

Annex D: The Pubs Code and Pubs Code Adjudicator: Part 1 - response form

The Code of Practice on Access to Government Information provides that the Department may make available, on public request, individual responses.

Following the close of the consultation period, the Government intends to publish all of the responses received, unless specifically notified otherwise.

This closing date for this consultation is 11 January 2016.

Please return your completed form to:

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

Email: pubs.consultation@bis.gsi.gov.uk

The Pubs Code and Pubs Code Adjudicator: Part 1 - response form

Name: David Morgan

Organisation (if applicable):

Address: Morgan & Clarke Chartered Surveyors, Pigeon House, The Broadway,
Oakridge Lynch, Stroud GL6 7NU

Email: _____

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

<input type="checkbox"/>	Pub-owning business with 500 or more tied pubs
<input type="checkbox"/>	Tied tenant
<input type="checkbox"/>	Interest group, trade body or other organisation
<input checked="" type="checkbox"/>	Chartered Surveyors specialising in Licensed & Leisure Property.



Department for Business, Innovation & Skills

Please be aware that the Government intends to publish all responses to this consultation.

Information provided in response to this consultation, including personal information, may be subject to publication or release to other parties or to disclosure in accordance with the access to information regimes. Please see page 7 of the consultation document for further information.

If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Department.

I want my response to be treated as confidential ☐ NO.

Question 1 - Rent assessment

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

Comments: *If there has been a dramatic effect on trade by the opening and close proximity of a large free-of-tie trading operation such as a Wetherspoons, does the existence of that hitherto, unforeseen and major trade competitor trigger an interim rent assessment outside the formality of the structured rent assessments? This cross-references with paragraph 6.9 – see page 10.*

Market Rent Only option

Question 2 – No Worse Off.

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

Comments: *The removal of the parallel rent assessment denies the non-professionally represented tenant the transparency that is required to make an informed decision as to whether to stay tied or choose the MRO Option. If the tenant would like to remain tied and “be no worse off than if they were free of tie”, the only mechanism for making that initial decision is the parallel rent assessment. If the supply-tied rent is set on a fair and reasonable basis then MRO Option would not be taken up.*

Question 3 – Market Rent Only – Option and Rent Assessments

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



Comments:

3.1 - *There is no connection with the current level of rental and that of current trading (see Para. 6.4). There have been a very large number of rent reductions within the last eighteen months and it is foreseen that there will be a substantial further number reflecting the five year rent cycle, contained within most pub leases, which then reflects on rents that were settled in the early years of the recent recession. It is not correct to assume that the current rental automatically equates to genuine open market rental value. Not increasing rent is irrelevant.*

3.2 - *The corporate fall-back position, if it is realised that a substantial rent reduction is likely, is the offer of keeping rents at the same level as previously settled. Under 8.12 the opportunity of considering MRO would be removed if the corporate tactic of keeping rents at the same level was adopted. This cannot be correct as the consideration of MRO is reflective of current trading and not of current rent levels.*

Question 4 – Wholesale Market Price of Beer

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?

Comments:

4.1 - *If an individual tenant takes up MRO Option they would not always be dealing with breweries direct. The most likely point of contact for wholesale supplies would be the most appropriate independent wholesaler serving their region. There is thus no specific wholesale market price published by breweries as the Independent Wholesaler would also seek a profit margin on the input price from the brewery concerned.*

4.2 - *The wholesale price agreed between different recipients of the breweries' products depends upon volume, with there being no one price point to suit all. It is thus difficult to envisage a base line for determining a significant price increase as a result of the substantial divergence in volume supplies either to individual tenants or groups of leases (small multiple companies) which is the determinant for original wholesale price.*

Question 5 – Price Increases

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?



Comments: *The wholesale price paid by the tenant must include all attributable costs that may result in the end-unit price for the product. It is from that price point that the gross profit margin is then determined in terms of retail sales. To exclude rises in tax, duty, regulatory compliance costs or inflation creates an artificial wholesale input price point, which cannot be correct.*

Question 6 – Significant Price Increases

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.

Comments:

6.1 – *The difficulty is further complicating matters in a differential between tied products and services is in the definition of what tied products and services are (a) being offered, and (b) being taken up by the tenant.*

6.2 – *The matter is further complicated by the accountancy data upon which the hypothesis is based. Generally an annual Trading & Profit & Loss Account, which is the determinate for a pub's turnover, is anything between six months – twelve months after the financial year end. Is an estimate of total pub turnover sufficient or would the landlord/pubco be reliant on their estimate of Fair Maintainable Trade (FMT) which should be achieved by the Reasonably Efficient Operator (REO) be a more likely start point for the calculation of total turnover.*

Question 7 – Two-Tier Approach

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?

Comments: *The suggested two-tier approach is fraught with complications and will not be either easy to define or to calculate from the tenant's perspective.*

Question 8 -

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

No Comment.



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?

Agree.

Question 10

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

No Comment.

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?

No comment.

Question 12 - MRO-compliant agreements

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?

Comments: *It is considered reasonable that the tenant should have the opportunity of seeking a like-for-like insurance policy concerning buildings (Para. 9.7). As an example, have a specific requirement that insurance should be placed through their Managing Agents, there have been a number of instances shown where there have been considerable savings on buildings and associated insurance by the tenant seeking like-for-like insurance cover through an independent quote. Furthermore, there have been examples where the threshold for claim on buildings insurance has been set unrealistically high, e.g., £10,000 being the excess charge point. A large number of minor works that should be covered by insurance have no cover at all. In Para. 9.11. it must be recognised that are only offering a five year term either for the grant of a new lease which will have the totality of the MRO provisions contained therein, or upon lease renewal. The exercising of MRO not at lease renewal should not penalise the lessee in having to accept only a five-year term when say, for example, they still had twelve years remaining on their lease.*



Question 13 – MRO & Five-yearly Review Patterns

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.

Comments: Para. 9.14 – Page 22. - *The rent review cycle in an MRO agreement should reflect the current formal rent review cycle contained within the relevant lease. There are still a large number of leases in existence with a three-yearly rent review cycle which it is assumed would be maintained at lease renewal. It is suggested that the open market rent review under the MRO agreement should shadow the previous lease rent review provisions at lease renewal. "Rent increases are further complicated by the inclusion of annual rent increases linked to movement in R.P.I. MRO leases are proposed as having upwards only rent review provisions.*

Question 14 - MRO procedure – Documents and Information

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?

Comments:

14.1 - Para. 10.23 – Page 26.

(iii). The difficulty with requesting relevant comparisons with similar tied pubs in the local area is that of the Data Protection Act. Pubco's stringently follow the Data Protection Act and will not reveal private accountancy information for cross-referencing purposes. Reliance on physical features alone can be both misguided and misleading in the absence of detailed financial records of other similar tied pubs in the local area. It may not be possible to provide the necessary financial comparisons.

(iv). There are a number of SCORFA items that are difficult to quantify in terms of value and whether or not they are taken up by or acknowledged by the tenant.

14/2 – Does the Independent Assessor have powers under the Arbitration Act 1996 to require documents to be produced under disclosure rules? This then links with Para. 11.2 which infers that the Adjudicator is an Arbitrator. No confirmation has been given that the Adjudicator will have to be compliant with the Arbitration Act 1996 in all dealings with adversarial parties.



Question 15

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

No Comment.

Question 16

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

No Comment.

Question 17 - MRO Procedure and Disputes linked with the Adjudicator

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.

Comments: *It is essential that the Adjudicator, backed by the Arbitration Act 1996, has full power to request information from either party to the MRO dispute.*

Question 18 - Waiver from MRO in return for significant investment -

The Account of Investment for the purposes of "Qualifying Investment".

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.

Comments:

18.1 – *There is a strong likelihood that a significant investment by a Pubco of, say, in excess of £100,000 would involve the complete re-theming and development of the outlet concerned which would, in all probability, be a closed unit. An example of this line of thinking is ... ; which was closed for ... years, unsuccessfully offered for sale in the open market as a public house, and (subject to appropriate consent for change of use) subsequently received a complete redevelopment by ... at a stated cost of : ... Whilst it is not known as to the type of agreement that has been reached between ... and the Lessee, it is more than likely that an investment of this magnitude would be reflected in a substantial new lease rental. Investments less than £100,000 should not preclude an application for MRO. Corporate investments have always required an appropriate "return" via a commensurate rent increase.*



18.2 – It is unlikely that an investment of this magnitude would be lavished upon a current leasehold interest which would require the business being closed for approximately six months and, of necessity, a new operational/occupational understanding being reached between Landlord and Tenant.

18.3 - Conversely we have seen a large number of tenant funded schemes of improvement that has involved tenant investment of up to £150,000. Tenant funded works of this nature would have an effect on rental disregarded at the next formal rent review. Equating investment to the level of rent paid has no correlation to reality or to 'significant' investment.

18.4 – The variation in rent terms almost always mirrors the required "return on investment cost" to the Pubco and is achieved by an addition to rental (previously) representing 10% of the cost of the complete scheme. This additional rental is not directly related to profitability of the on-site trading operations and often imposes an unsustainable financial burden upon the supply-tied operations. We have a number of current rent reviews where this unsustainable financial burden is being corrected at the formality of a five-year rent review where it is expected that there will be a significant rent reduction.

18.5 – Due to the certainty of operational control post "investment", it is thought more than likely that genuinely significant investment, not just redecoration or re-theming expenditure, will only be sanctioned on managed houses under the direct operational control of the Pubco. This is also supported by the totality of income from drink and food service contained within the outlet which would never be mirrored in a straight-forward lease subject to a supply-tie where the wholesale contribution/wet rent to the Pubco will operate the property as a managed house.

18.6 – It is considered very unlikely that investments of significance will be justified in the standard leasehold tied estate except upon obtaining vacant possession to enable closure and re-letting, or as a managed house business.

18.7 – Through recent years there have been a large number of examples of proposed minor works of investment (generally less than £100,000) where the costed proposal by the Pubco on which the capital return on investment is based can be substantially reduced in overall cost by the tenant undertaking the works in the achievement of the same proposal. By so doing the extra cost to the tenant is the financing of said works rather than an addition to rental.

18.8 - It is essential that the proposal for the intended investment is also put to the tenant for the opportunity of the tenant alone to cost and fund the development.

18.9 - The lower the proportion of wholesale contribution/wet rent, the more likely that the justification for the scheme would only be in a managed house environment.

18.10 – The complications inherent in this clause are daunting as the reality is not cost but the financial success of the future business in trade terms which initially is no more than an educated guess or estimate as to future success. Returning once again to the above example of

the property has been closed for years and the new development, whilst it is hoped will achieve significant positive success, is still an aspiration or guess in trading terms. That being the case, the intended associated rental is far from guaranteed as being a viable certainty.



18.11 – It is not considered that a minimum threshold for a significant investment can be determined on a national basis. The RICS Pub Benchmarking Survey has considerable regional fluctuations and as a statistical database is not seen as reliable or of assistance by the Pubcos with whom we negotiate either rent reviews or lease renewals.

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.

Comments: The opportunity exists for either the Tenant or the Landlord to instigate an investment by way of either structural or decorative/scheming change. The majority of minor investments undertaken by the Tenant are either funded by cash flow or by a simple short-term overdraft. The crossover point occurs when the Tenant has to take out a term loan. An example of this was the investment in the ... which involved the expenditure of approximately £230,000. The Tenant raised a term loan over ... years which is repayable monthly in arrears. In that example the pub was free-of-tie, although leasehold. The “substantial nature” of an investment seems to be any sum over £100,000 which in this instance would be a “qualifying investment”.

It is proposed that a “qualifying investment” opportunity should be offered to the Tenant to self-fund, if appropriate, in the first instance. If the Landlord undertakes that investment there is the certainty that they will require a return by way of increased rental.

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.

Comments: Referring to Paragraph 12.21 it should not be forgotten that an MRO lease automatically tracks the increases in Retail Price Index, year on year. Thus there would automatically be rent rises throughout the course of the waiver period which would be linked to the increased rental required by the Landlord to secure a return on investment. The Industry Framework Code would not apply and thus future rent reviews would be on an upwards-only basis. Bearing that in mind the waiver period should not exceed five years which would have no direct relationship to the minimum or maximum value of the proposed investment.



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?

Comments: *The difficulty in confirming whether or not the safeguards proposed will be effective can only be tested in the referral process. Until there have been some sample cases reviewed in detail in the referral process the answer is not known. It is suggested that there should be a "review of reviews" after say, a maximum timescale of two years to reflect upon the effectiveness of the entire MRO proposal.*

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?

Comments: *It is essential that if an assignment takes place during an MRO waiver period that the prospective assignee should be made fully aware of the attendant circumstances. In our considerable experience the average occupation of a leasehold is approximately three and a half years. If the waiver period is for five years it is more than likely that an assignment will be contemplated during the waiver period.*

Do you have any other comments that might aid the consultation process as a whole?

Please use this space for any general comments that you may have. Comments on the layout of this consultation would also be welcomed.

Comments: *The devil is always in the detail and rules are made to be circumvented by clever lawyers! It might be helpful to build in a "review of reviews" as per Question 21. Above after say, two years to effect modifications, if appropriate, to ensure that the fundamental concept of "No worse off" is still on track.*



Department for Business, Innovation & Skills

Please use this space to explain why you consider the information you have provided to be confidential.

The information/responses are not considered confidential.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes

☐ No

BIS/15/522/RF

Annex E: The Pubs Code and Pubs Code Adjudicator: Part 2 - response form

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This closing date for this consultation is 18 January 2016.

Please return your completed form to:

The Pubs Code and Adjudicator Team
Department for Business, Innovation and Skills
2nd floor, Orchard 2
1 Victoria Street
London SW1 H OET

Email: pubs.consultation@bis.gov.uk

Name: **David Morgan**

Organisation (if applicable): **Morgan & Clarke Chartered Surveyors**

Address: **Pigeon House, The Broadway, Oakridge Lynch, Stroud GL6 7NU**

Email: _____

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

<input type="checkbox"/>	Pub-owning business with 500 or more tied pubs
<input type="checkbox"/>	Tied Tenant
<input type="checkbox"/>	Interest group, trade body or other organisation
<input checked="" type="checkbox"/>	Chartered Surveyors specialising in Licensed & Leisure Property

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I want my response to be treated as confidential - NO.

Market Rent Only option and Parallel Rent Assessments

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.

Comments: *If the Landlord is insistent that the grant of a free-of-tie rent offer requires a new lease document and that new lease document contains upwards only rent reviews on a three or five-year cycle linked with annual rent reviews tracking the Retail Price Index, the Tenant would be worse off because the Industry Framework Code which would apply to a supply-tied lease will now not be relevant. It is highly likely that a completely new lease document will be granted side-by-side with the free of tie rent offer and it is the content of that new lease that could place the Tenant in a worse position than being supply tied. Currently Enterprise Inns are insistent upon only granting new FIVE-year leases despite the leases they replace being anything up to 20 years. The Tenant in that situation would be worse off.*

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.

Comments: *Currently supply-tied leases are not necessarily for a full wet product supply. It may well be that in Schedule 3, Part 1, the evidence supplied of the pub's level of trading in recent years is incomplete as a result of the lack of supply-tied information on, for example, cider, wines, spirits and minerals. This information would have to be supplied by the lessee as no direct evidence would be made available from the lessor. Schedule 3, item 3, will be impossible to implement as a result of data protection issues that apply to private and confidential information of other pubs in the local area not the subject of a supply-tie. This section is unrealistic and unachievable. Paragraph 4 would not necessarily resource all available independent wholesalers or the negotiated price which could be obtained from local brewery companies.*

Paragraph 5 – the value of housing and commercial properties is of no relevance to a stand-alone public house.

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.

Comments: *I have concerns over the detail that will be supplied by the Pubcos and at the date of responding (pre-January 18th 2016) have no evidence as to the transparency that will be exercised by the Pubcos.*

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?

Comments: Regulation 18 of the draft Pubs Code makes the assumption that the free-of-tie rental would automatically be higher than the supply-tied rent currently payable by the Tenant. There are a large number of situations that govern supply-tied rental that indicate, in certain instances, a massive over-assessment of current Open Market Rental which, under the Industry Framework Code, would then allow considerable reductions. We have examples of reductions of up to 45% being achieved from rent established in 2010/11 which have now been the subject of five years' recessionary influence. The free-of-tie rental would thus not automatically increase in accordance with Regulation 15B in Part 5 of prospective Pubs Code. There should be no requirement that there must be a rent increase in the supply-tied regime to trigger an application for MRO, Uniformly, rents set up to five years previously are too high.

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.

Comments: With very rare exceptions, every single rent review that has been handled through Morgan & Clarke Chartered Surveyors has seen a decrease from the current established rental. The reductions range between 15%-40% with minimal rentals staying the same as previously which is always the backstop intention of Landlords who will try to ensure that rents are not reduced. As an overview, approximately 95% of all rent reviews and lease renewals handled through our offices see a rent reduction.

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?

Comments: We have a number of instances where the initial rent proposal has been shown as being unrealistic. A revised rental offer is then subsequently made but without a Rent Assessment Form. The justification for this action is that "there is no requirement for us to justify how we calculate the negotiated rent." It should be mandatory that there should be detailed justification for a revised (lower) rent offer.

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?

Comments: *Pub owning businesses automatically require a Business Plan to validate and support the current passing rental. There have been examples of applications for the assignment of a lease to be rejected if the Business Plan subsequently showed that rent review intended within eighteen months would be reduced. In these situations, a revised Business Plan was required to artificially inflate total sales and profitability that would then justify the current passing rental. Business Plans are always required in the situation of an assignment of a lease to validate the probity of the prospective lessee.*

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?

Comments: *It is agreed that where a change in the tied rent is proposed that automatically the Landlord should provide a revised rent proposal. All of the Schedule 2 information should be supplied save for paragraph 4d) where there might be considerable disparity between the reality of on-site staffing costs (as opposed to) the suggested staffing costs from the Landlord which would have been linked to statistical data which, by its very nature, would be looking backwards not looking forward to future staff costs. This is particularly relevant with the new living wage which will be introduced in April 2016 set against the BBPA staffing statistics which are achieved from accountancy information, some of which is up to eighteen months out of date.*

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)?

Comments: *There is no need to supply a rent proposal where the rent is the subject of tracking the movement in the Retail Price Index (RPI) which would be a contractual obligation between parties subject to specific effectual data.*

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?

Comments: *Issues of dilapidations must cross-reference with the RICS and Law Society Protocols as published and subsequently amended. A Terminal Schedule of Dilapidations served on an out-going lessee at Assignment must be provided to the incoming lessee for validation that the works concerned have been undertaken. If the work has not been undertaken, either the Landlord must give a binding assurance that they will undertake said work or an appropriate costed allowance should be made for the incoming lessee to undertake said work. It is a standard lease requirement that full Civic and Statutory Regulation compliance must be evidenced. Where a property is being taken back for management, it is essential that the Terminal Schedule of Dilapidations clearly sets out the proposed intentions of the new management style of operations which may have a significant effect on the Terminal Schedule of Dilapidations.*

The Pubs Code - Arbitratable provisions

Question 11

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

Comments: The Arbitration Act 1996 confers well-established Statutory Protection to both parties and should be maintained in all references to the Adjudicator. We have examples of lessees who are not professionally skilled being unaware of the provisions and obligations that they can utilise which would be the duty of an Arbitrator to inform them of such provisions. Any defined dispute should always have full statutory protection.

Contractual inconsistencies with the code

Question 12

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

Comments: There are many and varied ways of penalising a lessee for referring a dispute to the Adjudicator for Arbitration by not so stating in 'terms'. For example, discretionary discounts could be varied downwards or even withdrawn. Delivery supply dates can be manipulated to an inconvenient day of the week, for example a Monday rather than a Thursday/Friday. The order for a Monday delivery would have to be placed before weekend trading which, at times, can considerably upset the pattern of ordering. Suspensions can be raised over inconsistencies in flow monitoring equipment which are subsequently shown as being groundless. All of the above could be considered as being at the verbal discretion of the Retail Field Staff concerned. It is the stated intent of new leases being free of tie that they are on an upwards only basis. Some leases at rent review stipulate that only the Landlord has the power to elect Third Party Referral to either Arbitrator or Independent Expert. The Tenant should be given the same opportunity of choice which also applies at lease renewal or the termination of the tenancy.

Extension of code protections

Question 13

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

Comments: In respect of Paragraph 10.8b) there is no definition of what "significant increase in the price" should be. For this sub-paragraph to apply, there must be a maximum percentage given. Similarly 10.8c) the "event beyond the Tenant's control" has not been defined. Would this mean that a pub in direct competition that has then reverted to free of tie would specify "an event". In paragraph 10.9d) the insurance arrangements should be the subject of competitive quotes on a like-for-like basis.

Group undertakings

Question 14

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

Comments: *Unless the Adjudicator is firmly allowed to follow the Arbitration Act 1996, representations to him or the associated production of documents would be governed by Statute Law. This particularly applies to an Order for Discovery specifically for the revelation of documents that the Landlord might not necessarily wish to have revealed.*

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.

Comments: *A genuine franchise agreement, such as MacDonalds, Costa and KFC sell first and foremost the branded image of the franchisor. If that brand image can be identified, as is more common with managed house high street branded outlets such as Harvester, Crown Carvery or O'Neill's for example, an individual supply-tied lessee would only benefit from superficial mentoring if a brand image is not created. So-called Franchise Agreements should not be excluded from the Statutory Pubs Code. The majority of the so-called franchise agreements are no more than a revised leasing arrangement in that they do not control food based product supply but only control drinks' supply.*

Question 16

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

Comments: *If the so-called business concept is that of the running of a broadly based public house then it would not satisfy the criteria of a unique branding that is the basis of franchising. However, if a unique branded concept can be established which must, in all probability, refer to a style of food provision, then the establishment of a pilot operation for that branded concept would be relevant.*

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.

Comments: *The concept of "a genuine pub franchise agreement" must be linked to branding rather than a hybrid style of lease operation. That, in my considered view, would not constitute true franchising as the franchising branding would in all probability involve the retail sale of concept food; there could be no particular reason why the so-called franchisee should not request an MRO Option as MRO would only apply to the provision of drinks' products. It must be recognised that there are a limited number of opportunities for the creation of a genuinely new food branded concept aside from the extension of large managed house concepts who would not be put at risk if out of management control and supervision.*

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.

Comments: A tenancy-at-will by understanding is only a temporary arrangement. If a tenancy-at-will governs a period more than twelve months it should be converted into a lease. It is considered that at maximum temporary agreements that would be granted exemption from the Pubs Code should only concern agreements of up to twelve months.

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.

Comments: Pre-entry awareness training is only very superficial and cannot replace genuine hands-on trade experience. However if there are sufficient protections in a tenancy-at-will or short term agreement, the level of extent of experience is not as essential compared with the taking on of a full term lease. Tenancy-at-will agreements generally have a very short term notice period that can be given by either party. There is no reason why if even in short term agreements or tenancy-at-will that full and appropriate information should not be given to the party occupying the premises.

However a full understanding of the risk nature to the Tenant in occupation on a tenancy-at-will expending monies on the development of the business and/or the structure with no security of tenure which has seen a large number of tenancy-at-will situations being frustrated by notice being given by the Landlord after such investment has taken place.

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?

Comments: It is essential that full detail of past trading performance is given to the new Tenant when entering into a tenancy-at-will or short term agreement. Similarly if the previous occupier was served with a terminal or interim Schedule of Dilapidations, that detail of wants of repair should automatically be supplied to the tenant in occupation with a full explanation as to where the responsibility lies for undertaking the required works. There have been many examples in past history of tenants-at-will being coerced into undertaking sometimes quite expensive repairs and decoration to the property and then being given notice with no opportunity for compensation or recompense.

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.

Comments: *The referral to PICAS (13.5) is primarily concerning Code Breach. It is envisaged that the referral to the Adjudicator for a code breach would be similar with the difference that a PICAS referral is not governed by the Arbitration Act 1996. If the Adjudicator has discretion over costs and finds against the Tenant there should be a ceiling or cap commensurate with the maximum costs referred to in Section 22. Consideration should also be given to the extent of representation which could be imbalanced by the Tenant being self-represented and the respondent having an eminent Q.C. It would be more equitable if the skills levels were matched by both sides. To instigate the procedure the proposed fee of £200 for the application would appear reasonable.*

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 an arbitration should be set at £2,000?

If you do not agree, please suggest an alternative level of fee, explaining the rationale for the alternative and provide evidence to support your case.

Comments: *It is not correct to state that the costs of arbitration are paid "by the losing party" with the exception where either party has exceeded the stated offer to settle which would be outlined in a binding Calderbank offer. If, for example, the Adjudicator's award exceeded the level of rental proposed by the Landlord in a Calderbank offer, the Landlord would be deemed to have "won" and costs would then be relevant against the Tenant. The opposite would apply if the Adjudicator's award was less than the rental offer contained in the Tenant's Calderbank offer with the Tenant then being deemed to have "won" and costs would then be awarded against the Landlord.*

It is a general principle, with very rare exceptions, that if the Adjudicator's award fell between the two Calderbank offers, that the situation should then be considered on a "drop-hands principal" in that each party would then bear their own costs and there would be no outright winner. Capping the Landlord's costs at £2,000 ex.VAT is considered reasonable on the following basis.

The direct costs of a referral to the Adjudicator to a Landlord would not be a specific cash-flow penalty as it would be to the Tenant. The Landlord would be at liberty, and indeed past experience has shown, to hire the very best legal advice (including Queen's Counsel) where expense is no object. It would be quite unfair to then load these discretionary extra costs on a losing Tenant if, as has happened in the past, the associated costs issue is used as a specific weapon for settlement knowing that the Tenant can ill afford to chance a losing case.

Enforcing the Pubs Code - proposed maximum financial penalty

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.

Comments: Whilst it is considered that the maximum financial penalty following an investigation by the Adjudicator should be set at 1% of the annual UK turnover of all group undertakings of the Pub-owning business, it has to be considered that such a maximum penalty would only be levied in quite exceptional cases. The likelihood of such an exceptional case (going the distance) is extremely small and the very existence of the penalty as proposed would be quite such a substantial incentive for settlement between parties.

Please use this space for any general comments that you may have. Comments on the layout of this consultation would also be welcomed.

Comments:

Please use this space to explain why you consider the information you have provided to be confidential.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒ Yes

☐ No