultation on the implementation of the Pubs Code and Pubs Code Adjudicator and have welcomed the opportunity to engage with officials throughout the consultation process. This joint response builds on the comments made during stakeholder and Ministerial meetings.

Overview

The ALMR and BII agree with the need to ensure that the new statutory regime is fair, proportionate and can be enforced effectively. This is a complex and complicated issue affecting a sector which, at all levels, operates under tight net profit margins, is sensitive to regulatory cost and where there is a continued fragility in terms of growth and investment. We recognise and support a pragmatic approach which balances competing interests and provides for a sustainable business model for all parties. This will be key to restoring confidence in the sector, vital in facilitating investment.

In light of this, **we therefore support the Government's proposals on parallel rent assessments and investment.** The ALMR, BII and FLVA are working collectively to develop additional business planning tools for lessees which will prompt them to undertake even more rigorous analysis than provided for under the Code and to enable them to undertake their own basic parallel assessment.

While the consultation is rightly wide ranging, we believe that **the key to delivering the Government's objectives is effective regulation of the rental valuation calculation**, making sure that the tenants have robust, evidence based information on which to take advice, enter into commercial negotiations and make an informed business decision. The regulation underpinning this must be **detailed and rigorous**, with the current IFC6 model being the starting point only.

We are also concerned about potential unforeseen consequences arising from the proposed drafting of the MRO triggers. We understand from meetings with Ministers and officials that there **is recognition that it would not be desirable if the wording of the MRO trigger unduly restricts the ability of a tenant to exercise the rights provided to him under the Small Business Act**. We have therefore suggested alternative wording in respect of these.

Finally, we would urge a rapid conclusion to the consultation process and an early indication of Government intention of implementation dates, the timetable for application to existing agreements and the procedural timelines to be applied going forward. While we recognise that much of the

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[1] The ALMR Benchmarking Report 2015 shows that two thirds of hospitality outlets will be operated on leasehold or tenancy basis: 44% commercial lease and 20% industry lease/tenancy. Of the latter, almost all operate under some form of tie: less than 5% were free of tie.

practical implementation will be set out in guidelines produced by the Adjudicator, there is nevertheless an urgent need to give lessees facing rent review or lease renewal negotiations this year an early indication of transitional arrangements. Any undue delay to the implementation process of the statutory pubs code only **prolongs the uncertainty which undermines business investment decisions by lessees and landlords alike.**

PART 1 CONSULTATION QUESTIONS

For ease of reference, we have grouped our comments on the draft regulations underneath the most appropriate question.

Rent Assessments

1. **Do you have any views on the proposed definition of a rent assessment?**
   We agree with the Government's proposal to define a rent assessment by reference to a procedure rather than to a fixed point in time. This will give clarity and certainty to both parties.

   We are, however, concerned about the proposed timetable surrounding the provision of a rent assessment and conclusion of negotiations, particularly the initial very short trigger and response periods. We believe that this may result in an unduly confrontational approach and, with a requirement to act within 14 days, may result in an increased use of MRO requests simply to avoid falling out of time. A slightly longer time frame may help avoid this and facilitate negotiated settlements. This is particularly the case with regard to rent assessment provided for within the lease or where no rent assessment has been held within 5 years, which may be termed 'routine' rent events.

   We understand that the 6 month period is based on the timetable set out in IFC 6 to avoid imposing any new burdens on business. However, we would not that the industry code allows an additional 3 month period to conclude a rent review or rent assessment process – with a requirement to provide information 6 months prior to the rent review date and an obligation to conclude negotiations within 3 months of that date falling due. We would urge the Government to reconsider whether this would not be a more appropriate maximum time period – notwithstanding the fact that the parties may move to conclude each stage of the proceedings inside this maximum – to avoid

   In respect of regulation 8 (2)(b), significant price increase, the 14 day timeframe may be appropriate and workable if it referred to the date on which a price increase took effect rather than the date on which it is notified. This mirrors the approach in other supplier relationships such as Sky, BT, PPL/PRS where a 30 day notice of a price increase will typically be given and the parties then have that period to raise and address concerns before intervention is required. A trigger which takes effect after a price increase takes effect provides for this normal commercial dialogue and resolution and avoids an immediate lodging of a rent assessment and simultaneous MRO request, both of which will involve both parties committing resource.

   We are also concerned about the wording at regulation 8(5) which sets out the circumstances which are not considered rent reviews and requiring a regulated rent assessment. Regulation 8(5)(e) appears to suggest that a regular midterm rent review provided for under the terms of the lease would not be considered a rent assessment. While this would clearly be different from an exceptional rent review as described in 8 (1), it is nevertheless vital that such regular or routine rent reviews are regulated under the code and

subject to the same information and disclosure obligations and conduct requirements (regulation 9, 10 and Schedule 2) as exceptional reviews. We would welcome clarification that this is the case.

We note the information requirements set out in Schedule 2 which rent proposals must meet. We believe it is vital that there is full disclosure and transparency at this stage in order to facilitate a negotiated settlement. We would therefore recommend that the intention behind the IFC requirements is translated into the regulations or guidance from the Statutory Adjudicator: namely, that the justification or evidence to support rent proposal assumptions be shared; that lessees and that evidence which either party may wish to rely on in third party resolution should be disclosed.

We note at 10(5) the proposal that an appropriately qualified person visit the pub within a 3 month period beginning on the day on which the rent review proposal is provided to the tied tenant. The IFC provision requires this visit to take place in a 3 month period ending on the day on which a rent proposal is provided. This was designed to ensure that the person preparing the rent proposal has a good understanding of the business and property **before** making a proposal. We believe that this should be replicated in the final regulations.

Delivering the commitment on no worse off

Although there is no specific question on the Government's proposals in respect of parallel rent assessments, we would like to register our support for the proposed approach and agree that the new proposals on MRO triggers and rent review procedures obviate the need for a separate PRA provision.

Market Rent Only Option

We are concerned that, as currently drafted, the Government's proposals on MRO triggers set the conditions for deployment so high that very few tied tenants will be able to use them. We know that, in light of recent debates in the House of Lords, the Government has indicated that these clauses are likely to be revised and we believe that this will be necessary to deliver both the Government's stated objectives and the intention of Parliament.

We note that there is no specific question in the consultation on the proposal that an MRO trigger should only apply to a normal rent review if the rent proposed by the landlord is increased (regulation 15(b)). For ALMR and BII, this is the most significant area of concern – of far greater concern than the drafting around significant price increases or significant impacts. If no other action is taken in respect of the MRO triggers, this condition must be removed in order to ensure Government objectives and Parliamentary intentions are delivered.

2. **Are there any other circumstances where a renewal would arise and which should trigger MRO beyond those we have set out?**
   We agree with the Government's proposals on renewals

3. **Is the wholesale market price for beer the appropriate baseline for determining a significant price increase?**
   The consultation suggests that any price related trigger should reference the published wholesale price of beer[2]. Whilst the principle behind this is good, a problem arises in so far as there is no published national wholesale price for beer to which tenants can refer. While this used to be published, we understand that competition law now prevents the collation

[2] The definition of 'beer' may need to be clarified as most beer ties will also include cider and it will be important to ensure that a significant price increase trigger refers to draught and packaged ale, lager, stout and cider.

and publication of national wholesale prices. An individual tied tenant would therefore have no means of knowing whether the price increase being proposed by their landlord was above or below the national wholesale price. Reference could only be made to increases significantly in excess of the stated % price increase being applied by the brewer.

4. **Is a 5 percentage point threshold above any increase in the wholesale price of beer (which will reflect any increases in inflation, taxation and any other input costs) the appropriate measure?**
   We believe that the definition proposed for a 'significant' price increase is set too high. We note the Government's intention is to ensure that this is used infrequently, we believe that the proposed definition means that it may never be used given that it allows for any price increase by the brewer (which would normally take account of duty, regulatory costs etc), an additional amount to take account of external costs (without requirement for supporting evidence or justification to be provided) **and** a margin for the pub company supplying it (again, without any requirement to justify why it may be needed).

   We note in respect of the margin that the consultation document refers both to 5% of the original wholesale price and a five percentage points above any increase in the wholesale price. We believe that these two definitions are at odds and, if applied, would allow different price increases to be defined as non-exceptional. In either case, we do not believe 5 % or 5 percentage points could be considered to be a 'small' margin. If a degree of tolerance is to be provided, then it must be a genuinely small margin, for example 1-2% and it should be justified by reference to landlord 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?**
   As noted above, it is normal practice for price increases from suppliers to take account of duty, tax, inflation and regulatory costs. The government's proposed approach risks these external costs being accounted for twice unless there is a requirement to justify price increases and provide evidence to support additional external cost considerations.

6. **Is this the appropriate way to measure a significant price increase for tied products and services other than beer?**
   As a metric, there is nothing wrong with the model, however, the thresholds are set too high to make it practicable.

   We note that the proposed threshold of 20 per cent of total pub turnover is high and that the majority of tied products other than beer which would be supplied would fall below it – as highlighted in our Annual Benchmarking Report (see appendix). This should be lowered or alternatively redefined to refer to % of products purchased or costs.

7. **Is a two tier approach appropriate?**
   A two tier approach may be appropriate provided the threshold was set at a more realistic level. However, we believe it may be more appropriate to use it to distinguish between goods and services.

8. **Are the proposed percentage increases in price appropriate?**
   We do not believe 30% and 40% price increases are appropriate thresholds. They are set too high to be meaningful and would allow successive swingeing price increases to be imposed without redress. Given that these are price increases excluding inflation, regulatory

costs or tax, it is vital that they are lowered to more realistic levels eg 5-10% unless a higher increase can be objectively justified and evidenced.

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?**
We agree with the proposed approach and reasoned justification for it.

10 **Do you have any comments on the significant impact trigger?**
A tenant will have a right to request a rent assessment – and 14 days after that is put forward, an MRO – following an event which has a significant impact on the level of trade and where the impact is beyond their control and could not be foreseen.

We note that, in order to make sure of this significant impact trigger, the tenant will be obliged to provide a written analysis of the forecast impact on their business. It is vital therefore that sufficient time is given to allow the tenant to prepare and produce this and the procedural timetable should be drafted accordingly. For example, there should be a realistic timeframe after the tenant became aware of the significant impact within which they can make representations to the pub company; it may be feasible to notify the pub company of the event and likely use of the trigger, but not to produce a detailed written analysis of the impact. Similarly, the pub company may need to time to assess the impact and respond appropriately. It is also vital that the 14 day trigger period is clearly set out as being after the rent review proposal has been received and not within the

In respect of the definition of a significant impact event, we would urge the Government to ensure consistency with exceptional circumstance events for the purposes of business rates.

We are concerned about the proposed wording of some of the tests and believe that the fact that they are cumulative tests may again set the barrier too high to be of meaningful benefit. We recommend that these one or more of the tests rather than all of the tests must be met.

The requirement that the impact must not affect any other pub as well may well rule out some instances where there will be a legitimate significant impact on trade. For example, two or three pubs on the same street or in the same village may all be specifically affected by the closure of a large factory in the near vicinity, a decision not to build a large housing development or to introduce a bypass. It should be sufficient for the pub to have to demonstrate that there is a specific effect on their pub and their business and the second half of point iii should be deleted. Similarly in point ii the reference to a willingness to offset the impact through a reduction in tied rent should be deleted. Almost all impacts are capable of being remedied in this way providing the landlord is willing to do so but the tied lessee is unlikely to be know whether this is the case until they exercise the trigger and ask for an exceptional rent review. If these two points are left unamended, then we believe that the significant impact trigger will be incapable of being exercised.

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?**

We note that tenants who are contracted in under Part II of the Landlord and Tenant Act have a right of renewal at the same terms and we would not expect an MRO right to interfere with this.

We therefore agree with the distinction between renewal and during the course of a tenancy, however, we would urge caution in drafting to avoid implying or indirectly requiring a new agreement is the outcome of an MRO trigger used during the course of a tenancy. A requirement to enter a new agreement would involve tenants in additional stamp duty and legal costs and an MRO trigger should normally only affect one clause of the agreement.

13. **Do you support the requirement that an MRO compliant agreement should provide for an open market rent review every five years?**
As noted above, we would not envisage the use of an MRO trigger affecting the other terms of the lease. The lease will provide for regular rent reviews or otherwise, often depending on length of agreement and other factors. We see no reason for the exercise of an MRO trigger to introduce a new rent review requirement over and above that already provided for or equally introducing a new rent review requirement.

MRO Procedure

14. **Does the list of required documents set out in para 10.23 provide the independent assessor with all the appropriate information to make an independent assessment of the MRO rental figure?**
We agree with the proposed list of documents and the emphasis on the requirement on both parties to provide evidence.

15. **Do you have any comments on the timescales for the MRO procedure proposed for the Code?**
We agree with the Government's approach to allow normal rent assessment and review procedures to be requested before an MRO is triggered. It is vital that the Code does not introduce a higher level of confrontation into what is already an adversarial process nor does it result in an almost automatic use of an MRO trigger by imposing unduly tight timescales. We fear that, as drafted, it may do just this.

We also note that the timescales appear to be dictated by a desire to complete the whole process within 6 months in order to mirror the IFC 6 requirements on rent review; the IFC provides for a maximum 9 month process, however. We believe that an absolute maximum of 9 months may be more realistic for requested or midterm rent reviews. For price increase or significant impact triggers, it is vital that sufficient time is given before the MRO process takes place to allow for normal commercial negotiations: for example, for MRO only to be triggered after a rent proposal to address or remedy the increase or impact is put forward and cannot be otherwise agreed.

Notwithstanding the above, 14 days is an unrealistically short timeframe for response and reaction. A tenant may be on holiday or away from the business and would miss the window of opportunity to engage. The same may be said of the individual BDM within the business who receives the initial tenant's request. A 28 day period would be more practical.

In discussions with officials and other stakeholders, it has been far from clear what the start date is for the MRO procedure and it is vital that this is set out clearly and unequivocally. The

start date should be the date on which a rent review proposal is received where one has been requested, and that should be consistent for price increases or significant impacts: normal commercial dialogue and negotiation should be allowed to happen rather than the two procedures having to take place simultaneously. Within 21 days of the new rent proposal being received or the pub company refusing to accept a rent assessment/MRO trigger event has taken place, then the lessee should have the right to trigger the MRO process.

In cases other than midterm rent review or renewals, where a rent assessment event occurs but the tenant does not wish to ask for a rent proposal before triggering MRO, then the tenant should have a 21 day period to request MRO. In this instance, the MRO start date would be the date on which a price increase takes effect or the date on which the tenant becomes aware of a significant impact event.

We also believe it is important to allow sufficient time at the end of the process when an independent adjudicator has been appointed. The 7 day period at the end of the negotiation period and the end of the independent assessor period for the tenant to accept the MRO offer appears unduly curtailed, particularly given that the tenant should be encouraged to seek and take professional advice at both these points to understand the true nature of the offer being made, its impact on other trading terms and the real costs of any action. We recommend that these periods are extended to a minimum of 14 days.

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

We agree with the Government's proposals that the procedure will come to an end when the tenant confirms in writing that it is accepting or rejecting the MRO offer. Equally, where a twin track rent assessment process is in train, the MRO offer will lapse if at any point during the process the tenant confirms in writing that they accept the revised tied offer.

17. **Do you have any concerns about the proposals for the resolution by the Adjudicator of disputes related to the MRO procedure?**

We believe that the Adjudicator should be able to arbitrate disputes about all aspects of the MRO procedure, the compliance of MRO agreements and the rent assessment processes. We agree that both the tenant and the pub company should be able to refer MRO disputes to the Adjudicator and that references may be made at any point during the procedure. In these instances, the timetable should be suspended until the dispute is resolved but the Adjudicator must be able to rapidly rule a reference as vexatious or frivolous if the purposes of it is just to delay resolution and redress, for example exceptional triggers. It would also be helpful to understand the timetables within with the Adjudicator must determine disputes.

Investment

The impact of market interventions such as the pub code on business confidence and investment should not be under estimated. Although the focus has been on investment and capex by the landlord, it should be noted that lessees also make significant investments in their property and businesses, both defensive and capex, solo and joint projects. Indeed, many significant investments made by landlord companies will be joint projects. The protracted uncertainty has had an impact on liquidity within the market and the willingness of banks to lend to lessees. It is vital that these provisions are pragmatic and flexible enough for both sides to take advantage of in order to sustain investment.

When the MRO provisions were debated in the House of Lords and an investment waiver was first proposed, the suggestion was that the tenant would waive their right to make an MRO request for a period of time. As drafted, the Government's proposals also remove the right for a tenant to have their rent reviewed for a period of time irrespective of whether the economic or trading circumstances have changed. We believe it would be helpful to allow the parties to continue to keep the rent under review as provided for in the lease where the waiver period is for a considerable period of time.

The circumstances of investment will be largely individual to each property and the circumstances of the individual lessee. For example, a well maintained and invested pub where the lessee has limited capital and tight cashflow may well see a small scale investment to refurbish or install a kitchen as significant, even if it is small in terms of capital outlay or in proportion to the dry rent. Similarly, the decision on whether the investment is significant enough to make up for loss of MRO and, more importantly midterm rent review, is a subjective one and will be different depending on the size and scale of the lessee. It is vital, therefore, that the Government retains an element of flexibility in the application of this provision and does not try to over-regulate it.

Provided the Code ensures that the lessee is not penalised or coerced into accepting a proposal and the Adjudicator has the power to determine a dispute on the application of this provision, we would recommend that the focus of regulation should be on the qualifying nature of the project rather than the amount or the length of the agreement.

We would also urge the Government not to draft the regulations in such a way as to require a new agreement to be entered into in the case of midterm investment projects. This will simply add costs to the lessee

18. How do you believe the 'amount' of investment for the purposes of 'qualifying investment' should be defined?

The Government is proposing that the amount of investment should be linked to the rent and has suggested that this should be either 100% or 200% of the total amount payable by the tenant to the pub owning company.

We do not believe that rent is the best metric upon which to base an assessment of significant investment. As the tied model develops, with alternative forms of agreement and turnover rents becoming increasingly common, it will not be a clear figure. Moreover, the tenant will have no knowledge of the wet rent or total amount the landlord company earns from the site.

As noted above, whether or not an amount is significant is dependent on individual circumstances and is a subjective assessment: at the end of the day, the tenant has to weigh up whether the benefit of the investment is worth giving up the benefit of MRO, the right to a rent review and outweighs the cost of alternative sources of funding. For some, 25% of dry rent may be significant, for others 400% would be significant. There is also a danger that a flat rate % would undermine a 'little and often' investment approach and instead encourage an all or nothing approach, to the detriment of the business.

Our preference would be for a minimum figure not to be set by regulation, but if one is to be included, it should be based on dry rent and should be 100%.

19. **Do you agree with the proposed definition of 'qualifying investment' in terms of the type of investment?**

As noted above, we believe that this is the most appropriate area for regulation to focus on and we agree with the proposed list of qualifying types of investment. We also support the suggestion that these conditions can be met individually and are not cumulative requirements.

We note and agree with the exclusion of investment which is a contractual obligation for the pub owning business to provide. There will also be contractual obligations on the lessee regarding repairs and maintenance and it is not uncommon for these to be included in large scale investments. For example, a lessee and landlord may agree to include decoration, roof or wall repairs in a project plan for what would be a qualifying investment. Provided that the landlord is taking on a lessee obligation for repair and maintenance or other contractual obligation and provided that this is only part of the qualifying investment, then this should not invalidate the investment waiver overall.

20. **What do you consider should be the maximum length of the waiver period?**

Given that the waiver period also removes the right a rent review, we would urge a cautious approach. As noted above, it is vital that lessee understand and can weigh up the true costs and benefits of the proposal before agreeing to the waiver and lessee groups will have a significant role to play in helping them to do that. Transparency and clarity are therefore arguably more important than absolute regulation of length.

We believe that the waiver period should be aligned to the return on investment period or the period of time over which the landlord pub company wishes to rentalise the investment. This should be disclosed as part of the investment proposal or investment agreement and the waiver should be capped at that. The Adjudicator will then be able to determine disputes as to whether the amount of the investment and agreed rent matches with the waiver period. In the majority of cases, an ROI period of 7 years would suffice but a longer period should be allowable where it can be objectively justified.

21. **Do you agree with the safeguards proposed by the Government and the role proposed for the Adjudicator?**

We agree with the proposed safeguards and the treatment of different disputes by the Adjudicator or courts according to the issue in hand.

22. **Do you believe that there are unintended or undesirable consequences of the proposed definition of 'qualifying investment' or of any other conditions referred to in this chapter on the MRO investment waiver?**

We have no additional comments to make over and above those highlighted above. We are keen to ensure that landlord and lessee continue to have the ability and flexibility to negotiate joint investment projects to suit their individual circumstances and would urge the Government not to be over rigid in their application of the waiver so as to underpin and not stymie investment across the sector as a whole.

PART 2

The second part of the consultation revisits some of the issues already covered in Part 1. We welcome the fact that the Government is listening and the commitment to get the legislation right.

For the avoidance of doubt, we support the balance the Government has struck in incorporating information requirements for a tied rent offer within the MRO procedure and agree that this will fulfil the objectives of a PRA without requiring a separate process. Moreover, the ALMR – working with the BII and FLVA – is working to produce a more detailed business planning and P&L document for tied tenants to use in interrogating the tied offer or rent assessment they receive and will include elements within this model which will enable individuals to make their own parallel assessment.

We also welcome the further interrogation of the rent assessment trigger to ensure that the drafting does not unintentionally undermine the protections intended through the Code.

Market Rent Only and Parallel Rent Assessments

1. **We believe that the stated MRO procedure, that will give tenants a free of tie rent offer alongside the tied rent review proposal will enable tenants to make an informed judgement as to whether they will be no worse off by remaining tied and fulfils the objectives of a Parallel Rent Assessment.**
   We agree with the Government's conclusion and support the desire to streamline and integrate the MRO and tied rent procedures so as to ensure that no undue burdens or costs are imposed. We believe that the integration of the PRA into MRO will be effective.

   We note the reference in paragraph 6.26 to information sourced by the tenant; this will continue to be key. We are committed to working outside the statutory regime to provide ever greater levels of information and support to tied tenants to enable them to make an informed decision and to understand and evaluate the options supplied to them.

   We are concerned, however, that the time table set out in Part 1 of the consultation for the MRO process will inevitably result in most tenants triggering both procedures. A 14 day window post receipt of a tied rent offer as part of a normal rent review is not sufficient time to determine whether a tenant wants or needs to trigger MRO in order to assess whether they are 'no worse off'. As noted in Part 1, we believe that, ideally, the process should run in parallel but should start sequentially. We therefore recommend that the timetable should be extended in order to allow normal commercial dialogue and negotiation before an MRO trigger decision is taken. For example, 14 days should be extended to 28 or opportunity should be given for preliminary discussion. We note that the current industry framework code provides for a 9 month period to conduct and agree a rent review – information is provided 6 months before due date and agreement reached 3 months after.

2. **We would welcome your comments on whether 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 judgement as to whether they will be no worse off by remaining tied.**
   While the list of documents in Schedule 3, paragraph 10.23 of Part 1 and paragraph 6.24 appear to be comprehensive, it is vital that the level of detail and evidential justification

each will need to meet is also regulated. For example, a summary of the methods used for calculating rent will only be helpful if it is accompanied by a requirement to provide a minimum level of detail in the rent assessment P&L, building on the requirements specified in IFC 6, and accompanied by a requirement to provide evidence to justify assumptions or of comparables.

Similarly, on purchasing obligations, it will be important to include the price at which the product is sold to the tenant, estimated selling price, volume of product (including volume on which duty has been paid if different from volume bought), allowance for wastage or promotions and estimated GP for each product/income line. We recommend an expanded model P&L and a requirement for the information to meet this minimum requirement be included within the Code. Equally, it is the detail of how 'put and keep' repair obligations will be translated into the statutory regime which will determine whether the Schedule 3 requirements are sufficient.

We would also welcome clarification that these information requirements will apply at all points where a rent assessment or rent proposal is made, even if there is no MRO trigger. This will be particularly important for contracted out, short term tenancies as well as new entrants.

3. N/A

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?**
The requirement in Part 1 of the consultation that an MRO option would only be available at normal cyclical rent review/assessment if the rent was increased would have unduly restricted tenants and landlord alike: limiting the information and ability to assess whether a rent proposal was fair for tenants and inhibiting landlords from seeking a rent increase where this may be appropriate and where the market or trade has picked up as a result of earlier investment or support.

Over the course of the last 5 years, many rents have been revalued and reassessed and there have been downward rent reviews. Evidence from Fleurets and Christie and Co highlights the fact that a large minority of rent reviews conducted over the previous year have seen a rent reduction. The ALMR Benchmarking Report also shows rent as a proportion of turnover declining (see appendix). Moreover, the greater use of indexation throughout a rent review period has meant that there is less of a jump in rent at the end of the period when it is reviewed. Depending on how the Code was interpreted, indexation could be seen to have levelled out increases at rent review so that even if the passing rent was increasing, the flattening between year 5 and year 1 would mean that the MRO trigger could not be used.

The fact that a rent stays flat or declines does not necessarily mean that it is robust, would meet the new justification requirements under the statutory code and nor does it mean that it is necessarily fair. As the Government has set out in the previous chapter, the MRO is designed to ensure that the tied tenant has a means of assessing whether their tied rent is fair. This availability of this assessment is key whether the rent is increased or decreased.

We therefore support the Government's proposal to remove the requirement for rent to increase at rent assessment before the tenant has the right to choose to exercise MRO. We do not believe that its removal will result in an increased burden for landlords.

5. **Please provide evidence**
Recent data shows that tied rents have been decreasing across the UK. The Fleurets Rentals Survey 2015 found that "a number of areas have seen decreased Tied pub rents. London had 44% of rent reviews seeing a decrease, the Midlands 82%, North 33%, South and West 53%. This will be primarily as a result of the Code of Practise allowing rents to go down". In comparison, "Free of Tie rents generally are seeing an increase...most free of tie leases will have upward only rent review provisions". Similarly the most recent RICS survey shows that average rents in Q3 of 2015 were lower than recorded in Q1 in both cash terms and as a proportion of turnover.

The Pubs Code

6. **Do you agree that these are appropriate conditions to be met before it becomes mandatory to provide specified information to a prospective tenant?**
While we support the proposal that a tenant should have visited and inspected the premises it should be sufficient for the tenant to notify the pub owner of that rather than having to make a formal application for a viewing and to be accompanied by the landlord or his agent. We are concerned to over burden the process at an early stage and note that the Pub Governing Body annual Report highlights an increase in the number of initial pub applications which are refused at an early stage and do not proceed to be serious inquirers. It is vital we get the balance right and a simple notification/confirmation of intention to inspect the premises and seriousness of intent should suffice.

7. **Do you agree that the 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?**
We are not certain of the purpose of this question given that the context in the consultation document is about the provision of information by the pub owning company to the prospective tenant to enable them to prepare a business plan. Para 8.14 refers to the fact that it will be a breach of the Code for a pub owning company to continue discussions with a prospective tenant unless they have provided them with sufficient information to enable them to prepare a business plan. Given that, we believe that it would be a retrograde step to allow a prospective tenant to continue discussions without preparing a business plan, providing evidence of that plan to the pub owning company and entering discussions on the basis of that plan.

   We can see no justification for the requirement for a business plan to be waived and indeed as Board members of the Pub Governing Body have previously expressed concern at the waiver of pre-entry requirements, including the business plan.

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?**
These requirements relate to instances where the rent has changed but which are not sufficient to trigger the rent assessment provisions of the Code. We would differentiate

between annual indexation requirements and the other amendments to rent highlighted in the consultation document. The former will be agreed as part of the initial rent and is therefore known by the tenant and capable of being included within a 5 year business plan and cashflow forecast at the start of the agreement; we therefore believe that these should be removed from the section. The latter are unforeseen or unexpected changes which could not have been incorporated into a business plan and therefore ones where the tenant requires a degree of information in order to negotiate with the landlord.
Schedule 1 information requirements are those which are provided at the start the agreement and which are designed to set out the overarching framework for that agreement over its lifetime. It would therefore be disproportionate to require those to be provided again at interim phases which do not meet the rent assessment/MRO triggers.

Schedule 2 provisions are specific requirements identifying how the rent has been calculated. It is inevitable therefore that most will be provided again where a change of the nature identified in 8.10 (excluding annual indexation) results in a proposal for a change in rent. The focus should be on the information which has changed, and provided the tenant retains the overarching right under the Code to ask for more information, including evidence or justification for assumptions, and the proposal remains capable of being referred to the Adjudicator, we see no reason to require all information requirements to be replicated.

9. **Should a rent proposal be required in all cases where there is a change in rent during the tenancy?**
We believe that there would be merit in excluding changes that are automatic or agreed in advance, such as annual indexation, or that are of a temporary nature designed to provide short term relief or support eg rent holidays in the case of floods. It would seem sensible to focus the information requirements on those instances where rent will increase or where there is a change in the tied purchase obligation as these are the instances which will have a material impact on the original business plan.

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?**
We agree that the proposals strike a fair balance. This is an area which is the subject of contention and dispute and the primary document has to be the lease. While we accept that the Government's focus on encouraging the tenant to seek legal advice rather than interfering in contractual matters is the right one, we note that the current IFC states that where the lease is silent - and many existing leases are - the assumption will be that an obligation is 'keep' not 'put'. We would welcome a similar approach in the Statutory Code.

11. **In the draft Code are there any provisions that you consider should be specified as non-arbitrable?**
We support the Government's overall approach, highlighting that breaches of provisions which in and of themselves would not give rise to a case before the Adjudicator should not be arbitrable, but could be subject to investigation by the Adjudicator. The focus of the Adjudicator's work must be individual cases brought by tenants in respect of clear code breaches.

We note that the SBEE Act does allow the Adjudicator to nominate and delegate to other bodies and believe that the existing PIRRS and PICA services could have a role to play here in respect of breaches of provisions deemed non-arbitrable.

Contractual inconsistencies with the Code

12. **Do you have any comments relating to the proposals for void and unenforceable terms?**
    We support the Government's proposals

Extension of Code Protections

13. **Do you have any views on the extent of the extended protection that is proposed?**
    We support the Government's proposals to cover situations where the landlord changes to one who does not qualify as a pub owning business. Should there be no change to the terms and conditions of the lease, then we believe that the Code protection should end with the conclusion of the next rent review as provided for in the lease.

    However, many of our members have found that where their landlord changes, there is often a material change to their business. Often there will be an immediate re-assessment of tied products and prices and it is not uncommon for both of these to change. While this is inevitable – for example a sale to a small brewer will inevitably result in a change of tied product – it is vital that a tenant retains the protection to request a rent review. Moreover, if the new landlord decides to review the rent before the next scheduled rent review, then the full Code protections should be available.

Group Undertakings

14. **Are there any elements of these proposals regarding group undertaking that you think would not work as intended or that require amending?**
    We support the Government's proposals as sensible and pragmatic.

Exemptions from the Pubs Code

15. **Please comment on the key characteristics of a genuine franchise agreement as set out in table 1.**
    We support the Government's intention to exempt genuine pub franchise agreements from the scope of the Code – a true franchise being based on a very different investment and business model than a traditional lease/tenancy, most notably in the flexibility the tenant has to operate their business - but agree that they should be included in the calculation of numbers of tied agreements.

    We note that the term 'franchise' can be used as short hand for a variety of business models, some of which will be no different to a lease and therefore support the objective of defining in legislation what constitutes a genuine franchise. The key determinant is a recognisable consumer facing brand which is capable of being subject to specific IP protection. This is consistent with European Competition Law which differentiates between franchises and other exclusive purchasing obligations in its exemptions. The provisions of table 1 – particularly clause 4 & 5 – capture this successfully and we support the suggestion that they be cumulative tests.

16. **Do you agree with the Government's proposals for reasonable piloting of the pub franchise model?**
    To be capable of being franchised, the concept must be tested and be shown to work in at least one unique location for a reasonable period of time. Given the nature of the business,

we believe that a pub franchise should be piloted in more than one location for a period of at least 18 months to two years, to demonstrate successful sustainability and replicability.

17. **Do you agree that the pubs code information requirements that are indirectly related to rent should apply to genuine pub franchise agreements?**
We agree with the proposal that Pubs Code information requirements should still apply to genuine pub franchise agreements.

18. **For how long should tenancy at will or other agreements be granted exemption from the Pubs Code?**
We believe that the Code should differentiate between short term agreements and tenancies at will. These are very different agreements, used for different purposes and often contracted with different types of lessee and should not be conflated in regulations.

    We support the proposal to exempt tenancies at will and short term agreements from the approach adopted under the IFC and should ensure that temporary arrangements are not unduly constrained and pubs are able to continue to stay open and trade whilst a long term solution is determined which is appropriate to the pub. In the overwhelming majority of cases, this will be achieved well within the 12 month period.

19. **Do you think it is appropriate that a tenant entering into a tenancy at will or short term agreement should have completed pre-entry awareness training prior to being offered the agreement?**
We agree that all new entrants to the market should complete pre-entry training before taking on an agreement for the first time, including Tenancy at Will and a temporary or short term agreement of less than 12 months. This training should meet national standards and be accredited by organisations which are on the OFQUAL register of awarding bodies and should only be capable of being waived where the lessee is an existing multiple operator, has an existing agreement with the pub company or can evidence existing successful trading

20. **What sort of information do you consider would be useful and desirable for a new tenant to receive from the pub owning business?**
We believe that the information provided to lessees entering into TAW or short term agreements should mirror the basic information set out in Schedule 2 and in particular historic trading data where available, current actual trading level, rent assessment compliant P&L for the site, the price list and other price relevant information (eg barrelage, volume of duty paid stock supplied), the relevant heads of terms of the lease as it will apply/disapply during the course of the agreement

Enforcing the Pubs Code

21. **Do you agree with the proposed £200 fee to refer a case to the Adjudicator?**
We agree with the Government's proposals.

22. **Do you agree with the Government's proposals that the maximum costs that tied tenants could have to pay a pub owning business following an arbitration should be set at £2000?**
Under the current self-regulatory framework, the tenant is not required to bear the pub company's cost should a case taken to PICA Service be unsuccessful . We are concerned that, when coupled with a fee to refer a case and the costs of preparing for arbitration, this could act as a disincentive for tenants. We nevertheless acknowledge that this is in keeping with

standard arbitration procedure and accept that costs may be awarded. We support the proposal for a cap.

For this reason, we believe that it will be important for low cost alternative dispute resolution models – such as PIRRS and PICA Service – to remain available in the market and would welcome the opportunity to work with Government and the Adjudicator to ensure that this is the case going forward, noting that the SBEE Act specifically provides for this.

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?**
We support the proposed maximum financial penalty.