FLVA

PUBLICAN'S PARTNER

RESPONSE TO THE DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS CONSULTATION INTO PUBS CODE and PUBS CODE ADJUDUICATOR

PART 1

This submission is made on behalf of the Federation of Licensed Victuallers Associations (FLVA) which is a members' organisation that has since 1992 looked after the business interests of self employed licensees. We sit as a board member of the Pub Governing body which gives us insight to industry issues and enables us to comment and give rise to concerns we may have in respect of the Statutory code and adjudicator proposals.

Executive Summary & Recommendations

1. During the passage of this legislation to provide the "no worse off than" principle, the letting programme of the Pub Operating Business's (POB) have altered. The vast majority of current substantive lets are now contracted out of the Landlord and Tenant Act 1954 (LTA) so many of the trigger events providing for this principle are redundant. This shift in letting profile should not preclude the Tenant in such an agreement, at inception or at a point of regranting, from being provided with information that enables that comparison to be made and justified. The POB's are also "challenging" renewals, and thereby avoiding a trigger event through requiring the property for their own use ie a "Managed House" This terminology perhaps requires a best practice definition in order that the Lay Tenant can fully understand its true definition.

2. The requirement for an upwards revision of the passing rent at review before the MRO option is triggered should be removed from the proposed legislation

3. Where the definition of price increases refers to the wholesale price of Beer this should also encompass Cider. Any increase by the POB of Beer or Cider wholesale pricing to a price above that quoted by the owning brewer's wholesale price (BWP) or higher than the quoted GBP Stirling increase as published by the brewer, should be classed as "significant" in terms of this legislation.

4. Other products and services price increases should be measured against previous prices paid, having made any adjustments for rises in tax duty or compliance costs but these adjustments should not include RPI.

5. Some of the stated conditions which must apply to a pub before a significant event is triggered are totally impracticable e.g. the fact that the event must be shown to affect no other pub. For this reason the requirement that all conditions must be met renders in the main, the "significant event" trigger redundant which must not be the case. All such resolutions to this significant event should be quantified by a rental assessment. Any justified significant event should apply to all tied pubs irrespective of agreement.

6. An MRO compliant agreement should be market led in its terms and should not be capped in its period of tenure.

7. The proposed timescales require "flex", and a pre "notification period" to allow for negotiations on the tied proposal. Negotiations should require a formal response no assumptions should be drawn in order that misinterpretations are avoided.

8. Periods of waiver from MRO in respect of significant investment should be driven by the period of ROI rather than an arbitrary expenditure or time period.

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

9. The broad definition of a rent assessment is accepted as proposed dependent upon comments below.

10. We strongly disagree with the proposal at 8.12 within the consultation that there should be an upwards only trigger requirement regulation, The quantum of the review should bear no part of the requirement for triggering the right to an MRO option and must be removed in total. Its inclusion would remove the option of the majority of outlets to validate the core principle of "no worse off than" via the MRO procedure. In evidence we would point to the Fleurets 2015 rental survey. See also our comments under Q5 of part 2 of the consultation. See link as below

http://www.fleurets.com/market-intelligence/media/fle019_rentalstats2015_web_v1.pdf

11. Thought should be given to the tenant's ability to call for an assessment where it has been 5 years since the last assessment. With the code provision that the assessment should be undertaken 6 months before the relevant review date this ability should be triggered at 4 years and 6 months from the previous assessment to be effective at 5 years thus allowing for a period for negotiation.

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

12. No further triggers are anticipated but the comment is made that agreements protected under LTA legislation would be covered at rent reviews and renewals and the 5 year time lapse between assessments. Unprotected agreements do not benefit from these triggers but they should not be precluded from requesting such an assessment should the circumstances as outlined for the significant events of price increases or trade impact be applicable.

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

13. A general point in this respect is that any significant price increase should also encompass ciders.

14. The pre discount pricing structure of pub owning businesses (POB) is a very complex and varied subject. Some POB quote a "wholesale price" lower than that published by the owning brewers "Brewers Wholesale Price" (BWP) which is potentially to the benefit of the tenant. Some however have a pricing structure above this BWP. It would therefore require some form of "normalisation" or registration of what is deemed to be the BWP

15. BWP would be an appropriate baseline in the determination of a significant price increase, however it is very difficult for a tied tenant to access BWP pricing structures at this point in time and to do so within the 14 daytime window allowed for such a trigger to be activated would not be achievable and would therefore preclude this trigger from the majority of tenants.

Question 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?

16. The formula providing for a 5% increase in the product price over and above any new quoted BWP to allow for tolerance before a significant event is triggered is not acceptable. It is such a large tolerance that it may have the effect, if used alongside your para 8.12 of part one of the consultation, of providing the required uplift in income stream to the POB without any increase in the rent proposal which as this consultation stands would negate the trigger event for MRO.

17. It is our opinion that any increase for products above the basic BWP increase, measured in £ sterling, rather than % terms should be classed as a significant increase in respect of the MRO trigger

Question 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?

18. We believe that it would be correct to exclude rises in tax, duty, regulatory and compliance costs but not RPI. This latter measure is too broad a basket when a cost increases, or decreases, for an individual product or service are being measured. The measure of an increase in the purchase cost to the POB would also be difficult to ascertain, in the case of insurance this may include elements of self insurance or the information may well be commercially sensitive and which the POB would not wish to disclose.

Question 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.

19. As per our response in Q5 we believe in the main that this measure, other than its exclusions, is not appropriate. Each category of product or service is individual. For example, insurance, both property and commercial, may need to be measured against statistics produced by the Association of British Insurers where it can be provided at an

industry level. For Wines, Spirits & Minerals RPI or perhaps more appropriately CPI may well be an appropriate measure in determining a significant increase. See our comments under Q9

20. This complexity may well mean that a determination by the adjudicator as to the significance of any increase will be required should a tied tenant wish to claim a trigger event to which the POB does not agree.

Question 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?

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

21. It is perhaps best to answer these 2 questions in parallel. There are very few tied products or services which would account for above 20% of the tenant's turnover. The exceptions to this would probably only be those of food, wines, spirits & minerals, where and if tied. Were these products to exceed this cost threshold either singly, or as a group of commodities, then it would be wholly inappropriate to require a 30% or 40% increase in their cost before being classed as a significant increase. See table at appendix 1 which provides the quantum against such a two tier approach and compares against an arbitrary RPI increase.

22. At the other end of the scale insurance recharges would probably be the next highest potential tied cost, and as a generality these are likely to only be in the region of circa 1% of turnover. A 40% increase in insurance charges as suggested would only lead to a small sterling increase but would be wholly inappropriate and should be classed as significant.

Question 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?

23. This question suggests that the % threshold method as detailed in Q7 & Q8 be abandoned in favour of this reference to previous prices paid excluding rises in tax, duty, and regulatory costs. Because of the complexity of the % threshold method for non beer (and cider) products this reference method may be the simpler and most appropriate method in our view. The time period should be aligned to that of the scheduled increases for the product or service supplied which in many cases would be 12 months.

24. Compliance and service contracts may be included within agreements as a mandatory tied service and may well have clauses that allow for a review of the charges made. This is done by measurement of the actual costs incurred by the POB in providing the service and should these exceed the charge made to the tenant then a balancing adjustment can be made. The price comparison method should encompass this "top up" to alleviate the practice of maintaining the "contract cost" and applying an increase via the annual adjustment.

Question 10. Do you have any comments on point's i. to vi. (significant impact trigger events)in Chapter 8?

i.

25. It may be obvious that an event is going to significantly impact upon a business but the full impact may well not be known at the onset of the event and the provision of a 12 month trading forecast would probably be a guess at best. Such a circumstance could be the non stocking of a dominant brand leader, or sector of products eg SIBA beers by the POB which could potentially impact upon the pubs trading volumes and or marketing stance.

26. In order for a tenant to receive business support from the POB there must be an option of receiving that support without it being a full and formal request for a rent assessment, (See comments under ii. below) which in turn may well lead to a subsequent MRO request providing the 14 day time scale is met and providing that the rent proposal is an increase in rent (a situation hardly likely to arise when such an event has taken place).

ii.

27. The request for support and the potential reduction in tied rent requires definition, be capable of challenge and should be formally documented and reflect the permanency of the situation and not merely be a short term fix. Any such agreed revised rent should be operative from the time that the detail and information, such as is available and is a reasonable request, is supplied to the POB by the tenant and be backdated as required.

28. We believe that the option of challenging any potential reduction in rent is central to this clause working proportionately. Any new tied rent proposal should rebalance the risk and reward principle and should fully reflect the current trading circumstances and not merely allow for the business to "exist" until the next cyclical review or renewal. This requirement to challenge is also supported by the Governments opinion that an event of significant impact will only be invoked "rarely and in exceptional circumstances".

iii.

29. This condition is impracticable as using the example of the closure of a local business or the construction of a bypass this would potentially affect many other pubs business's, all of which should be eligible to make a claim for significant impact, not all be precluded from making such a claim on the basis that all of clauses i. – vi. are to be met in order for the event to be defined as significant.

iv.

30. Accepted

v.

31. Accepted

vi.

32. Again this clause is impracticable on the basis that all clauses i. – vi. are to be met in order for the event to be defined as significant. In the case say of the closure of a major employer in the area, it may well be the case that in the short term trade may hold or increase as redundancy monies are spent. Beyond that short time scale the true and long term impact on the business will become evident and this short term "benefit" should not preclude the triggering of the significant event.

Question 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?

33. We believe that it is best to rely on the government's stance that it is the fact that there has been the impact on the business, rather than be specific about circumstances, which should bring about the focus rather than being prescriptive on events.

MRO-compliant agreements

Question 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?

34. We appreciate the fact that SBEE Act 2015 cannot cut across the rights granted, or not, by the contracting in or out of the Landlord and Tenant Act 1954 (LTA) but in light of the current contracted out letting practices of POB's the importance of an affordable Pubs Independent Rent Review Scheme" (PIRRS) or similar body to enable an existing tenant to challenge a proposed tied rent at letting or more importantly at "relet" is paramount.

35. In respect of the distinction between MRO compliance at renewal or mid-term we are in general agreement, other than in respect of paragraph 9.11 of part 1 of the consultation document. It is our belief that any agreement to be MRO compliant, which has been brought about mid-term, requested and subsequently granted should be for a term equal to the residual term of the original lease and not be capped in any way.

36. We are unsure as to whether it is envisaged that the rights to elect for an MRO proposal are a one off occurrence during the life of a lease or are repeated at each and every trigger point. We believe that the MRO trigger should be capable of being repeated. The first time a trigger point is encountered the Tenant may elect to stay tied, but subsequent triggers and events may dictate that opting for MRO would be the desirable option for the Tenant. We do understand that the MRO option once elected for cannot be reversed unless through negotiation with the POB.

37. Certain clauses within a current tied agreement may well not be compatible with a free of tie style tenancy agreement. These could be many and varied and should be removed by agreement between tenant and POB via Deed of Variation (DOV) at the granting of the MRO compliant agreement and should agreement not be reached be capable of challenge via the adjudicator who would be then in a position to be able to provide "best practice" guidelines. Examples of clauses which should be removed are the requirement of Flow Monitoring Equipment and mandatory service and compliance costs.

Question 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.

38. It is a requirement that to be a compliant MRO lease that there should be no terms within the lease which would not be expected and evidenced within a commercial FOT lease, to the benefit or detriment of the tenant. The test will be the comparables which will be brought forward.

39. To the best of our knowledge Wellington the largest FOT pub operating company, have as standard a 5yr cyclical, upwards only open market rent reviews. In the interim years there is a "Capped & Collared " RPI increase. This is currently set at 2.5% & 5%, this in practice means that on the annual anniversary an RPI increase will be applied at the calculated level but will be no less than 2.5% and no more than 5%. It is also becoming common practice to Tie Tenancy at Will and Temporary Management Agreements (a similar letting tool to a TAW)

40. The MRO compliant agreement should offer the protection of tenure (and term of tenure as per our response in paragraph 35) as your para 9.5 (1st consultation) provides for but not dictate the commercial terms between landlord and tenant which should be left to market evidence and commercial relationships.

MRO procedure

Question 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?

41. In general the documents proposed will provide the independent assessor with the information required but we would add the following.

42. That under iii) comparables should include similar FOT pubs in the area unless encompassed under v)

43. Again as detailed in paragraph 37.

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

44. We acknowledge the overall timescale of 6 months to meet the stated goal of the statutory legislation being in line with the current voluntary code but feel that flex should be given as below

45. The timescale as proposed will by default encourage all tenants who are eligible for an MRO event to enter into the procedure, as to not do so would mean that the opportunity would be lost. There needs to be some pre period where offers and negotiations surrounding the Tied offer can take place.

46. The 14 day period in the negotiation stage, between the MRO procedure start and the tenants request for an MRO option is too short and may well be missed through no fault of the Tenant due to something as simple as holidays. This should be extended to a minimum of 28 days.

47. Bearing in mind our comment regarding the overall 6 month window we suggest that no POB will propose a tied rent (nor should they) that does not stand the test of the tenant being "no worse off than" this means that in effect when the tied rent is assessed

and offered the FOT rent will also have been assessed so the 21 day response window for the POB to make the offer could realistically be shortened. If negotiations are conducted during the pre MRO period as suggested above and subsequently amended as a result of those negotiations then the FOT offer will and should have also been reassessed.

48. Within the negotiation period there needs to be some formal notification from the POB to the Tenant that they have made their best and final MRO offer, and its implications on the MRO process should this not be accepted. This is needed to avoid the situation where the Tenant believes that negotiations are still ongoing but falls out of the process by virtue of being deigned to have done nothing and the MRO option subsequently lapses.

49. If the Tenant moves into the Independent Assessment Stage, in effect the equivalent of stating they have made their best and final offer which has not been accepted by the POB then prior to the appointment of the Independent Assessor (IA) the POB should be allowed to accept the final offer of the Tenant without incurring further cost to either party. In order that there is no misinterpretation of the Tenants planned course of action and best offer the notification to the POB should include the MRO proposal from the Tenant which would be acceptable to them.

50. A POB will have the supporting documents more easily to hand than an individual tenant and the requirement to provide information to the IA within 14 days is very onerous and needs to be extended. This may be enabled by the foreshortening of the negotiation period or by allowing this documentation to be provided to the IA post the 14 day window as currently prescribed.

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

51. See comments above under paragraph 48 regarding misinterpretation of offers.

52. The period at the end of the IA stage which assumes that the assessment is accepted unless formally rejected is inappropriate as with paragraph 46 this window may be missed due to no fault of the Tenant.

53. Procedure could also come to an end if the POB agrees to accept the Tenants best and final offer as outlined in paragraph 49

54. When the tenant formally accepts the MRO offer there needs to be a time limit during which the new MRO compliant agreement is signed or becomes operational. This is a requirement so that there can be no delays through processing the new agreement due to delays in any legal process.

MRO Disputes

Question 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.

55. Other than cost implications for a Tenant, should the adjudicator refer to a second IA, we are in agreement with the proposals.

Waiver from MRO in return for significant investment

Question 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.

56. We are in agreement that the "amount" of investment should vary by outlet and cannot be set at a constant figure.

57. The proposal to set an appropriate amount based upon "wet" and "dry" rents is impracticable as a POB would not disclose their margin which defines the wet rent. This leaves the option of a multiplier of the dry rent as paid in the preceding 12 months. If this were to be used as a measure then it would be our belief that the qualify amount should be at least 200% i.e. the equivalent of 2 years dry rent.

58. The investment of a relatively small capital sum may well provide for a very quick ROI and should not mean that an extended waiver period be introduced. The waiver should reflect a true ROI and where applicable should not alter or delay future rent assessments and thereby the MRO trigger point. This perhaps leads to the conclusion that no qualifying amount needs to be stipulated but rather that any waiver period is simply aligned to the ROI period. This method would also negate the need to stipulate an arbitrary maximum waiver period. We envisage however that any waiver beyond 7 years will be exceptional and that 10 years should be an absolute maximum. Safeguards need to be in place to alleviate any bolstering of capital costs to provide for a longer waiver period.

59. The agreed waiver period however calculated should be documented via a deed of variation to the lease identifying future rent review dates and not via a side letter as this latter documentation has limited validity should there be a change of POB or Tenant.

60. The proposed "investment agreement" should also be supported by the provision of a rent assessment, which would detail the estimated P&L of the "new" proposal and could thereby not be simply used as a means of getting a return on capital via an increase in dry rent and potentially propping up an incorrect passing rent. The same safeguards as are in place in respect of the tenant showing due diligence i.e. the taking of professional advice should be the same as for pre contractual negotiations (subject to the stipulated waivers)

61. Any waiver period should be over ridden if any of the other MRO qualifying events were to happen. I.e. significant price increase or event

Question 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.

62. As detailed above in paragraph 58.

63. With regard to the type of investment which should qualify then the definitions will depend upon the timing of the investment as to whether this is at the onset of the agreement or mid-term.

64. If at the onset of an agreement then the works to be undertaken within the investment should be detailed within the lease itself to provide for clarity as to exactly what works are to be undertaken. Very importantly those works and costs should also be split into true capital works and what would better be described as repair and maintenance, this latter expenditure should not be included within any calculation of a waiver period. The tied rent assessment is calculated on the basis that the property is fit for purpose to enable a reasonably efficient operator to achieve a fair maintainable trade level.

65. If the investment is mid-term then the above definitions should also prevail in respect of true capital investment which should be defined as an investment which will drive the business forward and create new trading areas and environments, this may be defined by a structural alteration which increases trading capacity or introduces new potential trading opportunities e.g. provision of a catering kitchen or an extension to bar or dining areas. Importantly it should not include any expenditure which is the POB's liability within the existing agreement.

66. However should both the Tenant and POB agree, any liability of the Tenants under the current agreement could be incorporated with the qualifying investment definition and as such would then affect the ROI and as a consequence the waiver period.

Question 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.

67. See paragraph 58.

Question 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?

68. The safeguards as outlined are agreed and are also mentioned in our response paragraphs 60 & 61 and paragraphs 63 & 64

69. We believe that the adjudicator should only be involved in disputes in relation to the code. The code therefore should stipulate core principles of the "investment documentation" (ID) It is therefore imperative that the ID outlines aspects in respect of the waiver period, timing of the next cyclical rent review, date of commencement of the scheme, its duration, the date of commencement of any new rent role and the definition of a completion date of the scheme, which should include completion to an acceptable standard. It should also provide a course of action to be taken if the Tenant and POB are in disagreement in respect of any of the above. This may be the appointment of a mutually agreed independent RICS qualified surveyor, or in the absence of agreement then the appointment to be made by the Chair of RICS the appointment and findings of which would be binding on both parties.

Question 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?

70. The provision of the safeguards as agreed and suggested should provide for clarity in respect of investment between both parties.

71. If the investment is mid-term and documented by DOV then any subsequent Tenant who acquires the lease via an assignment will be made aware of the documents and deeds which are being assigned to them by the POB in the formal consent documentation and licence to assign. As a consequence the terms that they are bound by are formally documented. There should be a requirement that independent legal advice has been taken during the course of the assignment.

If any of the above comments require further clarification please contact our Operations Director, Martin Caffrey who can be contacted as below.

Tel
Mobile
Email

APPENDIX 1

This model assumes a pub with a turnover of £500k pa. Tied for all the categories as shown and shows the cost % as ratio to the Turnover and the relevant increases which could be charged before being deemed to be a significant event and compares this to an RPI increase of say 2.5%.

	T/O %	T/O £	GP %	Cost %	Cost £	Cost/TO %	Threshold %	Value £	RPI Say 2.5%
Food	20	100k	50	50	50k	10	40	20k	1.25k
Wine	10	50k	50	50	25k	5	40	10k	0.625k
Spirits	5	25k	60	40	10k	2	40	4k	0.25k
Minerals	10	50	60	40	20	4	40	8k	0.5k
Total					**105k**			**42k**	**2.625k**

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PUBLICAN'S PARTNER

RESPONSE TO THE DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS CONSULTATION INTO PUBS CODE and PUBS CODE ADJUDUICATOR

PART 2

This submission is made on behalf of the Federation of Licensed Victuallers Associations (FLVA) which is a members' organisation that has since 1992 looked after the business interests of self employed licensees. We sit as a board member of the Pub Governing Body which gives us insight to industry issues and enables us to comment and give rise to concerns we may have in respect of the Statutory code and adjudicator proposals

EXECUTIVE SUMMARY and RECCOMENDATIONS

1. During the passage of this legislation to provide the "no worse off than" principle, the letting programme of the Pub Operating Business's (POB) have altered. The vast majority of current substantive lets are now contracted out of the Landlord and Tenant Act 1954 (LTA) so many of the trigger events providing for this principle are redundant. This shift in letting profile should not preclude the Tenant in such an agreement, at inception or at a point of regranting, from being provided with information that enables that comparison to be made and justified. The POB's are also "challenging" renewals, and thereby avoiding a trigger event through requiring the property for their own use i.e. a "Managed House" This terminology perhaps requires a best practice definition by the adjudicator in order that the Lay Tenant can fully understand its true definition.

2. The requirement for an upwards revision of the passing rent at review before the MRO option is triggered should be removed from the proposed legislation.

3. There should be no exemptions from the requirement on a prospective tenant to produce a business plan, other than when the proposed let is that of a TAW. For the avoidance of doubt this exemption for a TAW let should not extend to a letting of a 12 month "probationary" style agreement.

4. Fully identified schedules of condition and costed schedules of work should be clearly identified to enable cross population to a business plan.

5. All changes to a passing rent, other than an RPI/CPI indexation, howsoever caused should be supported by a rent assessment

6. Pre Entry Awareness Training (PEAT) should be obligatory for all tenants, subject to the current voluntary code exemptions, for all styles of agreement including TAW.

7. A Tenant or Assignee, who may have relied upon the code provisions when entering into the agreement, may through the act of the sale of the property find themselves without this or the voluntary code protection at some point in the future. The current voluntary code is potentially binding on all successor landlords by way of reference or DOV in agreements. The statutory code proposals limits duration of the statutory protection and should not be a retrograde step. Consideration should be given to the provision of a section 27 style termination notice midterm with no penalty clauses incurred should the time limit of protection be truncated.

Question 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.

8. T he procedure as outlined for Tenants protected by the Landlord & Tenant Act 1954 (LTA), in the main covers (subject to comments made under Part 1 of this consultation) the requirement for them to judge if they are no worse off under a tied agreement and allows for opting to remain tied or to move on to an MRO compliant agreement. This in the majority of cases will be at the point of a cyclical rent assessment or at renewal of their agreement.

9. The vast majority of current lets by POB's in the market however do not have protection under the LTA and subsequently most do not have either a rent review which requires an assessment or a renewal at the conclusion of their fixed term i.e. the trigger points and therefore have no access to the MRO procedure. See comments under paragraph 12.

10. It is therefore essential, as a consequence of the fact that the Government has stated that a Parallel Rent Assessment (PRA) will only be integrated via the request for the MRO option, that a prospective or unprotected Tenant who is entering into a new agreement, which may indeed be the continued tenure of his existing property, has the ability to challenge via the Adjudicator that the code requirement of being no worse off than has been met.

Question 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.

11. Subject to the comments made in paragraph 42 In response to Q14 Part 1 we believe that the processes and documents provided for do provide the information to allow for a meaningful judgement to be undertaken by the tenant.

Question 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.

12. As stated in our response in paragraph 9 above we believe that as a consequence of current letting practices by the POB's in respect of agreements being wholesale contracted out of the LTA means that a new, and as a consequence, potentially less knowledgeable Tenant will have a more difficult route to achieving the principle of being no worse off than.

It is this group of inexperienced newcomers that have also struggled under the current regime.

Availability of the Market Rent Only option at rent assessment

Question 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?

13. This upwards only requirement regulation should bear no part of the requirement for triggering the right to an MRO option and must be removed in total. Its inclusion would remove the option of the majority of outlets to validate the core principle of "no worse off than" via the MRO procedure. See comments below in paragraph 15 in respect of the Fleurets 2015 rental survey

14. See our comments under paragraph 10 of part 1 of this consultation.

Question 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.

15. The Fleurets Rental Survey of 2015 evidences that in the Midlands, North and South West areas of the UK 82%, 32% and 53% respectively showed a decrease in rental values in tied pubs. The London area being the only location showing 57% of tied rental values increasing. The inclusion of the "upwards only" trigger would therefore be wholly inappropriate. See link as below
http://www.fleurets.com/market-intelligence/media/fle019_rentalstats2015_web_v1.pdf

16. It is our belief that the majority of leases in the market at the moment have an indexation clause, either RPI or CPI. It is also our belief that the majority of FOT leases do not have an indexation clause within the agreement and remain frozen for the duration of the rent review period, we cannot however provide evidence of this but the Fleurets survey as detailed above would perhaps indicate that this is the trend.

17. Of the reviews of Tied rents where we have had direct involvement over the last 3 years 49% have shown a decrease in rental values.

The Pubs Code - Information requirements

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

18. We agree with these conditions, the preferred position would be that inspection of domestic quarters be included also but appreciate that this is not always practicable and the privacy of the sitting tenant must also be respected. Should negotiations in respect of the letting reach a further and more substantive stage then this inspection of domestic should be required.

Question 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?

19. We are unsure of the meaning of the question. Perhaps it would be best to explain our thoughts in respect of business planning in general, and the information required from the POB to enable the plan to be produced.

20. Firstly there should be no exemptions from the requirement of a prospective Tenant to produce a business plan. It is essential in all circumstances. Other than when the letting agreement is a TAW

21. In the main a business plan should be prepared by a competent individual. This business plan should not only be a financial forecast, although this "shadow" P&L is of vital importance and should only be prepared by a qualified accountant. The modus operandi of the prospective tenant is in effect the key to the plan, and it is this plan which is subsequently developed into the financial forecast. There should be a synergy between the plan and the forecast and should reflect not only the perceived trading potential of the pub but the cost implications of delivering that plan.eg entertainment, repair liabilities both ongoing and those identified either via a schedule of condition or more probably a schedule of works to be undertaken.

22. In respect of the information which should be provided by the POB as detailed in Annex B of Part 2 of the consultation we suggest the following additions

- The act of contracting out of the LTA is prescribed by law and must be followed but it is insufficient to rely solely on the legal aspect of this procedure. It should be a requirement of the code that it is made absolutely clear that there is a possibility that the Tenant may be required to leave the property at the end of the contractual period not just that there are no rights of renewal or tenure.

- The implications of contracting out in respect of MRO should also be clearly identified in a clear statement that this will not be an option for the tenant at the conclusion of his contractual term

- The schedule of condition or schedule of works should be clearly identified and costed and upon whom that liability falls either at the onset of the agreement, during the period of tenure, at assignment, at renewal or at the latest at the conclusion of the term

- The full implications of "put and keep" especially where no schedule of condition is annexed to the agreement.

- All of the above repairing liabilities should be cross referenced to the business plan and financial forecasts.

- All other reasonable requests for information should be met and not restricted to those which are relevant to the negotiation of the rent.

- Costs of mandatory services . Insurance, statutory compliance, maintenance or decoration schemes.

- Letting history over the previous 5 years.

- Any service charges which are applicable to the Pub and the detail surrounding the calculation of same

- The code should also be provided at assignment to the assignee as the extension of code protection and group undertakings may be very relevant.

Question 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?

Question 9. Should a rent proposal be required in all cases where there is a change in the rent during the tenancy? Would there be any merit in excluding changes that are automatic or agreed in advance (for example, annual indexation provisions); or that are of a temporary nature (such as rent 'holidays' to provide short-term relief to the tenant)?

We answer these questions in tandem.

23. We believe that all changes to the rent role other than indexation should be accompanied by a rent proposal.

24. Where a "stepped" rent is negotiated and is written into the agreement these steps should also be supported by a rent assessment.

25. Rent holidays or partial alleviation of the passing rent, which are brought about by circumstances which do not qualify as a significant event eg flooding should also be supported by a mini assessment as part of the business support discussions and negotiations.

26. Where an agreement is contracted out of the LTA a letter of intent should be provided by the POB 6 months prior to the termination date, detailing whether their intention is to negotiate a new agreement with the Tenant or whether their intention is to terminate the tenure in line with their contractual rights. If it is the POB's intention to relet the pub to the sitting tenant then a new rent assessment should be provided to the sitting tenant along with the information requirements as for a prospective tenant (which in effect they are).

The Pubs Code – repair provisions

Question 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?

27. We believe that the provisions as outlined in the proposal are an appropriate balance

The Pubs Code – arbitrable provisions

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

28. We can identify no provisions within the code which should be specified as non arbitrable.

Contractual inconsistencies with the code

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

29. We have no comments.

Extension of code protections

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

30. There may be a distinction here between the end of the tenancy and the conclusion of the next rent review.

31. If at renewal, under LTA procedures a tenant could go to court to affect a renewal on the existing terms of his lease, which was subject to the voluntary code provisions, which may have been introduced, and relied upon, by means of reference in the original lease, or by a DOV, we are unsure which would be the superior of the 2 codes? It is our belief that the voluntary code would still be in operation as it would form part of the contract within the lease. If the voluntary code had not been formally introduced by reference or DOV then LTA would provide for a renewal based on existing terms which is not time restricted. Again we are unsure as to which piece of legislation would prevail.

32. Post mid-term rent assessment the Tenant or Assignee who has entered into the agreement on the basis of the code provisions may find themselves with an agreement which stands outside the code. Consideration should be given to providing the ability for the Tenant or assignee under these particular circumstances to give notice to terminate the agreement without penalty sanctions. This would be consistent with the ability of a Tenant at LTA renewal serving a section 27 notice to terminate.

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

33. We have no issue with the proposals.

Exemptions from the Pubs Code – genuine franchise agreements

Question 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.

34. We in the main agree with the proposals for the definition and characteristics of a true franchise where all of the characteristics apply.

35. We have a concern that the imposition of a low % split of turnover as the Franchisee share is the equivalent of an unrealistic rent proposal in a tenancy agreement which having been set for the duration of the agreement has no option for downwards review as would be the case in a tradition tenancy subject to rent review provisions. See paragraph 36 below

36. The impact of Minimum living wage and its imminent introduction and its accelerated implementation in the future, also cause concern in respect of the franchisee's liabilities. In a traditional tenancy where rent is calculated using the RICS guidelines an increase in staff wages would probably have a corresponding decrease on divisible balance which would then subsequently have a corresponding decrease in the rent roll, post bid, say at a 50/50 ratio for the sake of argument. Under a franchise arrangement where the Franchisee % share of turnover is say 20% there is no probable reason for Turnover to

increase so the Franchisee bears the whole burden of cost increase, again this is without redress at any future "rent review" date.

37. It is because of the above comments under paragraphs 35 & 36 above that we believe the franchise model may circumvent many of the intentions of the Code

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

38. The pilot concept must be shown to work not only for a period at least as long as 1 year in multiple outlets but also must be in variable geographic and socio economic areas which are relevant to the proposed letting.

Question 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.

39. In order that a potential Franchisee can properly evaluate the agreement on offer the provision of the information as for a let or rent review contained within the code should also be provided for a Franchise model. This should include traditional benchmarking statistics or signposting to same. It should also provide statistics directly from the pilot model which has been run by the POB as a "managed house" the identity of which should be made known to allow for investigation by the prospective Franchisee, in order that the comparability can be established.

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

Question 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.

40. We agree that a period of 12 months is a suitable period of limited exemption from the code to provide for exceptional circumstances for a Tenancy at Will (TAW) . This could be a similar period for a "probationary" style agreement, on the proviso that there is a short notice period, from the Tenant to the POB, say a maximum of 3 months, during which the Tenant can give notice to the POB and incur no penalty charges.

Question 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.

41. We believe that Pre Entry Awareness Training (PEAT) should be completed prior to a Tenant taking a TAW, subject to the exemptions as for longer term agreements as current in the voluntary code. A TAW tenant will have to have undertaken training and sat an exam (ALPH) in order that they can get a personal licence and therefore be the Designated Premise Supervisor to enable them to legally sell alcohol and conduct the other licensable activities. There is therefore no reason why PEAT should not be obligatory enabling the Tenant to understand not only the Licensing requirements but also the business implications.

Question 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?

42. If a Tenant is entering into a TAW as an expedient measure, looking towards the full term occupancy of the property in question under a substantive agreement then they should receive the majority of the information as required for that full term let as this may well influence the decision making process as to whether or not to enter into the TAW.

43. They should also have a full inspection of the property, including domestic. Whilst it may not be practicable for the POB to provide full schedules of condition, there should be an obligation for them to provide in outline their future plans for the pub, in terms of any expenditure which they may be contemplating, potential or probable long term letting model and or any disposal issues or plans

44. A full and detailed breakdown of expenses that the tenant will incur on top of the quoted rent. I.e. deposits or deposit build up, F&F hire, Maintenance contracts, compliance contracts. Staff liabilities under TUPE.

45. As a side issue it should be noted that current FOT POB's are now starting to tie their temporary agreements. This trend should be monitored.

Enforcing the Pubs Code – fee for arbitration

Question 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.

46. We agree with the proposals and discretionary powers as outlined in the proposal

Enforcing the Pubs Code – costs of arbitration

Question 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 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.

47. There should be no confusion in respect of the fee currently paid by a Tenant under the PIRRS scheme and the awarding of costs under referral to the Adjudicator. The PIRRS charge is for a service provided to determine a rent which is in dispute. Should this be the nature of the case brought by the Tenant then we would be in agreement with that fee.

48 If the case brought about was for any other code breach then we would be in agreement with the £200 fee but this should be subject to the same provisos as the current voluntary code where a full refund is given if the case were to be proven.

49. For a tenant to pay the full costs of the POB has the possibility to be used as a "tool" to dissuade Tenants from entering the process at all. Much better would be a process of identifying vexatious claims at an early stage, resulting in a "no case to be answered", therefore zero costs incurred. Should it be found that there is a case to be answered, then all cases should proceed to adjudication without fear of affordability on the tenant's part.

Question 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.

50. We are unsure of the turnovers of the POB's concerned but in general we would be in agreement with the proposal of the suggestion of a % of UK Turnover as being the method of calculation and 1% would be an acceptable figure to us.

If any of the above comments require further clarification please contact our Operations Director, Martin Caffrey who can be contacted as below.

Tel
Mobile
Email