(38)

The Pubs Code and Adjudicator Team
Department for Business, Innovation and Skills
2nd floor, Orchard 2
1 Victoria Street
London SW1H 0ET

Dear Sirs,

As a personal License holder and having been in the trade for over 30yrs with various sites from Wine Bars, Night Clubs, Ale House and Local Community Pub I feel I have a varied experience in the trade. [REDACTED]

I would like to answer a few points on the much needed

"Pubs Code and Pubs Code Adjudicator
and Delivering *No Worse Off*"
Ref: BIS/15/522

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

I support the commitment expressed in section **6.1** which states;

> *"The Pubs Code will provide around 13,000 tied tenants in England and Wales with increased transparency, fair treatment, and the right to request a rent assessment if they have not had one for five years."*

And the reiteration of the fact that;

> *"The Small Business, Enterprise and Employment (SBEE) Act 2015 stipulates that the Pubs Code must be consistent with the principles of (i) fair and lawful dealing by pub-owning businesses in relation to their tied tenants and (ii) that tied pub tenants should not be worse off than a free-of-tie tenant."*

I would like to question the provision in section **6.4**, which states;

> *"Having a rent assessment will entitle an existing tenant to renegotiate their tied rent during the course of their agreement to reflect current trading. It will also entitle a tenant to request the offer of a Market Rent Only (MRO) agreement."*

Firstly it is our experience that frequently in rent review assessments, pub owing companies use forecasted, or theoretical, trading levels in their FMT (fair and maintainable trade) calculations, rather than the current trading level of the pub as specified above. I ask will there be an amendment to this code to directly specify the use of current trading levels in rent review procedures?

Secondly you state that a tenant "will" be entitled to request an MRO offer, but within sections **8.12 - 8.35** you add a precondition of;

> *"so long as the rent proposed by the pub-owning business is higher than the existing rent that the tenant is paying"*

Given the statements in the government response to the pubs owning companies and tenants consultation (published 3rd June 2014);

> *"the Government remains strongly of the view that the unfairness in the relationship between pub owning companies and their tied tenants is continuing and damaging"*

And that;

> *"many tied tenants continue to face unfair treatment and hardship"*

There is an existing acceptance that many tied tenants are already paying too much for their rents, and this fact is one of the overarching realities that necessitated government action. To remove the entitlement to an MRO offer at rent review, as specified in **6.4** of your proposal, and directly specified in **part 4 section 43(6)** of the Small business enterprise and employment act 2015, for any reason, is clearly unjust, and cannot achieve the core objectives of the SBEE act, namely that, a tied tenant should be no worse off than a free-of-tie tenant.

It is very clear that, if the 'only if the rent is higher' clause remains, this changes the commitment of 'should be no worse off', into a commitment of 'the level at which they are worse off should not significantly widen', which will not and cannot achieve the objectives of the SBEE act.

I appreciate that it appears that you have what appears to have been a u-turn on PRA which I applaud you for but I would just like to express my views on this issue just incase you once again have a change of mind:

I support the commitments expressed in sections **7.1 - 7.5**, however sections **7.6 - 7.11** highlight a concerning misunderstanding of the concept and purpose of the parallel assessment mechanism. The PRA mechanism is not, as is suggested in 7.7, an alternative to an MRO offer, nor as described in section **7.8** an *'artificial construct'*. PRA is simply the concept of evaluating a proposed FMT tied rent offer in equivalent terms with an MRO offer.

The 2013 consultation did not directly question the suitability of being able to compare tied rents and market only rents in equivalent/parallel formats, and i would now like to request what evidence this consultation gave to indicate a lack of support for such an intrinsic mechanism.

"Pubs Code and Pubs Code Adjudicator and Delivering *No Worse Off*"
Ref: BIS/15/522

Section 7.7 also indicates that "Representatives of tied tenants compared the PRA proposal unfavourably". As a tied tenant of over 11yrs I can confirm that I am in full support of this principle and I am unaware of any tenant that i personal know of that has been against the concept.

I would be interested to know of any tenant or indeed tenants groups that have expressed an unfavourable response.

The comment ascribed to the All Party Parliamentary Save the Pub Group warning;

> *"that a parallel free-of-tie rent assessment procedure would overwhelm the Adjudicator with thousands of cases and would set the system up to fail."*

Is not a warning over the concept of being able to compare rents in a like for like basis, but a warning over any proposal that places the adjudicator at the heart of deciding what suitable MRO offers should be for over 13000 tied pubs, giving an unachievable workload of 2600 cases every year. This concern of overwhelming the adjudicator is actually more likely within your current proposition, where pub owning companies are not required to quantify an MRO offer, and as such more cases would undoubtedly go to the adjudicator under appeal.

In the official government response to the pubs owning companies and tenants consultation (published 3rd June 2014) it states;

> *"There is no evidence demonstrating that a tied lessee receives benefits not available to free of tie tenants or freeholders. Nor are we in a position to say with confidence that rents for tied pubs are invariably lower than rents for equivalent free of tie premises. We have been given examples where free of tie premises cost more to rent than tied ones and examples where they cost less."*

It is only by requiring pub owning companies to present their tied rent demands in equivalent terms with a genuine market only rent offer, will there be any incentive for pub owning companies to tailor their rent demands to ensure 'tied tenants are no worse off'. Whilst an abstract MRO offer may help some tenants to simply escape from their unfair tied terms, without the mathematical link of showing it side by side with their tied rent FMT calculation, it will not have the power to effect the fairness of tied tenants trading conditions, or to assure that 'tied tenants are no worse off'.

In **7.9** it is further stated that on PRA *"many respondents had argued would be unworkable"*, this was not among the findings in the official government response to the pubs owning companies and tenants consultation (published 3rd June 2014), are you able to clarify where this assertion can from, or whether it was simply a default response by one or more of the pub owning companies, whose unfair treatment of their tenants has been at the heart of the current need for legislative action.

Section **7.10** goes further to demonstrate an apparent misunderstanding of the RA concept, where it states;

> *"Requiring pub-owning businesses to provide both PRA and MRO assessments would add complexity to the operation of the Code and would impose significant additional burdens. Nor would it be a simple task to merge the two procedures – as PRA works on a 'bottom up' basis, demonstrating the value of various tied benefits to the profitability of the pub; whereas MRO involves a straightforward 'top down' assessment of the commercial rentable value of the pub."*

PRA is not a separate calculation, but simply the mechanism of comparing a tied rent and an MRO offer in equivalent or parallel format. PRA will not be *'demonstrating the value of various tied benefits'* as described above, but is intended to describe the presentation of tied rent offers and MRO offers in equivalent formats, both to give tenants clarity in their choice, and to discourage pub owing companies from continuing to demand overinflated tied rents that could not be justified in such a mathematically equivalent format, and in doing so strive to achieve the core objective that 'a tied tenant should be no worse off'.

Sections **8.1 - 8.11** detail parliaments intentions with regard to MRO in line with the core objectives of the SBEE act, however as mentioned above, in section **8.12, 8.13 & 8.19** the following clause to a statutory entitlement to an MRO offer has been added;

> *"so long as the rent proposed by the pub-owning business is higher than the existing rent that the tenant is paying"*

Given the acceptance of the fact that tied tenants are currently worse off than free of tie tenants, and the subsequent need for the government, following the will of parliament, to legislate against this unfairness, to add the above clause will only serve to ensure 'the level at which they are worse off should not significantly widen'. This will therefore not meet the core objectives of the SBEE act, and falls to meet the stated objectives of this proposed code in the executive summary and in section **6.**

"Pubs Code and Pubs Code Adjudicator and Delivering *No Worse Off*"
Ref: BIS/15/522

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

Adding the provision that if a tenant demonstrates that they are, under their current trading arrangement, experiencing financial hardship, then this should also be used a trigger for a rent assessment, and subsequent MRO offer. This will ensure that tied tenants do not continue to be 'more worse off' for any remaining duration of a 5 year cyclical rent review.

Q.9 Do you agree that a significant price increase should be calculated by reference to the price paid by the tenant at a previous point in time? If so, should that be six months ago?

Regarding sections **8.21 - 8.27**, pub owning companies, work within a GP% (gross profit) multiplier, as such when price rises or duty rises are passed on to tenants, this results in a direct increase in their cash margins beyond the simple increase in base costs. As tied prices have already been demonstrated to be too high, and are one of the key reasons that tied tenants are worse off than free of tie tenants, any increase, beyond the increases caused by inflation and duty which already increase a pub owning companies cash margin, is significant.

To proscribe any level of 'acceptable' increase, is to provide tacit permission for pub owning companies to use it as a benchmark. With tied tenants beer purchase prices already reaching equivalency with some free trade end of line sale prices, an increase of up to a further 5% every 6 months, would be highly significant and unsustainable for tied tenants. To then allow up to a 40% increase in other tied products every 6 months, ie an compound increase of up to 96% every year, before an entitlement to renegotiate the trading terms of a lease could be requested, would clearly not prevent substantial abuses of the tied arrangement, and would compound the level to which tied tenants are currently worse off.

Even if a pub owning company were to exceed such generous provisions to overcharge for tied products, providing they chose not to increase a rent that was previously negotiated on with significantly lower tied product prices, a tied tenant under the ,'only if the rent is higher' clause, would have no options but to become significantly more worse off, directly contrary to the core objectives of the SBEE act and this proposed code.

"Pubs Code and Pubs Code Adjudicator
and Delivering *No Worse Off*"
Ref: BIS/15/522

I do concede that for the purposes of this legislation, a significant percentage must be proscribed, but feel that 3% above any baseline increases from inflation and taxation, over the course of 1 year should be more than sufficient for all tied products. Providing the government keeps to its commitment to allow for a rent review with subsequent MRO offer, without any extraneous clauses to remove its protection.

Q.11 Can you suggest any other circumstances that would be likely to have a 'significant impact' on the expected business of a pub; and that you believe would not be covered by the proposed definition in the Code?

I am concerned that certain provisions relating to significant impact trigger events are not fit for purpose, directly contradict sections **6.9 & 6.10** of this proposed code, and cannot achieve the core principals of the SBEE act.

Specifically in section **8.32** where in the event of a significant impact that adversely affects a tenants trading conditions, when a tenant requests a review, the 'only if the rent is higher' clause allows the pub owning company to refuse to alter a tenants trading arrangement, with the tenant given no protection from circumstances beyond their control that have had an adverse impact on their trade, and thus guaranteed to be more worse off. Which clearly cannot achieve either the objectives of this proposal or the SBEE act.

Furthermore in the definitions of a 'significant impact' in section **8.35** point (iii) states that an event is only significant if it;

> *"specifically affects the tenant's pub, and is not an impact that can be shown to affect other pubs too"*

If an event is so significant that it has affected more than a single pub, then this is logically clear evidence of just how significant an event is, it cannot be taken as evidence of the opposite, and used to deny a tenant the protection against such events that is proscribed in the SBEE act.

Q.20 What do you consider should be the maximum length of the waiver period (a) 7 years; (b) 10 years; or (c) another option? Please provide an explanation for your answer and any evidence to support your case.

Section 12.1 states that;

> *"The provision of a rent assessment entitles a tenant to request the MRO option."*

This is a clear commitment, as specified in the SBEE act intended to ensure that tied tenants are no worse off', but a statement in contradiction to the 'only if the rent is higher' clause in sections **8.12, 8.13, 8.19 & 8.32**, which ensures that the level to which tied tenants are worse off should broadly stay the same or worsen.

Section **12.2** states of the belief, by pub owning companies, that uncertainty over the ability to recoup investments in MRO agreements would result in a 'chilling effect' on levels of investment. As the core purpose of this legislation is to ensure that tied tenants are no worse off, then any monies paid by a tenant, either in tied dry and wet rent, or in market only rent, should be equivalent. As either scenario should be equivalent, and finite, the pub owning company likewise should be no worse off. The notion that charging a fair open market rent would prevent pub owning companies from recouping an investment, is clearly an admission that they are currently financially extracting more than is fair from their tied tenants. It can only be concluded that any such exemption, from the principals in the SBEE act, for investment, will be used to keep tied tenants in unfair trading arrangements.

Section **12.14** states that in qualifying the levels at which a pub owning company would be recouping its investment, that wet and dry rent should be known to both parties. From the wide experience; pub owning companies have never, and will never, agree to disclose the level of wet rent they receive (ie the level to which they profit from the cost of tied goods). As this would in many cases, provide clear and definitive proof of just how much tied tenants are currently worse off. This is a further clear indication that the investment loophole will prove unworkable.

In almost every other form of property holding company, a percentage of revenue from rent is always reinvested to maintain its properties. Pub owning companies appear to exist within an unsustainable bubble, where there appears a presumption that all rent received is simply profit and any investment back into its own business is separate. Given that, if the core principals of the SBEE are enacted correctly, a pub owning company's revenue should be equivalent in both tied and MRO agreements, there is clearly no need for the 'investment loophole'.

Q.22 Do you believe that there are any unintended or undesirable consequences of the proposed definition of "qualifying investment"

Section **13.2** gives the view that the governments proposed provisions for the use of PRA has not changed;

> *"Our assessment of the impact of delivering the 'no worse off' principle and the proposed provisions on rent assessments and MRO and parallel rent assessments has not changed since the primary legislation. The decision not to pursue the discretionary power to introduce a separate parallel rent assessment procedure removes this additional burden."*

"Pubs Code and Pubs Code Adjudicator
and Delivering *No Worse Off*"
Ref: BIS/15/522

Yet this would seem to contradict the government's statement in its response to the pubs owning companies and tenants consultation, published 3rd June 2014, where it stated;

> *"The Enhanced Code will contain the requirement to offer parallel tied and free-of-tie rent assessments, which will enable tied tenants to judge whether they are being offered a fair tied deal."*

Following the detailed explanation earlier, that PRA is not a separate calculation, but merely the requirement to have a tied rent and an MRO offer presented in equivalent (or parallel) formats, and how by doing so would create a direct mathematical link between tied and market only rents, thus ensuring that both tied and market only rents can be shown to be fair, I believe that the government must uphold its commitment to include the PRA mechanism for linking tied and MRO agreements.

In section **13.3** the government states;

> *"The proposed waiver from MRO in return for significant investment has the potential to reduce the burden on business by allowing significant investments that benefit both businesses involved. We have not been able to quantify this impact."*

As mentioned earlier there is a clear reason why the government has not been able to quantify the impact of this provision, because under the core principal the tied tenants should be no worse of than free of tie tenants, pub owning companies should be no worse off. As such this investment loophole which has the potential to remove the protection of the core principals of the SBEE act, should no be included in the statutory code.

There is much talk of 'investment'! I know of pubs that had a small wooden lean-to built for the smoking ban and were then charged £35-50 weekly or as in my own :

[REDACTED]

Yours truly.

[REDACTED]

Licensee
[REDACTED]