GREENE KING
BURY ST EDMUNDS

THE PUBS CODE AND PUBS CODE ADJUDICATOR

A Government Consultation

Response by Greene King PLC
18 January 2016

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

INTRODUCTION

This is the response from Greene King plc to the Government's consultation on the pubs code and adjudicator: delivering 'no worse off'.

Greene King, the pub retailer and brewer, was founded in 1799 and is headquartered in Bury St. Edmunds, Suffolk. We employ 42,000 people following the recent acquisition of Spirit Pub Company.

We operate c. 3,100 pubs, restaurants and hotels across England, Wales and Scotland, of which c. 1,900 are managed pubs, restaurants and hotels, and c. 1,200 are tenanted, leased and franchised pubs. Our leading managed brands include Hungry Horse, Flaming Grill, Farmhouse Inns and Chef and Brewer.

Greene King also brews quality ale brands from our Bury St. Edmunds and Dunbar breweries, and is the UK's leading cask ale brewer and premium ale brewer with brands such as Greene King IPA, Old Speckled Hen, Abbot Ale and Belhaven Best.

We are recognised for the overall quality of our pub estate and beer brands, which has been achieved by long-term investment and a continued focus on providing customers with great value, service and quality. Our vertically integrated model ensures that we are well placed to respond to the ever-changing market conditions and challenges.

The following sets out our responses to the Government Consultation: The Pubs Code and Pubs Code Adjudicator, Part 1 and 2.

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PART I

Rent Assessments

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

1.1 We believe that the definition of 'rent assessment' requires clarity. Sections 6.11 to 6.13 describe it as a process. However, within the sector the phrase 'rent assessment' is often taken to mean the calculation that is made to set the rental value of the property. To avoid ambiguity we would suggest the references are made to 'Rent Assessment Process' and 'Rent Assessment'.

1.2 We agree generally with the triggers set out in Regulation 8.2, which details how a tenant may request a rent assessment. However, we would suggest some revisions as set out below.

1.3 Regulation 8(2)(a) needs some refinement. One of the triggers for a rent assessment is the contractual rent review under the lease. The way that this paragraph is worded means that the tenant can potentially require a rent assessment where a review date has passed but that rent review has not been concluded. This could be because: -

a) neither party has chosen to trigger the review and there is no means contractually for the tenant to do so,

b) neither party has chosen to trigger the review but it is still open to the tenant to do so,

c) one or other party has triggered the review but the outcome is pending.

1.4 It is only in the first instance that the tenant should be able to call for a rent assessment under Regulation 8(2)(a). If the tenant is able to trigger a rent review under the lease or there is one pending then the tenant should exercise his contractual right to do so. And Sections 48 – 50 of the Act set out how this can be done if the tenant wants to refer the review to the Adjudicator.

1.5 The following example illustrates this:

1.5.1 Mr Smith has a 15 lease of the Crown Inn on 10 January 2007 at a rent of £75,000 per annum. There was a market rent review due on 10 January 2012. There is nothing specifically required to trigger the review but neither party has chosen to implement it or to sign a rent review memorandum because they both conclude that the open market rent is the same as the passing rent i.e. £75,000 per annum.

1.5.2 Mr Smith receives advice in November 2016 that rents have fallen locally and that on review the rent would be £50,000 per annum. It would be in his interests to trigger a review under Regulation 8(2)(a) (earlier than one would be due on 10 January 2017). He can do this because as the Regulation is currently worded the last time there was a rent assessment was when the lease was granted in 2007.

1.6 The consequence is that the tenant gains a windfall opportunity when the parties have contracted to follow a particular review cycle and the tenant is simply "playing the system". This is inequitable.

1.7 We therefore suggest that an additional proviso is added to Regulation 8(2)(a) as follows: -

1.7.1 "provided that, for the purposes of this subparagraph, a rent assessment includes a contractual provision for a rent review under the tenancy where the date of the review occurred over five years before the date of the request but where the tied

pub tenant has, at the date of the request, the ability to trigger the contractual rent review or the outcome of the contractual rent review is pending, the tied pub tenant shall not be entitled to invoke this provision".

1.8 More clarity should be provided around regulation 8.2 (c), which sets out the requirements of a tied pub tenant when requesting a rent assessment following a trigger event. We have responded to this in more detail under question ten.

1.9 We agree that the timescale set out in Regulation 9.2 (a) is reasonable in proposing a rent assessment on a tied basis six months before the rent review date. However, the timescale set out in in Regulation 9.2 (b) states the rent review proposal must be sent to the tied pub tenant within 14 days. This is an unfeasible timescale and should be extended to a minimum of three months to ensure sufficient time is provided to complete a rent assessment in accordance with the Royal Institution of Chartered Surveyors (RICS) guidance which includes:-

a) inspection of the pub and its locality,

b) analysis of the pub's trading performance and benchmarking data,

c) collation and analysis of comparable evidence, including inspection if appropriate.

1.10 Our assessments are subject to an internal approval process, which includes sign-off by a Chartered Surveyor, prior to the proposal being presented to the tenant or before the pub is offered to let on the open market. This process takes well in excess of 14 days. If the pub-owning businesses is required to produce a rental proposal within such a short period of time, there is a risk that the assessment may not include sufficient consideration of the factors that affect value, with a greater prospect of dispute and unnecessary referrals to the Adjudicator.

1.11 The Industry Framework Code (IFC) provides an improved timescale for both the pub-owning business and the tenant in terms of a minimum rent assessment period. This was typically between 12 and 6 months prior to the rent review date.

1.12 We have concerns with the overall timescales set out in the Regulations and would refer you to our response under question 15 with regard to how rent assessments work within the Market Rent Only (MRO) procedure.

Market Rent Only Option

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

2.1 We do not believe there are. However we would make the following comments about the lease/tenancy renewal process and the Landlord and Tenant Act 1954 (LTA54).

2.2 The logic of having two sets of proposals on renewal, namely a tied rent with a new lease and MRO rent with compliant agreement, so that the tenant can decide which option to choose, is understood. However, we would suggest that the procedure for a tied pub tenant to exercise MRO needs to be consistent with the existing procedure for renewals under the LTA54. We are concerned that there are the following anomalies that the regulations pose and ask that they are considered and appropriate amendments are made.

2.3 Landlord Opposed Renewals

2.3.1 As presently drafted, Regulation 14 provides that a pub arrangement is renewed on the date when the pub-owning business serves the tied pub tenant with a Section 25 notice or the pub-owning business receives a Section 26 request from the tied pub tenant. However, the regulation does not make reference to the circumstances where the Landlord opposes a new lease. As it stands, an MRO request would have to be processed at the same time as the Court is deciding whether to make a termination order and refusing to grant a new lease. If the landlord's opposition is successful, the MRO request would come to nothing. By the time of reaching this stage, significant time and expense may have been incurred by the parties, which will have been wasted.

2.3.2 This cannot be right. We therefore suggest that where a landlord opposes the grant of a new lease and the tenant has requested an MRO, determination of the MRO is adjourned until the landlord's opposition has been determined, whether that be by way of negotiation or by the Court. If the Landlord is successful, then the tenant will not be granted a new agreement. If the Landlord is unsuccessful, then the renewal process can continue and the tenant shall be entitled to pursue the request for an MRO.

2.4 Tenant Request for MRO following a Section 26 request

2.4.1 A tenant can serve a Section 26 request for a new lease. Under Section 26(6) of the LTA54, the Landlord has two months in which to serve a counter notice opposing a new lease and setting out the ground(s) for doing so.

2.4.2 As currently drafted, Regulation 13 proposes that the tenant can serve a separate notice on the landlord to require an MRO as soon as the request has been served and the landlord must send a response with 21 days. However under Section 26(6) of the LTA54, the landlord has two months in which to serve a counter notice opposing. This cannot be right. The MRO start date in such circumstances must run from the last date on which a counter notice could be served.

2.4.3 The following example illustrates this: -

Mr Smith is the tenant of the Kings Arms under a protected lease which expires on 1 January 2018. On 20 January 2017 Mr Smith serves, by recorded delivery, a Section 26 request for a new lease commencing on 2 January 2018 and sets out the terms for the new lease. This is received on 22 January 2017. The pub-owning business has until 20 March 2017 in which to serve a counter notice under Section 26(6), if it wishes to oppose a new lease.

On the same day Mr Smith also serves a notice under Regulation 13(1) that a trigger event has occurred (the service of the Section 26 request) which is received on 22 January 2017 as well. As presently drafted, Regulation 13 requires the pub-owning business to provide a full response (and potentially offer an MRO-compliant tenancy) by 18 February 2017, i.e. a month before the pub-owning business's deadline for deciding whether to oppose. Both parties must then negotiate terms for a new lease and it must go to the Adjudicator if they cannot agree the rent.

On 10 March 2017 the pub-owning business serves a counter notice under Section 26(6) of the LTA 54, opposing a new lease under grounds (f) and (g) of Section 30(1), on the grounds it intends to undertake major redevelopment of the pub and

also wants to take back the pub for its own business use. The pub-owning business also issues proceedings for a termination order to end the tenancy on 1 January 2018. This is completely inconsistent with the MRO process.

2.4.4 This cannot be right. The MRO start date in such circumstances must run from the last date on which a counter notice could be served.

2.4.5 If the Landlord decides to oppose a new lease then he will serve a counter notice under Section 26(6) and the matter should proceed as we have set out above.

2.4.6 If the landlord decides to oppose a new lease then he will serve a counter notice under Section 26(6) and the matter should proceed as we have set out above.

2.5 Tenant Request for MRO following a Section 25 notice

2.5.1 Under the LTA54 the landlord must state in the notice whether he opposes a new lease. If he does so then we recommend that the matter proceeds as set out above. However, if he does not then if the parties cannot agree terms for the renewal lease, the Court will determine them.

2.6 Determining the rent and other terms for the renewal lease

2.6.1 As presently drafted, the Regulations envisage that the Landlord makes an offer of MRO at the outset. Regulation 22(2) contains certain terms that are absolutely prohibited but otherwise the landlord is entitled to offer a new free of tie lease on whatever terms it wishes. The tenant may respond in a number of ways: -

d) The tenant may decide not to take up the offer.

e) The tenant may want to take a free of tie lease but not agree the rent. In that situation the Regulations provide for the appointment of an independent assessor to decide the rent.

f) The tenant may also challenge whether the terms offered are reasonable. If he does so then the tenant can refer that issue to the Adjudicator who will have to decide whether what is offered is reasonable and so constitutes a full response under Regulation 20(3). However, the Adjudicator is not deciding what terms should be included in the lease. He can only rule on whether what has been offered is compliant. If he decides that it is not then the MRO process resumes. A fresh offer must be made, which is then open to challenge and so on. Until it is determined that the terms are reasonable, the independent assessor cannot decide the rent.

2.6.2 The following example illustrates this: -

The Tenant is currently on a five year protected lease. It contains an obligation only to keep the interior of the pub in repair. The tenant is not responsible for repairs to the structure or the exterior. The landlord offers the tenant a three year lease with a full repairing obligation. It won't grant any longer because it has plans to take the pub back and run it himself in three years' time at which point he will oppose a new lease under Section 30(1)(g).

The tenant challenges this under Regulation 22 on the basis that three years is not a standard term of business in a free of tie lease and that a full repairing lease is not standard for a three year lease (whether tied or free of tie).

How in practice is the Adjudicator to determine that issue? It may be perfectly reasonable for such a term to be offered where, for example, the Landlord has

expended significant sums already ensuring the pub is in a good state of repair or where the pub is in disrepair but the rent has been set at a low level to reflect this.

2.6.3 Deciding whether this is a standard term of business is wholly artificial and we would suggest an impossible exercise to undertake. The independent assessor cannot determine the MRO rent until the dispute is resolved, because the terms affect the rental value.

2.6.4 We would recommend that Regulation 22(2)(c) is made narrower. We accept that the Regulations need to make provision that an MRO compliant lease must not contain unreasonable terms and conditions. Section 43 of the Act is designed to ensure that the tenant is offered a lease without a tie but it is not intended to operate so as to restrict the other terms that the Landlord can include within the new lease. The terms in question under Section 43(4) and Regulation 22(2)(c) should be only those which are intended to operate as a disincentive or penalty on the tenant who might want to exercise MRO (for example by allowing the Landlord to break the lease). The Regulation should not be widened to require the Adjudicator to examine every aspect of the proposed lease.

2.6.5 All of this runs alongside the LTA54 Act renewal. By contrast, the judge has a much wider jurisdiction to consider all of the terms and the above scenario would present no difficulties at all. There is a substantial body of case law which assists the judge in deciding the length of the lease and the other terms and indeed there is a specific direction under Section 35 for the judge to have regard to the terms of the current tenancy and to all relevant circumstances. Further clarification has then been provided by the House of Lords in O'May v City of London Real Property Co Limited [1983] 2 A.C. 726.

2.6.6 Indeed, following the approach set out in O'May, it would be potentially open to the tenant to ask the Court to grant a free of tie lease. The result is that there are two sets of lease negotiations/determinations running in tandem, one involving both the Adjudicator deciding whether what has been offered is MRO compliant and then the independent assessor deciding the free of tie rent; and the other involving the Court where the tenant may be arguing over the terms being offered and also seeking a free of tie rent.

2.6.7 This would seem to be both artificial, a nonsense and also very expensive. The assumption appears to be that if the tenant wants an MRO lease then he will pursue an MRO request under the Regulations on the basis of lower costs. However, he may not (because of the hurdle of arguing that the offer is unreasonable), or because he does not like other aspects of what he has been offered and so he reverts to the Court process and so the anomaly exists.

2.6.8 Our recommendation therefore is if the tenant applies to Court for a new lease and in his Court application he seeks a free of tie lease, then any steps taken to pursue an MRO request under the Regulations shall be stayed pending the outcome of the Court application and shall cease if the Court orders a free of tie lease.

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

3.1 Yes, we agree that the wholesale market price for beer is an appropriate baseline. We believe this is a sensible way to assess a significant increase as long as the five percentage

points are considered as per annum and not since the start of an agreement. We would also suggest that a 'basket' of tied products is considered when assessing the significant increase in price criteria, as opposed to a single product.

4. Is a five percentage point threshold above any increase in the wholesale price of beer (which will reflect any increases in inflation, taxation and other input costs), the appropriate measure?

4.1 Yes, we agree this is an appropriate measure as long as the five percentage points are considered as per annum and not since the start of an agreement, and that they cover a basket of products and not a single product.

5 Do you agree that the calculation of a significant increase in price for tied products and services other than beer should exclude any increase in the wholesale price that results from rises in tax, duty, regulatory compliance costs or inflation (RPI)? Are there any other factors that should be excluded?

5.1 We agree with the proposed calculation of a significant increase in price and that this should exclude any increase derived from rises in tax, duty, regulatory compliance costs or inflation which are wholly out of the control of the pub-owning business.

5.2 We would request clarification on whether services are looked at individually or grouped together as a package.

6 Is this the appropriate way to measure a significant price increase for tied products and services other than beer? If not, please explain the alternative you would recommend.

6.1 The proposed format for calculating significant price increase for tied products and services other than beer appears a sensible solution. However, we would request clarification on whether services are looked at individually or as part of a package of services.

7 Is a two tier approach appropriate? If so, is the proposed threshold of contributing to 20 percent of the pub's turnover the right one?

7.1 We agree that the proposed two tier approach appears appropriate.

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

8.1 We believe that the percentage increases in price are appropriate.

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

9.1 We agree that this is a sensible approach and would agree with the proposed timeframe.

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

10.1 We agree it is sensible to set out criteria to define the impact of the 'event'. With particular reference to 8.35(i), we would suggest that the impact of the event on trading conditions is supported by audited accounts for a minimum period of 12 months after the event and not based on a forecast. As a result, there will be a gap in time between the significant event occurring, evidence being provided and the assessment being made. The move to an MRO agreement should therefore be the date when the assessment has been made and the tenant has decided to go ahead with the MRO and not the date of the significant event.

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

11.1 We believe that all circumstances have been considered.

MRO-compliant agreements

12 Do you agree with the distinction drawn between an MRO compliant agreement that arises from a request for MRO at renewal and an MRO compliant agreement that arises from a request for MRO during the course of the tenancy?

12.1 We agree that there should be a distinction between an MRO request made at renewal and during the course of the tenancy. However, the distinction should relate only to the length of term for the MRO compliant agreement. All other terms for the MRO compliant agreement should be the same. For a request made during the course of a tenancy we agree that the proposed minimum period of time should be five years or the remaining term of the existing tied tenancy, whichever is the shorter.

12.2 It is suggested in the consultation document at section 9.11 that there should be no break clause that can be exercised only by the pub-owning business. The way in which Regulation 22(2) is worded suggests that it is the insertion of a break clause which is prohibited. This implies that if the break clause is already in the existing lease then its replication in the MRO tenancy will not fall foul of Regulation 22(2). We would recommend however that this is made clear.

12.3 We also have concerns about what is meant by "standard terms of business" between landlords and free of tie tenants. We would suggest that Regulation 22(2)(c) is removed for the following reasons: -

12.3.1 There is no single set of standard terms of business between landlords and the tenants of free-of-tie pubs.

12.3.2 The term used in the Regulation is "landlord" and not "pub-owning business." Landlords will be many and varied. Free of tie leases are a form of investment like any other. They will attract many different types of investor and indeed those who would not be described as investors at all (such as a community that has exercised asset of community value rights and acquired the pub). Some landlords will still be

very hands on in their control of the pub and others will view it very much as an arms-length relationship.

12.4 However, such agreements are usually on the basis that the lessee is responsible for all repairs and maintenance, there are periodic rent reviews, rent is subject to annual indexation and rent is payable quarterly in advance.

12.5 We would also refer to the drafting error in Part 1, where the cross-reference in regulation 22(b) is incorrect. The reference should be made to Regulations 14 to 17 instead of 15 to 17, therefore we would ask that this is checked and Regulation 22(b) amended to refer to clauses 14 to 15 in the final published version.

13 Do you support the requirement that an MRO-compliant agreement should provide for an open market rent review every five years? Please explain the effect of such a requirement on the commercial relationship between the tenant and the pub-owning business in an MRO agreement.

13.1 The regularity of rent reviews is a significant issue. It is tempting to say that a five yearly pattern is typical but this may change depending on market conditions and whether the rent is subject to annual indexation. For example, the standard rent review pattern in leases granted by Morland Plc in the 1990's that exist in our estate was three yearly. Therefore, we believe that MRO-compliant agreements should follow what is available in the open market.

MRO procedure

14 Does the list of required documents set out in paragraph 10.23 provide the independent assessor with all the appropriate information to make an independent assessment of the MRO rental figure? Should any other documents be added?

14.1 The assessment of the MRO rental figure should follow the RICS Guidance. It should be noted that the RICS Guidance Note 'The capital and rental valuation of public houses, bars, restaurants and nightclubs in England and Wales' applies to all rental valuation.

14.2 The Guidance Note should be sufficient, however we would comment as follows on the points listed under 10.23: -

i. This should require trading history to be for a defined period such as the immediate preceding years (minimum one and maximum three). However we would point out that pub-owning business are only likely to have access to the purchasing history of tied products and will not have access to food and accommodation sales. Information provided by the tenant should include a breakdown of wet, dry and accommodation trading figures supported by the last three year's tenant's audited accounts. This is standard practice in the sector and anything less would be inadvisable.

ii. Trading forecasts for the immediate following years should be clearly specified as those that a reasonably efficient operator would be expected to generate and not the operator's actual performance. Trading forecasts from a sub-standard operator seeking an MRO would not be acceptable.

iii. In practice, the ability to provide comparisons between the tied pub's level of trading and that of other pubs in the local area will be difficult, if those pubs are not already owned by the pub-owning business. This information is not available in the public domain and therefore we would request that this condition is removed.

iv. SCORFA is not a relevant consideration when assessing a free-of-tie rent and should not be stated as a mandatory information requirement when assessing a free-of-tie rent. We refer you to the RICS guidance.

v. Analysis of the wider commercial property market may assist in setting a tone of values for the locality. However, the permitted use of the property (i.e. both as stated in the MRO compliant agreement and planning policy) should determine how relevant this information is.

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

15.1 We believe that the timescales are too short and would therefore request that these be extended. We propose the following extension of timescales in the specific circumstances set out in Regulations 14 to 17: -

15.1.1 For periodic rent reviews and renewals; although the tied rent assessment will have been completed and the rent proposal sent as per Regulation 9.2(a), we propose that a pub-owning business will still require a minimum of six weeks to ensure a sufficient MRO assessment is made following receipt of a tenant request.

15.1.2 Where a rent assessment has not been concluded within five years prior or for a significant increase in price or a trigger event; we believe that a reasonable timescale is three months in which to provide a tenant with a full MRO proposal. This time is required to undertake an assessment under RICS guidance which includes: -

a) inspection of the pub and its locality,

b) analysis of the pub's trading performance and benchmarking data,

c) collation and analysis of comparable evidence, including inspection if appropriate.

15.1.3 Under these circumstances the tenant will have triggered the MRO request and the pub-owning business will not have had sufficient prior warning to undertake the assessment following RICS guidance. This proposed timescale is in line with our response under question one in relation to the rent assessment.

15.2 During the independent assessment period, the time to appoint a suitably qualified and available independent assessor is too tight. The tight timetable would lead to the parties applying to the Adjudicator, placing unnecessary burden on that function. It is therefore suggested that the regulations provide that where the two parties agree, the timescale may be extended to enable a mutually acceptable appointment to be made. This is common practice in dealing with third party referrals under both pub and commercial leases.

15.3 The proposed timeline of 21 days for an independent assessor to consider the dispute and make a determination is too short. During this part of the process, the assessor will need to consider information provided by the parties, inspect the property, its locality and comparable properties. Where a rent dispute is referred to third party determination,

whether via PIRRS, an RICS appointed independent expert or arbitration, the independent expert or arbitrator will set directions and a timetable that reflects the complexity of the case and procedural matters. The proposed process does not appear to make any provision for agreement of a statement of agreed facts or dealing with a dispute about a point of law that could impact on the valuation.

15.4 It is our recommendation that it would be better to follow the established practice of allowing the independent assessor to set directions and an appropriate timetable. We appreciate that there is a desire to manage this process within a realistic timetable and suggest that a long stop period of six months is given for the independent assessor to make a determination from the date of the confirmation of appointment. The regulations should provide that where the two parties agree, the long stop date may be extended.

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

16.1 We agree with all the proposed circumstances a MRO procedure would come to an end. Although we would request clarity around Regulation 34 (b)(v) and 34 (b) (vi) as there is a duplication of conditions.

16.2 We would add that a MRO procedure would come to an end if the pub is sold. If appropriate, a new procedure should commence with the new owner and the current procedure cease.

16.3 In addition, we refer to our comments under question two, paragraphs 2.3 and 2.4 relating to landlord opposed renewals and tenant Section 26 requests under the LTA54. Where a landlord opposes a renewal or a tenant requests an MRO compliant agreement via a Section 26 request, the MRO request should be adjourned. It should come to an end when either the landlord's opposition is determined or when a MRO compliant agreement is granted via the LTA54 renewal process.

16.4 It follows that if the landlord's opposition is successful, the tenant will not be entitled to a new agreement. If the landlord is unsuccessful, then the tenant would be able to pursue the MRO process. For Section 26 requests, it would seem to be an unnecessary duplication to permit the MRO process to continue if an MRO compliant agreement has already been granted via the Court.

MRO disputes

17 Do you have any concerns about these proposals for the resolution by the Adjudicator of disputes related to the MRO procedure? If so, please explain your concerns.

17.1 We believe that the proposal of potential escalation of the question of rental valuation to a second tier of determination, namely the Adjudicator, is unnecessary.

17.2 There is a long established practice in both the pub and commercial property sectors that disputes about rental valuation at rent review may be determined by an independent surveyor acting either as an arbitrator or independent expert and that person's decision on the question of valuation shall be final. Disputes about rental valuation for lease renewals are usually dealt with by Alternative Dispute Resolution, enabling suitably qualified experts to resolve a technical matter. PIRRS has also been extended to be an option in this area.

17.3 In the event of a dispute, the proposals provide for the parties to make a joint appointment of an independent assessor and if they cannot agree, either party may request the Adjudicator to make an appointment. The Adjudicator, therefore, has the power to appoint a suitably qualified assessor. We find it illogical for the Adjudicator to have the power to over-ride the decision of someone they have freely appointed. We believe it is the responsibility of the Adjudicator to ensure that a competent assessor is appointed.

17.4 There appears to be an inconsistency between the roles of the Assessor and the Adjudicator. The inference is that the independent assessor is acting as an independent expert, whereas the Adjudicator is acting as an arbitrator. Regulation 31 (1) (a) states that the Adjudicator shall 'arbitrate the dispute'. Determinations by independent expert and arbitration are fundamentally different processes. For example, an independent expert will make a determination based on his/her expert knowledge. Information provided by the parties may be considered but the independent expert is not limited to considering just that information. Arbitration is a quasi-judicial process under which the arbitrator must make a determination based on the evidence presented by the parties and not his/her own expert knowledge. Arbitration is also governed by the Arbitration Act 1996.

17.5 This inconsistency could lead to a scenario whereby an independent assessor makes a determination that is partly based on information provided by the parties and partly by his/her knowledge. The disputed rent is then referred to the Adjudicator who makes an assessment based solely on the evidence of the parties. A question therefore arises; is the evidence presented at arbitration limited to what was considered first time round by the independent assessor or can the parties introduce the new evidence considered by the Assessor?

17.6 It is therefore requested that this potential inconsistency is considered and should a two tier approach to independent assessment be considered necessary they operate on the same basis to avoid a potential procedural conflict.

17.7 We would also wish to make the point that pub rental valuation is a specialised area of valuation within the property sector and there are relatively few suitably qualified people available to advise on rental value and deal with disputes. We believe there should be clear guidance on the suitability of a person appointed as either an independent assessor or arbitrator. We request that Regulations 29, 30 and 31 provide that both the independent assessor and person appointed by the Adjudicator to arbitrate are suitably qualified by holding a minimum qualification of being a Member of the Royal Institution of Chartered Surveyors (MRICS) and have a minimum of five years' experience in dealing with the valuation of public houses in England and Wales.

17.8 Protracted disputes can distract both parties from the day to day business of operating a pub business which could impact on the customer. It will also add expense and delay to the process of determining whether an MRO compliant agreement will be introduced for a specific pub, which we believe is not the intention.

17.9 We therefore respectfully request that the Adjudicator's role is to deal with disputes about procedural matters and interpretation of the Pubs Code in relation to MRO, but should not deal with the question of valuation.

Waiver from MRO in return for significant investment

18 How do you believe the "amount" of investment for the purposes of "qualifying investment" should be defined? Please explain your view by reference to the type of rent payment and percentage which should be used, with evidence to support your response.

18.1 We are pleased that the Government has recognised the importance of investment in the sector and acknowledge that it is difficult to specify a fixed amount as a "qualifying investment" due to the consideration of several factors.

18.2 Above all, we would encourage maximum flexibility to be applied here, as investment schemes are vital to both pub-owning companies and tenants in creating future growth opportunities. We would advocate as little 'red-tape' as possible, to allow two consenting parties to be able to agree on mutually beneficial investments. However, we recognise that tighter regulations may need to be applied and on balance we believe that a specified level of investment, excluding regulatory or compliance costs, is the most practical way to deal with this. The question of whether a significant investment has been made, with a resulting benefit to the trading potential of the business and tenant profitability, should be the starting point in establishing the definition of a qualifying investment.

18.3 We believe that the amount of investment should be defined as simply as possible to avoid ambiguity. We therefore suggest that a minimum investment threshold level of £25,000 be considered, to exclude regulatory or compliance costs. This is easy to understand and would ensure that pub-owning businesses are still minded to invest in relatively small, popular forms of investment, known as 'sparkle' schemes, without the potential risk of an MRO request. ('sparkle' schemes are further explained in our response to question 19 but in essence they involve a significant change to the look and feel of a pub, often combined with the launch of a new retail offer).

18.4 Secondly, we do not agree that the definition of a qualifying investment should be tied to the rent payable by the tenant, as this will not take into account pub specific circumstances. For example, the level of rent payable may have been agreed as a result of a variety of circumstances and we believe it is impossible to adopt a formulaic approach as it is sometimes difficult to identify how the correct level of rent payable is defined in order to set the base on which to apply the percentage. This is likely to become more relevant in future with the increased use of turnover rents and other forms of modernisation of the model.

18.5 Consequently, we do not agree that linking the qualifying investment definition to the rent (in any form) is appropriate. The key question must be whether a significant investment has been made. The relevant criterion is whether there is expenditure, beyond the landlord's contractual obligation, that will significantly benefit the tenant. There is a real risk that a link to the current rent will form a barrier to going ahead with an investment where both consenting parties wish to proceed.

18.6 Our investment strategy has been based on the philosophy of 'relatively small and often' which enables businesses to grow organically without putting undue financial pressures on tenants. This is illustrated by our capital development programme for our last financial year where 60% of our total capital expenditure was spent on schemes costing less than £25,000. In comparing our investment schemes against rent, 71% of our investment schemes last financial year were lower than our average rent. If it is decided that the amount of investment should be defined by reference to the rent, the percentage should be

no more than 50% of the fixed rent. This is crucial in achieving the unanimous aim of not stifling the on-going investment programmes from the large pub-owning businesses which are so vital to the great British pub.

18.7 We believe that we provide a vital source of expertise and funding. We want to continue to invest with our tenants in order to support them with improvements in their businesses so that they can meet market trends and provide a better experience for customers. Without this, the quality of pub estates will deteriorate over time as stringent commercial views will be taken, which will adversely impact on the tenant and customer.

19 Do you agree with the proposed definition of "qualifying investment" in terms of the "type" of investment? If not, please explain why not, and suggest an alternative definition, with evidence to support your response.

19.1 We are very concerned that the definition of "qualifying investment" excludes 'sparkle' schemes. As currently drafted, these schemes would not be recognised as a "qualifying investment", which would result in a significant reduction in pub-operating businesses' capital investment programmes. This would restrict the ability of pubs to compete in the leisure sector, marginalise businesses, worsen customer experience and lead to closures.

19.2 A 'sparkle' scheme is a well-known term in the pub sector and is a similar concept to a shop fit in the retail sector where retailers fit out a shell to their particular brand or trading style. Within the pub sector such schemes comprise new floor, wall and ceiling finishes and decorations, new electrical wiring and lighting and new landlord's fixtures and fittings such as serveries and back-fittings, sanitary-ware, heating and product dispense. While none of these items are either structural or an extension of trading floor space, they have a significant impact on the presentation and market positioning of a pub business. This improves customer experience and sustainability of the pub. While naturally both our tenant partners and ourselves look to deliver 'sparkle' schemes to grow sales, they are also effective in preventing decline and maintaining a pub's market share.

19.3 The work included with this type of scheme is significantly greater than typical decorating or repairing obligations found in a tenancy or lease agreement, which do not impose on either party a requirement to upgrade finishes, fixtures and fittings or theme the decorative scheme to target a particular market or customer. Such work is discretionary and both parties will seek an appropriate return.

19.4 Pub-owning businesses provide a vital role in providing funding for these types of schemes that would otherwise be difficult for tenants to raise in the financial sector. In addition, we provide expertise in design, marketing and training to deliver such schemes to a high standard that benefits the customer.

19.5 The pub and leisure sector is extremely competitive and pub tenants and pub-owning businesses must be allowed to react to market conditions and earn suitable returns on their respective investment expenditure. We are concerned that if the definition of "qualifying investment" is not carefully considered to enable pub-owning businesses to continue to deliver 'sparkle' schemes, a popular and effective form of investment will be discouraged. We believe that the ability to apply an MRO waiver for a minimum investment level of £25,000 would ensure that pub-owning businesses are minded to continue investing in these smaller but necessary and beneficial investments.

19.6 Clause 12.19 states that a "qualifying investment" does not capture purely cosmetic improvements to a pub. As stated previously, work that may be considered as 'cosmetic'

can often be very significant in terms of scope and cost. It is wrong to think that a decorative led scheme is not significant. We would therefore suggest the inclusion of an additional condition under Regulation 12 (c):-

19.6.1 The scope of work shall be for a designer led refurbishment and improvement of facilities comprising all or some of the following works: -

- stripping out trade areas to receive new floor, wall and ceiling finishes,
- provision of new serveries and back fittings
- provision of new services (gas and electrical) and associated fittings
- provision of new sanitary-ware and associated services
- provision of new heating systems and opening up of old fireplaces to provide real fires

19.7 With regard to the conditions set out in Regulation 12 (2) (c), we comment as follows: -

a) We agree with condition (i), however the definition should include for items commonly described as Landlord's fixtures and fittings eg. extraction and ventilation systems, sink units, built-in cold storage and three-phase electricity. These items are usually paid for by the pub-owning business as part of the investment scheme and although these items do not form part of the physical structure of the building, they are an integral part and will be bespoke for that building. Referring to the example of a kitchen refurbishment, these items often form part of a significant cost of such a scheme.

b) We would suggest that the interpretation of condition (ii) is further expanded to provide clarity around internal alterations such as layout and configuration of the property. For example, the removal of internal walls and staircases or the incorporation of non-trade areas such as storage areas into trade areas would increase trade floor area capacity but would not require a physical extension to the property.

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

20.1 We believe that the standard waiver length should be five years, although we would suggest that a provision to extend the waiver to a maximum of no less than ten years is permitted by exception and in accordance with the suggested conditions:-

a) Where the development capital expenditure is over £100k

b) By mutual agreement of both the tenant and landlord

20.2 This would provide pub-owning businesses and their tenants with a level of flexibility to ensure that the pub has a sustainable future following the investment without the risk of an MRO request, other than those requests set out in Regulations 16 and 17.

21 Do you agree with the safeguards proposed by the Government and the role proposed for the Adjudicator? Are there other safeguards that you consider should be provided? If so, what and why?

21.1 Yes, we agree that the safeguards are adequate for a tenant to make a sensible decision on a waiver from MRO.

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

22.1 As we previously explained under questions 18 and 19, we are very concerned that the proposed criteria for determining a qualifying investment will exclude 'sparkle' schemes. As a result we believe that if our recommendations, previously outlined, are not recognised there will be the unintended consequence of a significant number of necessary and beneficial investments not being carried out.

22.2 'Sparkle' investments, as previously described, provide internal improvements to a pub e.g. refurbishment of trade areas, upgrade toilets, and improve catering kitchens and food preparation areas, utilising the capital cost synergies and expertise that a pub owning company group benefits from. The tenant benefits from improved facilities without having to incur significant expenditure that they may be unable to fund. The customer benefits from improved facilities and a better experience when visiting the pub.

22.3 If the "qualifying investment" definition remains the same it will deter 'sparkle' investments. This will see the quality of the pubs decline or fail to keep pace with competition, which will affect the customer experience, leading to pub closures and conversions to alternative use. This will result in fewer opportunities for tenants and entrepreneurial business people to run a pub business with a low cost of entry and a reduction in customer choice.

22.4 We would stress therefore that a minimum investment level of £25,000, excluding regulatory and compliance costs, be included to ensure pub-owning businesses continue with these necessary and beneficial investments.

PART 2

Market Rent Only Option and Parallel Rent Assessment

1. We believe the stated MRO procedure, that will give tenants a free-of-tie rent offer alongside a tied rent review proposal, will enable tenants to make an informed judgment as to whether they will be no worse off by remaining tied and fulfils the objectives of a Parallel Rent Assessment. If you believe that this does not achieve the goal, please give your reasons why.

1.1. We agree that the proposed MRO procedure provides the ability to demonstrate the 'no worse off' principle.

2. We would welcome your comments on whether, in addition to the other information requirements of the draft Pubs Code, the documents provided for in Schedule 3 of the draft Code and described in paragraph 10.23 in Part 1 of this consultation are sufficient and appropriate for calculating a meaningful free-of-tie market rent that will allow tenants to make an informed judgment as to whether they will be no worse off by remaining tied.

2.1. We believe that this question refers to the information to be provided to the independent assessor where agreement has not been reached for a MRO rent, and therefore our response reflects that of our response to question 14, Part 1.

2.2. In relation to the items specified in Schedule 3, we comment as follows: -

i. Pub-owning businesses are only likely to have access to the purchasing history of tied products and will not have access to food and accommodation sales. Under question 14, Part 1, we have proposed that trading history should be for a defined period such as the immediate preceding years (minimum one and maximum three) and information provided by the tenant should include a breakdown of wet, dry and accommodation trading figures supported by the last three year's audited accounts. These should include a breakdown of wet, dry and accommodation turnover and gross profit and expenses. This is standard practice in the sector and anything less would not provide a balanced view on the pub's trading performance.

ii. For trading forecasts, this should be clearly specified as trading forecasts that a reasonably efficient operator would be expected to generate and not the operator's actual performance. Trading forecasts from a sub-standard operator seeking an MRO based on actual performance would not be acceptable. Conversely, we recognise that the performance of an exceptional operator should be disregarded.

iii. In practice, the ability to provide comparisons between the tied pub's level of trading and that of other pubs in the local area will be difficult, if those pubs are not already owned by the pub-owning business. This information is not available in the public domain and therefore we would request that this condition is removed.

iv. Under RICS guidance, the market value of SCORFA is not included in the rent calculation of free of tie rents and as such we do not believe it is relevant. We therefore request that this condition is removed.

v. Analysis of the wider commercial property market may assist in setting a tone of values for the locality. However, reliance on this information should be treated with caution. The rental value of a public house will take into account the permitted use of the property (i.e. both as stated in the MRO compliant agreement and planning policy) and this will determine how relevant this information is. We would also point out that rental values of commercial property such as shops and offices are based on net floor area whereas generally, rental values for public houses are based on the profits method of valuation (please refer to RICS guidance).

3. If you believe that the combination of current proposals will not adequately deliver the no worse off principle or does so in a disproportionate way, please give your reasons and, where relevant, provide evidence.

3.1. As per our response set out under question one, we believe that the current proposals adequately deliver the 'no worse off' principle.

Availability of the Market Rent Only option at rent assessment

4. What would be the effect of removing from the draft Pubs Code Regulations the condition that there must be a proposal for an increase in the rent at rent assessment before a tenant may exercise the MRO option?

4.1. Under the Pubs Code rent reviews can be downwards as wells as upwards. A rental valuation will reflect the trading potential of a pub and the market's view of this. If this has declined since the previous assessment the tenant will gain the benefit through a reduction in the rent. To offer an option of an MRO where the rent has been reduced is over-compensating the situation.

4.2. For all rent reviews, including where a rent reduction is proposed, the Pubs Code provides for the review to be referred to an independent assessor where agreement cannot be reached. Most agreements include a contractual right for the landlord and tenant to refer to a third party for determination if agreement cannot be reached. Under our Code of Practice, we are members of PIRRS which gives tenants a low cost alternative.

4.3. We believe the commitment to both downwards and upwards rent reviews provides adequate protection.

4.4. We believe that by retaining this condition, it provides the added benefit of providing significantly increased security of tenure to tenants and continuity of business, as in many cases the landlord would be satisfied with the same or lower rent and be prepared to offer a new agreement on expiry. The unintended consequence would potentially see pub-owning businesses seek to take back leases at agreement expiry for their managed operation.

5. It would be particularly helpful to receive evidence of the percentage of rent reviews that have resulted in a freezing or reduction of the rent over the last three years; of the prevalence of annual indexation provisions and other inter-rent review arrangements in tenancy agreements; the typical increase in the amount payable by the tenant that they result in; and the way in which these are exercised by the pub-owning business under the terms of the tenancy.

5.1. Over the past two years 60% of rent reviews in our core estate in England have been agreed with either a reduction or rent freeze.

5.2. 78% of agreements within our estate include an RPI indexation provision, many of which are protected by an upper level cap. The exceptions are tenancies at will, one year agreements and old leases that typically include a three yearly rent review pattern. RPI increases are calculated by reference to RPI statistics published by the Office for National Statistics and tenants are notified of the change to rent by way of letter.

5.3. Apart from contractual periodic rent reviews and RPI indexation rent payable may change mid-term due to the following action: -

- Capital Alterations/Refurbishment
- Variations to the product purchase tie
- Permanent reductions due to a material change in circumstances
- Temporary concessions to support tenants e.g. road closure or seasonality

5.4. Rents for these transactions are negotiated at arms-length and there is no contractual obligation requiring the tenant to agree to the rent change. The rent changes agreed for these situations vary on a pub by pub basis and it is not possible to produce any meaningful analysis.

The Pubs Code - Information requirements

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

6.1. We believe it is important for any prospective tenant to receive all relevant information from us in a timely manner to ensure they understand the obligations they are entering into, to assist them in their business plan preparation and their decision making. It also serves to support our recruitment process by ensuring we appoint the right tenant for the right pub.

6.2. While we understand the principles behind the conditions as set out in Regulation 5 (5)(a) and (b), we do not believe they are adequate as they are too broad and would be difficult to manage in practice. Clarity is required around at which point a prospective tenant can rely upon the protections of the Code.

6.3. For casual enquirers, we would not expect to supply all the information detailed in Schedule 1. In these circumstances, the information will be limited to information as published on our website. We would be keen to establish those prospective tenants with a serious interest in a specific pub and therefore, before providing the information as specified in Schedule 1, we would suggest that a serious prospective tenant is identified as someone who has: -

6.3.1. Expressed a serious interest in a specific pub and submitted an application form

6.3.2. Completed the pre-entry awareness training and provided confirmation of this by providing a copy of the PEAT certificate

6.4. Once this is established, and we are satisfied that they are suitably qualified, the information specified in Schedule 1 and Schedule 2 would be supplied to enable the prospective tenant to prepare a business plan in readiness for a formal meeting/ interview about the specific site.

6.5. Once a business plan has been submitted and a formal meeting/ interview has been conducted, it's at this point we would suggest that a prospective tenant receives protection from the Pubs Code in relation to the provision of information requirements.

6.6. Full protection of the Pubs Code should only be provided once a formal legal agreement is entered into.

7. Do you agree that a pub-owning business may not require a prospective tenant to submit a business plan unless the tenant is a qualified person to whom it has provided the specified information?

7.1. Yes we agree. We would only expect the submission of a business plan from a prospective tenant with a serious interest in a specific pub, who has been identified as suitably qualified as per Regulation 4.

8. Do you agree that where a change in the tied rent is proposed during the course of the tenancy agreement, the tenant should be provided with a revised rent proposal? Should all of the Schedule 2 information be required; or only those elements that have been changed? Should all of the Schedule 1 information be provided at the same time?

8.1. We agree that where a rent payable is to be varied permanently, either due to a change in the contractual terms or a change in trading circumstances, a rent proposal should be provided. However, where there is a temporary change in the rent payable eg. support during a road closure or seasonal trading conditions, there should not be a requirement to provide a rental valuation.

8.2. We would suggest that the forecast Profit and Loss statement referred to in Schedule 2, points 4 – 6, should be provided for a permanent change in rent, but not where the change in rent is temporary. Temporary rent concessions are usually for a relatively short period of time and designed to provide immediate impact to support the tenant business by providing cash flow to meet expenses that have to be met such as wages, utilities and local suppliers. For example, the impact of a road closure or flooding on a business is immediate and introducing excessive administration and process would delay the introduction of such support, which may put the tenants business under further stress. In some cases, excessive delay will result in business failure and pub closure.

8.3. Information provide under Schedule 1 is in connection with the granting of a new agreement and is not relevant to a change in rent during the term of an existing agreement.

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

9.1. As stated in our response to question eight, we do not agree that a rent proposal should be required in all cases where there is a change in rent during the tenancy. In particular we do not believe that a rent proposal should be provided for annual indexation or temporary arrangements to support a tenant.

9.2. The initial rent payable at the start of an agreement is negotiated at arm's length between landlord and tenant and will reflect the terms and conditions of the agreement including whether the rent is subject to annual indexation. Furthermore, the tenant should take account of annual indexation when preparing projected cash-flow and profit and loss forecasts as part of their business plan to ensure the impact is considered.

9.3. We would also mention that under the Pubs Code tenants will have the opportunity to request a rent review if one has not been undertaken during a five year period and this will provide protection to adjust the rent if it is out of line with market value.

9.4. Our current range of agreements that include an indexation provision also include a 'cap' to protect tenants from excessive variations in indexation on the following basis: -

- Rent less than £75,000 per annum – indexation limited to a maximum of 4%
- Rent £75,000 per annum or more – indexation limited to a maximum of 2.5%

9.5. Where older agreements do not include such a provision we have voluntarily operated the above system.

9.6. On a practical note we would mention that the majority of our agreements include an annual indexation provision and to require that a rent proposal is provided at each indexation point would place an unnecessary administrative burden on our business with no tangible benefit for the majority of tenants.

9.7. With regard to rent changes for temporary support we have explained our reasoning why we do not support the provision of a rent proposal in our response to question eight.

The Pubs Code – repair provisions

10. Do you consider that these measures on repair obligations provide an appropriate balance between the rights and duties of pub-owning businesses and those of their tied tenants?

10.1. We do not believe the proposed measures provide an appropriate balance between the rights and duties of pub-owning businesses and tenants. We agree that pub-owning businesses should clearly set out the repairing obligations of the pub-owning business and tenant in the terms for letting a pub and to confirm those works that either party will be required to undertake under the terms of the letting.

10.2. However, we do not agree that the repairing obligations should be limited by reference to a schedule of condition. A fundamental principle of English contract law is that the buyer should undertake appropriate checks before entering into a contract known as – 'caveat emptor'. This is recognised in the wider property market and consumer sector generally. For example, the largest financial transaction the majority of people enter into in the UK is the purchase of a house. House buyers will usually arrange a survey at their own expense before entering into their purchase. So, we do not understand why it is proposed to give prospective tenants of public houses additional statutory protection that is not provided elsewhere. Prospective tenants should carry out appropriate checks and satisfy themselves that they fully understand the obligations they are entering into before completing a legal agreement.

10.3. We would also add that the operation of repairing obligations by reference to a schedule of condition is fraught with difficulty and more likely to lead to disputes than the operation of 'put and keep' repairing obligations. By reference to a schedule of condition, the party responsible for the repair is only required to maintain items in the state that they are described. For example, if under an agreement the tenant is responsible for the repair of all windows and associated framework and there is cracked window pane, the tenant will be required to maintain the window pane to that standard. There is usually no contractual obligation on the landlord to replace the glass. As a result, the landlord also has no right to go onto the premises to do so. The end result is that neither party is responsible for putting it right and so the person who cares most about the cracked window pane ends up replacing it.

10.4. By reference to a 'put and keep' repairing obligation the responsibilities are very clear and each party knows what their obligations are. The important area to manage is to ensure that the tenant fully understands the repairing obligation under the agreement and what they are responsible for before entering into a legally binding agreement. We agree that where the tenant's repairing obligation is on a 'put and keep' basis this should be made clear to the tenant at the start of negotiations to avoid potential misunderstandings. If they believe the obligations are too onerous they will either look to negotiate more favourable

terms or walk away. There is no obligation on a tenant to enter into an open market letting. We believe that by focusing on the requirement for a schedule of condition the point is being missed.

10.5. The proposals do not make a distinction between full repairing leases and non-major repairing tenancy agreements. We appreciate that the tenant's obligations under a full repairing lease are potentially onerous and, under our Code of Practice require that any tenant entering into such an agreement arranges a full structural survey and testing of services before entering into a legally binding agreement. We believe this mechanism gives greater protection to tenants by ensuring that they are made fully aware of the state of repair and condition of the property and future maintenance responsibilities at the outset.

10.6. We therefore suggest that if additional protection is to be provided for tenants entering into a full repairing lease, the Pubs Code states that the pub-owning business must obtain evidence from the prospective tenant that they have obtained a full structural survey and services test reports before legal completion of the lease.

10.7. For non-major repairing tenancy agreements, the tenants repairing obligations are less onerous. We would therefore suggest that tenants should rely on their own inspection of the property and it should be discretionary as to whether they arrange a structural survey.

10.8. Where the tenant believes the landlord has not fulfilled its repairing obligations, the tenant should provide the pub-owning business with the opportunity to resolve any issues arising through its own complaints process prior to referring to the Adjudicator. If the tenant remains dissatisfied with any resolution then the tenant may still reserve the right to refer to the Adjudicator.

10.9. The unintended consequence of the current proposal is that the Adjudicator could be inundated with repair disputes that could be more effectively managed between tenants and pub-owning businesses. This would deflect time and resource from dealing with genuine disagreements. By having reference to the Adjudicator as the ultimate point of referral, tenants will have peace of mind that pub-owning businesses will have an incentive to deal with complaints about repairs promptly.

The Pubs Code – arbitrable provisions

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.

11.1. The following details areas we believe should not be arbitrable:-

11.2. Part 13 – Business Development Managers (BDM)

11.2.1. The objective of this part of the draft Code is to ensure that BDMs are suitably qualified and receive appropriate training so that they can carry out their responsibilities. These include negotiations over rent both at the outset and on a review of the rent (whether contractually or following a trigger event under Regulation 8(2).

11.2.2. We believe that if a tenant is able to refer to the Adjudicator for arbitration a dispute about the qualifications/the quality of the training that a specific BDM has received (which could be in the context of a rent negotiation), this has the potential to alter the way in which the rent negotiation is conducted. Taken to its extreme it could be used by the tenant who does not agree with the rent assessment to

challenge the assessment instead of (or in addition to) using the mechanisms under the Regulations (such as independent assessment) or the Lease (such as arbitration).

11.2.3. If the tenant is unhappy with the result, the remedy is to use those mechanisms rather than to personalise it.

11.2.4. Any failure by a pub company to comply with its obligations under Part 13 is better dealt with by way of an investigation by the Adjudicator.

11.3. Part 14 - Compliance

11.3.1. Again it would be unduly onerous for a pub company to have to prove this to an individual tenant and may require data to be disclosed in breach of data protection legislation and is better dealt with by way of an investigation by the Adjudicator who will in practice be best able to monitor compliance.

Contractual inconsistencies with the code

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

12.1. We have no further comment on what is proposed.

Extension of code protections

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

13.1. The extended protections for small pub-owning businesses would appear to be onerous, particularly in relation to BDM's and Code Compliance Officers. If, for example, the pub was to be sold to a private individual, it would not be possible for that person to comply with most of these provisions. We would suggest that the extended provisions should only apply to smaller pub-owning businesses who own 50 or more pubs.

13.2. We would also add that the MRO procedure should not be included in the extended protections. If a pub is sold, any MRO procedure should cease.

Group undertakings

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

14.1. We have no further comment on what is proposed.

Exemptions from the Pubs Code – genuine franchise agreements

15. Please comment on the key characteristics of a genuine franchise agreement as set out in Table 1. Where you think a characteristic should be amended or removed please set out your evidence as to why. Similarly if you think further characteristics should be added please set out your justification as to why as well as an explanation of what should be added.

15.1. We do not recognise that all characteristics listed in Table 1 describe a genuine franchise agreement and it is our understanding that it also does not represent the view of the British Franchise Association. However, we recognise that they more accurately describe certain management style agreements currently available in the industry, which would be exempt from the Pubs Code.

15.2. We agree in principle that any genuine pub franchise agreement that does not have a passing rent or a wholesale price for beer will be excluded from the MRO provisions set out in the Regulations.

15.3. When assessing the characteristics of a genuine pub franchise, we believe that accreditation by the British Franchise Association (BFA) must be included. This cannot be gained without a stringent test of the provision of the key requirements demanded by that body, particularly around the provision of a full operating system and know-how for a proven trading concept. We have held accreditation for our branded pub franchise model (Meet & Eat) for a number of years, and we have plans to develop this model further in the future. The proposed definition does not support this 'genuine franchise'.

15.4. In response to the characteristics listed we would comment as follows: -

15.4.1. We agree with characteristics one, two and three.

15.4.2. Characteristic four - No rent is paid – What is included mis-describes the position. It is normal for the franchisee to occupy the property under a lease or tenancy and to pay a rent. Leases and franchises are normally not mutually exclusive. What distinguishes a franchise from a more traditional leasing arrangement is that the rent is not fixed but varies depending on the turnover or other benchmark against which the franchisee's performance is measured.

15.4.3. Characteristic five – No separate transaction for products and services – We are concerned by this characteristic as this is not a recognisable trait of most, if not all, contracts for the main franchises in the UK. We believe that this characteristic better describes a form of management style agreement and would not apply to a franchise agreement.

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

16.1. We would agree with the proposal for 'reasonable piloting'.

17. Do you agree that the Pubs Code information requirements that are indirectly related to rent such as the signposting to sources of benchmark information and the provision of historical trade information should apply to genuine pub franchise agreements? If you disagree please clarify which requirement(s) is

of concern, suggest any deletions and/or amendments and justify your arguments.

17.1. Yes, we agree that some information should be provided to assist any prospective franchisee in their decision making. However, it should be recognised that historical or generic information may not be relevant to an open market letting of a public house in a particular branded format or trading style for the first time. The principle of branding is that the consumer offer is targeted to a specific sector of the market and will optimise sales and profitability. If the pub has not been previously operated under a specific brand there will not be any site specific information available for its performance under that brand or trading style.

17.2. While reference may be made to other pubs operating under the same brand in similar locations, this cannot guarantee future performance at a specific site. It should also be recognised that the availability of reliable comparable information will be dependent on the number of pubs operated within that brand or trading style. Where a brand or trading style is relatively new such information may be scarce.

17.3. Benchmark reports will provide an understanding of certain costs such as wages, energy bills and rates, however the cost and purchasing structure for different types of branded franchise operations will vary and this should be highlighted to any prospective franchisee.

17.4. While historical information on the pub can be provided it should be noted that it may not be directly relevant to its future operation, as the pub may be newly repositioned to a branded franchise format. A newly branded franchise will add value to the business which may not be reflected in the previous history of the pub.

17.5. In order that clarity is provided, we would suggest the inclusion of an additional Schedule setting out the information requirements for a genuine pub franchise, and would suggest that it includes:-

i. The Pubs Code Regulations 2016
ii. An overview of the franchise offered, franchise details such as the length, terms of sale, repairing obligations etc
iii. Details on how the franchise business model operates and associated costs
iv. A forecasted profit and loss statement for 12 months
v. A description of the property
vi. Details about insurance
vii. Historical trade volume information, although this should be provided with a caveat if the property had not previously been operated as a franchise business, as commented above
viii. Benchmarking reports may also be signposted to help with understanding certain costs, but again a caveat would be required as these reports would not directly reflect a franchise operation
ix. The pub-owning business's procedures for establishing breaches and remedies
x. The pub-owning business's procedures for dealing with franchisee complaints

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

18. For how long should tenancy at will or other agreements be granted exemption from the Pubs Code? Please explain the rationale for your answer and provide any evidence to support your case.

18.1. We agree with the proposed 12 months exemption period.

19. Do you think it is appropriate that a tenant entering into a tenancy at will or short-term agreement with a pub-owning business should have completed pre-entry awareness training prior to being offered the agreement? Please explain the rationale for your answer and provide any evidence to support your case.

19.1. A tenancy at will or short-term agreement, by their nature, is used in temporary circumstances where we look to prevent a pub from closing while a longer term solution is sought with a new tenant. The pre-entry training relates to longer term tenancy and lease agreements only and therefore would not have any relevance in a tenancy at will situation.

19.2. However, we would suggest the provision of a simplified and tailored PEAT online training module, taking no more than 30 minutes to complete. This would be appropriate for new tenancy at will tenants by providing a clear understanding of what they could expect to be included under this type of agreement. More importantly, this could provide clear guidelines on what is not included e.g. no right of tenure, to prevent tenants investing in the business. We would also suggest that the conditions set out in Regulation 4 (4) would be applicable to this provision.

19.3. If the longer term view is that the tenant will be moving to a permanent longer term tenancy or lease agreement, we would expect completion of the pre-entry awareness training as per Regulation 4.

20. What sort of information do you consider would be useful and desirable for a new tenant to receive from the pub-owning business when entering into a tenancy at will or short-term agreement?

20.1. As explained in our answer to question 19, due to the nature of these agreements often a tenancy at will is granted on short notice. The requirement to supply detailed information would delay the process and may result in pub closures. We would expect to provide pertinent information in relation to repairing obligations, statutory compliance, treatment of utility bills and price lists.

Enforcing the Pubs Code – fee for arbitration

21. If you do not agree with the proposed £200 fee please explain why and give the rationale and any evidence in support of an alternative amount.

21.1. We agree in principle to a tenant being subject to a referral fee so as to prevent large numbers of spurious claims being made to the Adjudicator. However, we would disagree that a pub-owning business should be subject to this fee.

21.2. As a pub-owning business with over 500 tied pubs, we will be required to pay a levy to cover the set-up costs of a statutory Pubs Code and Adjudicator, as well as annual levies to cover costs of arbitration, investigations, appeals and all other costs associated with running the Pubs Code. Therefore we believe that we should be exempt from paying any further fees if we decide to refer any dispute to the Adjudicator.

Enforcing the Pubs Code – costs of arbitration

22. Do you agree with the Government's proposal that the maximum costs that tied tenants could have to pay a pub-owning business following an arbitration should be set at £2,000? If you do not agree, please suggest an alternative level of fee, explaining the rationale for the alternative and provide evidence to support your case.

22.1. We agree in principle to a maximum limit however we believe the level of £2,000 is low.

22.2. We acknowledge that a simple system is required for ease of understanding and fairness, ensuring any tenant is clear on the likely costs that could be incurred when referring to arbitration. We would suggest a form of sliding scale based on the value of the awarded rent, such as detailed below:-

- For awarded rent up to and including £30,000 the arbitration costs should be set at £2,500.
- For awarded rent over £30,000 a flat 10% should be applied, capped at £10,000.

Enforcing the Pubs Code – proposed maximum financial penalty

23. If you do not agree that the maximum financial penalty the Adjudicator should be able to impose following an investigation should be set at 1% of the annual UK turnover of all group undertakings of the pub-owning business, please explain why and give the rationale and any evidence in support of an alternative amount.

23.1. We strongly disagree with the maximum financial penalty as stated. As a vertically integrated business, we do not feel it is fair and proportionate to include our managed and brewing operations within the financial penalty calculation, as they are not subject to the Pubs Code and Adjudicator.

23.2. For the purposes of the calculation, we would strongly suggest that only the division responsible for the management of tied leased and tenanted pubs is considered, and where financial information is available and published separately to other operations within the pub-owning business.

23.3. In most cases, this is publically available and audited financial information and if a company that falls under the code is not a publically listed company, then it should be required by the Adjudicator to disclose its annual, audited, relevant turnover.

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

Adjudication process

24.1. Consideration also needs to be given as to how the adjudication process dovetails with any pending Court proceedings or determination. The Code does not attempt to exclude the right of a pub-owning business or a tenant to take proceedings to enforce the terms of a lease or tenancy agreement. However, there is the potential for duplication and also for inconsistency.

24.2. The following example illustrates this: -

a) The pub company issues Court proceedings for non-payment of rent. The tenant defends the claim and brings a counterclaim for damages for misrepresentation alleging that the pub-owning business provided false information on the previous trading history of the pub before he entered into his tenancy agreement. Such a counterclaim could equally be the subject of a complaint to the Adjudicator.

24.3. In such circumstances, the issues which the Adjudicator could be required to review would be substantially the same as that of the Court (although the remedies are different) and the results could be different. What would happen for example if the Adjudicator decided that the Landlord information provided to the Tenant was false, but the Court came to the opposite conclusion. This would be undesirable for obvious reasons and bring both into disrepute. It is quite possible that the Court will order a stay of proceedings (for example where the issue in dispute is subject to an arbitration clause and one party insists on arbitration through the Adjudicator). Alternatively, the parties may agree to a stay to enable arbitration to take place. In such circumstances, however, the Code and/or the Regulations should make clear that the Adjudicator will not consider a referral unless and until the Court proceedings have been stayed, pending the outcome of the referral, or discontinued so that the Court is no longer required to consider that issue.

24.4. The other scenario where this can give rise to difficulties is where the Court has determined the dispute in favour of the pub-owning business but one party (we assume this in practice will be the tenant) is dissatisfied with the result (although he has chosen not to appeal). Accordingly, the Regulations and/or the Code should make provision that a matter cannot be the subject of a referral where it has already been determined by the Court.

24.5. We would also add that the Adjudicator should be provided with the flexibility to establish his/ her practices in relation to this Pubs Code.

Part 13 - Business Development Manager

24.6. In consideration of Regulation 42(4), we agree with the items listed under 42(4)(a), however we would suggest that the provision to record appropriate notes is only provided where these items have been discussed in a face-to-face meeting. We do not believe it is appropriate to record all telephone discussions due to the unnecessary administrational burden this will place on our BDM's.

Part 16 - Premises

24.7. We would request clarity as to how it is anticipated that the dilapidations process, at the end of a tenancy, will work, as referred to under Regulation 50(8). For example, a landlord typically arranges for a schedule of dilapidations to be prepared around 6 months before the end of the tenancy. A follow-up inspection is arranged one to two months before the end of the tenancy to check what works have been undertaken by the tenant. If there are outstanding dilapidations or new dilapidations have accrued (e.g. a roof leak that was not in existence at the first inspection) the tenant would be formally notified. It seems to us the existing law relating to dilapidations provides sufficient protection for tenants and we would question why this process should be covered by the Pubs Code.

Pub-owning business complaints procedure

24.8. Outside of the MRO procedure clarity is required in regards to other Code complaints and the protocols for referral to the Adjudicator. We would suggest that pub-owning businesses are given the opportunity to resolve any complaints through their own internal dispute mechanisms under their accredited Codes of Practice as stated in the IFC. We recognise that that any complaint should be dealt with in reasonable timescales and would suggest timescales as stated in our Code.

The Pubs Code

24.9. We would request clarity on the publication of documents that pub-owning businesses and tenants will be able to rely on. Is it the intention that a Pubs Code will be produced to reflect the Regulations? If so, we would recommend that this is accredited with a Crystal Mark by the Plain English Campaign for ease of understanding by all parties.

24.10. If this is not the case, we would suggest that BIS produce some guidance literature for tenants and their advisors on how to use the Pubs Code and where to go for help. Tenants will potentially incur significant costs by appointing independent legal advisors to explain these Regulations, which we do not believe is the intention.

Transition period

24.11. We remain extremely concerned about timescales prior to the implementation of the Pubs Code and provisions of MRO.

24.12. All parties would benefit from clarity on when MRO will become applicable. Our understanding is that the earliest a rent review could become eligible for MRO is six months after the introduction of the Pubs Code. We would request a further period of transition of up to six months after this, to enable all parties to be able to successfully implement new statutory regulations.

24.13. In addition, we request that some consideration is given to recent significant investments made by pub-owning businesses and whether an investment waiver could be introduced as part of the transition arrangements.

Items identified for correction/ clarity in the consultation document, Part 2

24.14. Clause 8.14 – incorrect regulation detailed, we believe this should be shown as 5(5)(a).

Items identified for correction/ clarity in the regulations other than those previously mentioned

24.15. The contents list requires updating to reflect the correct Part numbers referred to throughout the Regulations.

24.16. Regulation 24(7) referred to under 26(d) does not exist, we believe reference to 24(6) should be made.

24.17. Regulation 9(2)(b) conflicts with the timescales shown in Diagram 1:The MRO Procedure - 14 days versus 21 days.

24.18. In closing, it is very important to us that we can continue to invest with our tenants and to continue attracting entrepreneurial operators to our business and indeed the sector. We are concerned that over-regulation and complex processes will discourage this as operators will look to other sectors in which to invest, which will lead to further closures of our great British pubs.

24.19. We would be keen to see our proposals and recommendations be carefully considered and we would be willing to meet to discuss further or provide more evidence if required.