(28)

[REDACTED]

I would like to support the submission of the Pubs Advisory Service and I would ask you to note the following points:

Market Rent Only option and Parallel Rent Assessments
Q.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.
My Response:
It would if MRO option was being offered unconditionally at rent review - the proposed condition that MRO option is only available at rent review where a rent increase is made ensures that the goal can not be achieved. We welcome the clarification in Part 2 that it plans to ensure that its approach to the MRO option (set out in Part 1 of this consultation), along with the requirements to provide information in relation to a tied rent offer (set out in Part 2), fulfil the objectives of a PRA.
see 6.21 There is an issue where Regulations refer to a 'MRO offer' it should read 'rent only offer' or 'free of tie offer'. Market rent is defined in the SBEE Act, it does not follow that an offer from a POB, accepted by a tenant, would be market rent. Either party could have acted without necessary knowledge, possibly imprudently or even with compulsion. Therefore this must be amended in the Pubs Code in order that any ill advised acceptance of a rent only offer put forward by POB's are not later inappropriately used as 'Market Rent' evidence against other tenants in rent review or lease renewal proceedings.
see 6.27 Part 2 see 9.11 of Part 1 there is an unacceptable proposal that the new MRO agreement can not be more than 5 years, regardless of the unexpired term of the tied agreement. In order to effectively compare the rents of tied and free of tie offers the duration of the agreement term should be equal where at all possible, e.g. the rent for a lease of 5 years and a lease of 20 years, all other provisions being the same would probably differ (the 5 years term rent being lower).
see 6.28 (bullet point 2) Is the tied tenant, who considers their tied rent is unfair, being offered no remedy (assuming the proposal for conditional MRO option at review were adopted) ? What is the remedy at rent review if a MRO option is not offered and the existing tied rent leaves the tenant worse off than if FOT ? It appears that the tenant can refer their tied rent offer the Adjudicator where they feel there is a breach of the code. Given that the code's primary objectives include ensuring a tied tenant is no worse off, if the tenant can establish using the PRA/MRO procedure (despite not having a MRO option) that their tied rent is leaving them worse off than if they were free of tie then they presumably can refer the rent to the Adjudicator - this has the potential to create a huge burden on the Adjudicator and will necessitate the Adjudicator determining 'no worse off' tied rents. It was understood that the purpose of an open, unconditional, MRO option at rent review was to be the remedy if tied rents left a tenant no worse off, allowing market forces to control tied rents, NOT that the Adjudicator should have the added responsibility of determining tied rents.
see 6.29 The process as proposed only allows tenants with a proposed rental increase to make an informed choice between the tied rent figure and a free-of-tie rent figure and ensure they are no worse off under a tied rent. This is not acceptable and does not reflect the will of parliament or the spirit of what has been understood by all, even the POB's to be the legislative intent.
see 6.31 distinction needs to be made between 'new tenancy' and a 'renewed tenancy', which

may also inadvertently be described as 'new'. A new entrant to the industry agrees a new tenancy but has no MRO option whereas an existing tenant at renewal may agree a renewed tenancy AND has the MRO option.

Q.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.
My Response
We would also request that the POB provide flow monitoring data reports for the previous 5 years and an indication given as to whether this is in fact raw and unchanged data or if it is data that has been changed via manual input or editing by the monitoring company collecting it and a reason why it has been changed if requested. Insert at Schedule 3 - 1(i) This includes the provision of historical flow monitoring reports or documents and a written indication as to whether the data has been changed or subject to manual input after it was recorded. This applies even if the monitoring equipment has been removed or no longer used.
see 6.20 It has recently come to our attention that the issue of saleable content needs to be addressed. Most POB's have consistently advised both new and existing tenants that the yield from a 9 gallon (72 pint) container of cask ale is 72 pints of saleable beer. In our experience this is not true and is confirmed by the duty paid by brewers on these containers (duty typically being paid on c68 pints). With the latter in mind information provided to tenants needs to include 'realistic' yield information from containers in order to establish a more accurate level of gross profit for the purposes of rent assessment.
see 6.32 What is lacking for new entrants is information ensuring they are aware of what they may earn, and pay in rent, in respect of both a FOT and tied agreement. PRA was proposed for new entrants and should be maintained in order they can make informed business decisions and/or seek professional advice.

Q.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.

My Response
The question that needs to be asked is 'how could a POB circumvent the key objectives of the legislation ?' As the proposal stands it's fairly easy - A POB can obstruct lease renewals using the grounds that they may want the pub back for their own occupation - forcing a horse trading deal where the tenant surrenders to a short 5 year term with no MRO option (as there is no rent review). Then at rent review rely upon inflationary annual rent increases and monopolistic control of tied product price increases instead of proposing rent increases at review. We foresee that as proposed few tied tenants will ever get the opportunity to consider a MRO option, lease renewal tactic is already being used. Frankly the POB's are well ahead of the Government proposed legislation and already negating the impact.
see 6.15 PRA is an essential tool regardless of whether a tenant has the right to a MRO option or not. In order to be able to establish they are, or are not, worse off than if they were free of tie. Just because a rent proposal at rent review does not request a higher rent it does not follow the existing tied rent is either fair, reasonable or leaves the tied tenant no worse off. This is one of the primary reasons that ALL tied tenants (of complying pub owning businesses (POB's) should be offered a MRO option at rent review (or every 5 years) regardless of the rent proposal made.

see 6.18 If the MRO option at rent review is to be conditional (such as only in the event of a higher rental proposal) then the TIED rent needs to be subject to scrutiny by an independent assessor authorised by the Adjudicator. Again this is why there should be no conditions on MRO option at rent review, the mere presence of an open MRO option at this time to tenants is the catalyst to encourage fair and reasonable tied rents using market forces. If the tenant has no MRO option then the pub owning business (POB) can simply rely on the inflationary annual rent increases and their total control of the tied product prices. Making MRO option unconditional negates the necessity for a tied rent assessment adjudication system to be in place and reduces the burden on the Adjudicator.
There appears to be no proposal in the code to deliver the no worse off principle to tied tenants where unless the rent proposed at review is higher than rent passing - this appears to be based on the false assumption that the existing rents (perhaps inappropriately set in the past or increased by inflation) are already 'fair' and is quite incorrect. A review of previous consultations and select committees highlights the issue of existing rents very clearly.

Q.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?

My response
It (upward only rent offer) renders the whole code unworkable and only a very small number of pubs would trigger MRO if left as proposed, the POB's would simply rely upon RPI from an already high dry rent to maintain the unfairness and keep the status quo. Therefore we insist you remove clause 15 (b) from Part 4 of the Statutory Instrument as it fails to meet the stated objectives of "no worse off or levelling the playing field"
The effect (of removing it) would be to deliver the legislative intent and what was expected by the House of Lords, Commons and industry. This condition, apparently slipped in without any consultation, was met with outrage by us and practically negates the purpose of the Act. Following the release of the FOI's it appears no POB or any other party suggested such a negative condition which begs the question where did it come from. Both Ministers (Baroness Neville Rolfe and Jo Swinson) assured the respective Houses that MRO option would be delivered at rent review. Indeed even the Government's own fact sheets expressed : "The Government's amended MRO clauses also provide tenants with the added protection of the right to a Market rent Only agreement at certain trigger points :

- At rent review (or every 5 years after the tenant's latest rent review, which ever is the sooner)"

At no time was there any mention of conditions indeed the power to impose such we believe is not conferred by the SBEE Act and if permitted opens the opportunity for judicial review. Tied agreements already contain provisions where a POB can sever the tied terms at any time, for any reason, requiring a rent review to reflect the new FOT terms (no other changes to the agreement are allowed for and there is no necessity for a new agreement). Essentially, POB's have an unconditional MRO option which they can activate at will. To be truly proportionate (and levelling the playing field) the MRO option should be operable by tenants on the same terms. In order to deliver no worse off in a measured and controlled way tenants groups have at this time agreed to a compromise whereby the MRO option is offered at rent review. Tied tenants are seeking an unconditional, open, MRO option at 5 yearly intervals.

Q.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.

My response:
The amount of rent reviews resulting in a nil or reduced rent is low as the rent has increased over the term by annual inflationary increases. The majority of occasions, we are aware of, where rent has been reduced is where a tenant employs the services of a professional to act on their behalf. Typically, as this is a negotiation, the POB will commence with a proposal of an increase or nil increase, even where they recognise the pub is over rented. Offering a loophole where a POB can simply rely on inflationary increases and propose no 5 yearly increase is without merit and simply encourages existing unfair tied rents to increase annually by inflationary measures. What we are seeking to achieve is a rebalance of risk and reward for existing tenants and not leave them in the same position they are already in, a position that ironically led to the necessity for intervention being brought in.

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

My response
Yes

Q.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?

My response
Yes

Q.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?

My response
Yes - Everything in Schedule 1 & 2 information should be provided.

Q.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)?

My response:
We consider that rent proposals are only made where the rent is open to negotiation. In view of the latter we do not consider, at this time, there is a necessity for a rent proposal in connection with an annual indexation provision but there may be a necessity where a rent of a temporary nature were proposed as these kind of offers typically have other terms attached.

Q.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?
The Pubs Code – arbitrable provisions

My response
Yes.

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

My response:
Yes. Change Part 12-41 (3) A flow monitoring device and its ancillary equipment means a device which is attached to the beer lines at the tied pub, this device may be owned, rented or installed by the pub owning business or its appointed contractors.
a) to measure the volume of BEER being sold by the tied tenant. - (remove the word alcohol and amount) Then insert: c) that is prescribed under the Weights & Measures Act 1985 d) that the device is installed in such a way that it is fully accessible by the Food Business Operator (Pub) and that they are not being prevented from inspecting or accessing any part of the device or that its installation reduces access to their food equipment e.g. beer lines or fob detectors. This is in order that the FOB can carry out manual cleaning and to confirm that hygiene is not compromised by the device and ensure that the weekly line cleaning regime is effective and supported with visual analysis, thereby ensuring that the FBO can fully comply with HACCP, Safer Food Better Business Regulations e) that the device meets Regulation (EC) No 1935/2004 f) that all the device's CE documentation and declarations of conformity are left on site so they can be inspected by the Food Business Operator in the formation of HACCP or other FBO policies and to assist insurers and or any statutory bodies.
In general the high standards found in FOT pubs should not be reduced in tied pubs because POB's want to measure beer. The BIS should raise standards not reduce them through an unintended consequence as they risk forcing FBO's to breach ever stringent food laws. The highest possible conditions of flow monitoring device operation must apply if POB's are to introduce equipment that piggy backs onto the food equipment already found in a pub, the reasons should be obvious - it is a continual desire by FBO's to reduce risk to the public health in accordance with lawful and correct procedures and to keep beer quality in a tied pub symmetrical with beer found in a FOT pub. No-one has to die the consumer simply has to experience difference and Pubs are increasingly aware of how high this standard needs to be in a pub as witnessed in the case of "Rare or Medium Rare Burgers". We request you read the following from leading brewing industry microbiologist Karin Pawlowsky who covers the risks we have highlighted:
One of the main reasons for unsatisfactory beer quality is microbiological contamination. Although the drink itself has a significant antimicrobial effect, a small number of bacterial and yeast species are resilient enough to survive and grow under the conditions in beer
"One of the most significant challenges for the brewer is with draught product. Beer for draught dispense is generally packaged in keg format and transported to the dispense outlet (the bar or pub). Here the keg is connected to the dispensing system where beer travels from the keg in the cooled cellar, through dispense lines (typically 40 to 50m long), to the tap in the bar area. Even though the brewer delivered an immaculate beer, the drink at the tap may be unacceptable to the consumer if the dispense equipment has become contaminated with spoilage organisms.
Contamination control
Contaminated equipment in the pub has the potential to significantly damage the drink´s quality, thereby risking loss of consumer loyalty. When beer is sold in glass all the equipment in contact with the product, such as beer lines and taps, should be microbiologically clean in

the first instance and should be kept clean by regular cleaning regimes which, in the case of cask conditioned beer, should be at least weekly. Additionally, it is critical that pub managers and their staff are suitably trained to raise their appreciation of the effect of poor hygiene on beer quality and to improve their understanding of the correct procedures to follow." Source: http://www.campdenbri.co.uk/news/brewery-dispense-hygiene.php

see 9.5 In addition to the express items considered fundamental breaches of the Code should be breaches of the Codes (and legislations) primary objectives. Contractual terms that are found by the Adjudicator to be contrary to the objectives, "to ensure fair and reasonable and tied tenant is no worse off than if they were free of tie", should be void and unenforceable. The Pubs Code should clearly express the same.

Extension of code protections
Q.13: Do you have any views on the extent of the extended protection that is proposed?
Group undertakings

My response
Government knows that tenant groups proposed that all protections should be extended including MRO in the event of a sale to an alternative POB that fell under the legislative threshold. It has always been our view this it is the tied terms in the wrong hands that provide the opportunity to undertake bad practice and abusive behaviour. The ability to restrict tied product choice and increase tied product price remain the weapons of choice to developers seeking to effectively evict tied tenants in order to undertake redevelopment and prove the site was unviable. We strongly believe that the absence of this protection will prove to be a mistake.
Group undertakings

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

My response
We are of the view that s.71 of the SBEE Act should have offered the power to not just exempt but to include new and novel types of pubs models and individual companies. This way, in the event of situation like what we are seeing with emerging pub companies like New River Retail, then the Adjudicator could require they must comply with the legislation.
Exemptions from the Pubs Code – genuine franchise agreements

Q.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.

My response
We are not aware of any commitment to exempt genuine franchises, that there was simply a commitment to consult upon whether they should or should not be exempt. We are naturally very concerned that a new "doorway" will be opened and manipulated and remain strongly of the opinion that protections should be offered to franchisees too. POB's will seek to convert agreements that clear the definition hurdle and thereby avoid MRO.

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

My response:
Yes.

Q.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.

My response
Some information may still be appropriate. Anything that will ultimately reflect upon the tenants earnings should be disclosed, e.g historic trading information we would consider may be a necessary information disclosure.
Exemptions from the Pubs Code – tenancy at will and short-term agreements

Q.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.
My response
TAW's are often the first to step an inexperienced tenant taking on a long term agreement. Once committed, moved house, maybe even put children into local schools and planning their resources and funds. The eventual longer term agreement when presented is then very difficult to refuse, despite it having potentially onerous terms that were not appreciated or discussed at the outset.
Given the above we would support a 6 month maximum exemption period. In the event the TAW is 6 months and is renewed then on renewal the tenant should automatically be offered protection.

Q.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.

My response
Yes as the new inexperienced entrant to the trade might move from a short term agreement into a long term agreement having never done the training - then getting a waiver to training later on via the virtue of now being considered an "experienced" operator. The course content should be approved by the Government (BIS) as suitable and not misleading or too selective on key areas to be of any real use. The information incoming entrants to the trade receive is of such a crucial nature it must not be left to the trade to provide and accredit one, as seen recently some of the "awareness training" fails to give enough clarity on the simple issue of achievable sales from cask ales. The course providers are in some situations either unable or unwilling to point out that cask is subject to duty disclosure notices and how a new tenant would use them in setting your pricing or planned profit that goes into a business plan. No awareness course should caveat the content and be shying away from being transparent by saying things like "you must get further independent advice of your own" as it then fails to make people "aware" and becomes an "signposting" brochure with no higher knowledge on offer and that other people will give you that knowledge if only you seek them out. Further, any signposting may mean they never get the correct advice at all, clearly if the advice exists then the Government should ensure it is added to the awareness training and not remain a "treasure hunt" for new entrants run around obtaining it. The awareness training needs to

have an agreed set of facts that can be relied upon when making a sound and informed decision to rent a pub.

Q.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?

My response
The same information that is listed in Schedule 1
Enforcing the Pubs Code – fee for arbitration

Q.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.
My response
We agree with the proposed fee.
Enforcing the Pubs Code – costs of arbitration

Q.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.

My response
Yes. The proposed level will also encourage both parties to seek a mutually agreeable resolution
Enforcing the Pubs Code – proposed maximum financial penalty

Q.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% 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.
My Response
The penalty should be increased by a further 1% for further breaches of the same, in order that a penalty acts as a deterrent, changes behaviour and is not simply a tax on the business that they pay from time to time. A review of the level of penalty should be undertaken in any case.

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