

British Pub Confederation

Standing Up for Pubs and Publicans



Rt Hon Greg Clark MP
Secretary of State
Department for Business, Energy & Industrial Strategy
3 Whitehall Place
London
SW1A 2AW

28th March 2018

Dear Mr Clark,

The reality about the Pubs Code – there is no genuine MRO

The British Pub Confederation, representing tenants and pub campaigners, are writing to you because it is now clear that tenants of the large pub-owning companies do NOT have access to a genuine Market Rent Only option.

This has been demonstrated in all the cases where tenants have tried to pursue it, but also is clear that the Pubs Code was drafted in a way that ensures this. It is also clear from a meeting we had in October with the Pubs Code Adjudicator and Deputy Pubs Adjudicator that they are aware that tenants do not have the right to a genuine Market Rent Option as intended by Parliament and only have access to negotiate a free-of-tie agreement, which is not a genuine Market Rent Only option at all.

This is frankly, disgraceful and something we need to raise with you as Secretary of State for Business, Enterprise, Innovation and Skills as well as with all the MPs who voted for a genuine Market Rent Only option.

The Government has failed to deliver what it promised and broken its commitments with regard to this matter. The Pubs Code in operation and in drafting fails to deliver and honour the intent and principles of the legislation. This flouts the will of Parliament and it means that thousands of hardworking tenants have been duped and betrayed. We are now advising all tied tenants of this fact and also calling on all campaigning organisations who supported the Market Rent Only option – and the Fair Deal for Your Local campaign – to campaign for what was promised and what it is now certain we do not have.

The British Pub Confederation

The organisational members of the Confederation are listed on the right and include tenants' representative organisations, business organisations, trade unions and tenants and pub campaigners' groups. Collectively the British Pub Confederation represents many more pub tenants than any other organisation. The British Pub Confederation Steering Group is made up of representatives from the member organisations and this is our collective view, one that we are now sharing with pub tenants.

Background

Member organisations:

Forum of Private Business

Guild of Master Victuallers

Licensees Supporting Licensees

The GMB

Scottish Licensed Trade Association

Fair Pint Campaign

Pubs Advisory Service

Justice for Licensees

Punch Tenant Network

Federation of Small Businesses

Unite the Union

Protect Pubs

Society for Preservation of Beers from the Wood

As you know, the right of tied tenants to access a Market Rent Only option was introduced into the Small Business, Enterprise and Employment Bill in November 2014 and subsequently passed into law in 2015.

The term, Market Rent Only option, was adopted by the Fair Deal for Your Local campaign coalition. It was introduced as a more realistic and accurate way of defining the 'free-of-tie option with open market rent review and the 'genuine free-of-tie option', terms that already existed. These are the terms that the successive Select Committee reports presented as the solution to the chronic overcharging and exploitation of pubco tied tenants, so the same as the Market Rent Only option.

So this solution – in its various names – is defined as being the right to be free of product and supply ties and pay an independently assessed market rent to the pub owner, with ***other terms remaining the same.***

However it is now apparent that, due to deficiencies in the Pubs Code [Redacted], that the so-called Market Rent Only option we currently have and Pubs Code is NOT actually a genuine Market Rent Only option.

What's more, not only is there not a genuine Market Rent Only, but we also have a situation where all tenants have access to is a free-of-tie 'offer' from the pubco, a an offer of course that will be one that suits the pub-owning company and inevitably one that will set the rent at a level to compensate the pubco for loss of profit from their overcharging for beer, the 'wet rent'.

The whole basis of the Market Rent Only option is that it is based on an independently assessed market rent and the whole point of the option is to allow tenants to access and then take an independently assessment market rent without the pubco being able to thwart or "game" that. However, due to the absurd process laid down in the Pubs Code, that allows the pubco to insist on unreasonable terms and then force arbitration, most tenants are not even able to get near to having an independent rent assessment.

Market Rent Only option definition

The Market Rent Only option – as I and the Fair Deal for Your Local campaign made clear to Ministers and Civil Servants in the later stages of the Small Business, Enterprise and Employment Act (in writing again and again) – is very simply but very clearly **the right to have an *independent assessment of the market rent of the pub, on a free of tie basis, and then have the option to pay that rent only to the pub owning company.***

Anything that is not the independently assessed market rent (and having gone through an independent rent assessment) is NOT a Market Rent Only agreement.

Market Rent

The 'market rent' is understood to be the commercial (market) rent on that pub premises when let as a pub, in the current trading conditions and free of all product and supply ties. This is in contrast it to a rent level set by and in the interests of the pub owning company. Due to the considerable profit that pub owning companies make from tenants through the beer tie, any free-of-tie arrangements offered by pub companies have been and are likely to be on above market rent levels (i.e. above the level that would be set by an independent assessor, working on the proper basis of comparing other similar pubs in that area including non-tied pubs).

The Market Rent Only concept as previously defined

Despite the clear and systematic attempt of the pub owning companies to undermine and prevent access to a genuine Market Rent Only option and with both the PCA and BEIS failing to tackle this, the concept was clearly defined and understood prior to being introduced in the SBEE Act 2015 and cannot be watered down or changed.

- It was first mentioned in The Monopolies Commission Report into the supply of beer as far back as 1969.
- **The Business Select Committee (BEC, BIS, BEIS)** identified the 'free-of-tie option with open market rent review' or 'genuine free-of-tie option' as their recommended solution to the issue in both 2010 and 2011
- **The Independent Pub Confederation** adopted this as their desired policy solution and campaigned for it to be introduced.
- Then the replacement committee of campaigners, which was to become the **Fair Deal for Your Local campaign coalition** took the decision to rename this the Market Rent Only Option to better and more clearly explain it but also to distinguish it from pubco free-of-tie agreements/offers, which merely exchanged sky high (and clearly not market) rents set by the pubco, to compensate for the loss of the profit from the beer tie.

In the launch briefing of the Fair Deal for Your Local campaign (May 2013), it included the following:

The Fair Deal for Your Local campaign believes that the best way to ensure a fair deal for pubs – and to deliver the Government's clear commitment - is to include in the statutory code an option for tied publicans to only pay a fair, independently assessed market rent to the pub owning company - a 'market rent only' option.

So subsequent attempts to redefine – or allow the redefinition of the concept – are wholly unacceptable and legally dubious.

Tenants do not have access to an independently assessed market rent and what's more, the right is unobtainable as the Pubs Code process has been drafted (we suspect deliberately, in collusion with the large pub companies) in way that prevents tenants from taking what should be a legal right, through unnecessary and prolonged negotiation and arbitration. So access to this right is in the hands of the pub owning companies, which is outrageous and a clear breach of trust on behalf of the Government and the PCA (who were involved in the drafting of the Code).

The legal right to a Market Rent Only option without delay or distortion

It is also critically important that taking the Market Rent Only option should not affect other terms of lease nor require a new or different lease. It merely means (or must be made to mean) that eligible tenants have the right to change from being tied to being free of tie on a new rent set by the Independent Assessor. An imposition of a new lease or enforced change of anything other terms of a lease go against the spirit of the legislation and undermine the simple legal right of tenants to choose the Market Rent Only option, as envisaged by Parliament and Government.

The Market Rent Only option also should not be able to be delayed or thwarted by pubcos. The whole point was that it would allow the tenant to get an independent rent assessment alongside whatever offers (tied, part tied or free-of-tie) the pubco makes. The pubco's desired free-of-tie rent level must not be a benchmark for genuinely independent assessment by an independent assessor; plus tenants should not be forced into any arbitration over pubco offers.

British Pub Confederation - [Redacted]

As was stated explicitly in correspondence and in meetings, to be a genuine Market Rent Only option, the process has to work as a legal right for tenants to reject any offer made by the pub-owning company and to then move to an independent assessment, without delay, and at the end of the MRO process period, they can start to pay that independently assessed rent without any delay (and in the case of any delay due to legal challenge, that rent is backdated to that exact date).

Conflation of the MRO option with Free-of-Tie deals offered by pubcos/agreed between the parties

What has instead happened is that the drafting of the Pubs Code pubco free of tie offers being confused with MRO – they are not the same and must not be conflated (as they are being) or confused.

Free of tie, leased pub deals have long been around – and mean that a tenant accepts a higher rent for going free of tie, **with the rent of course being set by the pubco** (and set a figure normally that compensates them for the loss of the ‘wet rent’ through the excessive tied prices). This is manifestly NOT a Market Rent Only option and must not be allowed to be presented as such.

Free of tie Offers

There is a flaw in the legislation, where it refers to pub owning companies making MRO “offers”. What this actually refers to is the pubco offering a free-of-tie rent to the tenant, based on their own valuation/aspired level of profit (and on the basis, as above, of them losing the profit from the beer tie, the ‘wet rent’. This is not therefore an offer of a market level rent; plus any such free-of-tie lease offer can and may include any terms the pubco wishes to include, which is a second reason why it is NOT a MRO option, for this is simply the right to go free-of-tie on a independently assessed rent, with other terms remaining the same.

So the legislation should be amended to clarify that any such offers of FREE-OF-TIE leases by pub-owning companies are free-of-tie offers, not Market Rent Only offers.

However, even with the confusion with the “offer” stage, it is the presentation of negotiated free-of-tie non-MRO deals as MRO that is more worrying. The two parties (tenant and pub owning company) may negotiate and agree any lease terms they wish, but this is separate to the legal right to insist on an independent rent assessment and then to pay this sum to the pub owning company, with other terms remaining the same which is what the MRO Option is (and only that is).

Instead pubcos are presenting their own offers of free of tie leases where they set the rent and terms with the genuine Market Rent Only option – where the rent is independently set by an independent assessor. They are wrongly referring to free-of-tie leases where they set the rent as ‘Market Rent Only’ or MRO leases or offers. They are not. Pubcos are even putting ‘MRO’ on the front of such leases, which is quite wrong – and must be stopped.

What is particular worrying is that the Pubs Code Adjudicator himself has confused these two things, which threatens to water down the legal right to the Market Rent Only option as anode, as intended by Parliament. In his letter to Rachel Reeves MP, Chair of the BEIS Select Committee, dated 3rd November 2017, Mr Newby said “which may be because they [the two parties] have agreed a MRO”. This very worrying – because such agreed free-of-tie agreements are clearly not based on an independently assessed market rent, so are not ‘Market Rent’ deals at all and moreover they have been agreed outside of the Pubs Code MRO process!

It is only a Market Rent Only agreement if the market rent has been set by the independent assessor; otherwise it is just a free-of-tie pubco lease.

So, for the reasons above, a free-of-tie rent offered to a tenant (which may or may not be agreed to) cannot be defined as a Market Rent Only deal, only as a free-of-tie deal agreed between the two parties.

The Pubcos tactic of thwarting and watering down MRO

The tactic of the pubcos is very clear and cynical, it is to seek to thwart access to the real Market Rent Only option – in others words to thwart the tenant getting to the all-important independent rent assessment, usually by deliberately insisting on unreasonable lease terms/a new lease (which is not necessary for MRO), which then means that these terms have to be arbitrated on by guess who, Mr Newby, who is then taking months and months, meanwhile many tenants give up (and are forced to agree a deal or face a long delay with associated costs they can't afford, or actually going out of business).

Then the pubcos are claiming that whatever negotiation has taken place here, (which is without the tenant knowing what their independently assessed Market Rent is) the pubco then claims that if they have agreed a free of tie lease, then this is it a 'MRO agreement/deal' when that is patently not the case ([Redacted] the tenant from taking one or even actually getting to find out what their Market Rent should be!). Pubcos are even putting 'MRO' on such leases, which is quite wrong – and must be stopped.

Of course, very conveniently for the pubcos because this negotiation is done deliberately outside of the terms of the Pubs Code and not through the MRO process (and because it also involves arbitration that the pubco has deliberately ensured becomes necessary) lo and behold, all this can then be deemed private and secret – which covers up what is going on. It stinks and it is time that you and your Department got a grip of the situation and acted, including over Mr Newby's failures and distortion of his quasi-judicial role.

The right to the Market Rent Only option, as laid down in the Small Business, Enterprise and Employment Act 2015 should not require **any** arbitration. The right was clearly laid down – and envisaged by Government and Parliament – to be a simple one, to obtain an independent assessment of the pub's market rent and then have the right (at the end of the agreed period) to opt to pay that and pay only that to the pubco (and on the same lease as previously). Mr Newby must know this – yet is behaving as all cases have to go through arbitration (over pubcos seeking a new lease and unreasonable terms, which they should not be allowed to do) and is thus himself blocking tenants' rights to the MRO option. This is disgraceful and confirms all tenants' fears about him and his approach to his role and to the Pubs Code.

This is also in clear breach of the principle of "fair and lawful dealing" laid down in the legislation, so we also believe that the situation with regard to Mr Newby's 'interpretation' of the Code process is allowing unfair dealing and is thus in breach of the legislation.

Those fears are heightened by the fact that the Pubs Advisory Service (members of the British Pub Confederation) wrote to the PCA back in September 2017, over a year ago months ago, to complain about the incorrect use of 'MRO' by Punch Taverns, but have had no response! A tenant similarly wrote to the PCA and has had no response.

So we are concerned that the PCA is clearly ignoring attempts to undermine and redefine the Market Rent Only option and both fundamentally change it and render it meaningless for tenants and for fairness.

The betrayal of both Houses of Parliament who supported a genuine MRO

The national Fair Deal for Your Local campaign, which I Chaired, campaigned for a GENUINE Market Rent Only option, something that tenants do not currently have access to. As the person who actually rebranded the 'free-of-tie option with open market rent review' into (in my role as Chair of the Fair Deal for Your Local Coalition) and the person who then introduced the Market Rent Only option into the legislation, I can tell you that the current situation is that tenants do not have a Market Rent Only option, merely a weak right, at certain trigger points, to ask the pubco for *their* assessment of what *their* free-of-tie rent would be, on less unfavourable and often wholly unreasonably or unaffordable terms dictated by the pubco, who then simply kick the whole thing into the long grass once the tenant challenges those terms.

Most tenants simply can't then afford the time to continue to pursue this, when they are paying over the odds for product and rent (and may well be failing to make a living). Worse still, the PCA office are taking so long with arbitrating on these terms (which would not happen with a genuine Market Rent Only option) so it simply is not worth and in many cases not possible for a tenant to continue to pursue the process.

Ministers and Civil Servants clearly said they understood that pubcos would seek to "game" and that they would therefore prevent this; they have failed and instead allowed the whole process to be halted but also allowing pubcos to issue hostile Section 25 notices, thus preventing tenants accessing the all-important independent rent assessment and denying them any right to genuine MRO.

Also, ridiculously, with no clause in the Pubs Code that specifies that the tenant has the legal right, as always envisaged, to pay the market rent from the date of the end of the time-limited process (120 days) it allows the pubcos to deliberately prolong the period and with the failure of the Pubs Code Adjudicator and office to deal with cases in a reasonable timescale, tenants have little if any chance of getting to a rental agreement within two years, not the 120 days (originally 90 in the original amendment) that was the legal maximum.

Clear Parliamentary and Ministerial intent regarding the Market Rent Only option

The Government and the then Business, Innovation and Skills Department, were clear that, following the vote of the House of Commons for the Market Rent Only option, that it would accept the vote and introduce it, as envisaged.

This was confirmed by the Secretary of State on the floor of the House of Commons and by other Ministers also in both Houses and in letters, that also then confirmed the basic understanding of the Market Rent Only option. For example:

From Baroness Neville Rolfe, BIS Parliamentary Under Secretary of State letter to stakeholders 21 January 2015:

"It [the MRO option] enables those tenants to pay their company a market rent for the pub and then purchase drinks and other goods and services from whomever they wish...the Government accepted the principle of a Market Rent Only option. The Govt will be tabling a number of amendments at Lords Committee to Clause 42 of the Bill....The amendments do not change the original policy intent of the amendment on which the Government was defeated".

In the associated document sent with this, it included the following:

'Pubs Code and Adjudicator'

"The tenant would pay a market rent for the pub but would be free to source beer and other products from any source - known as the Market Rent Only option.

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If the tenant and pub-owning company are unable to agree a Market Rent Only agreement then the tenant has the right to request that the market rent be determined by an independent assessor, in line with the MRO amendment tabled in the House of Commons.

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If they are unable to agree a Market Rent Only deal then the tenant may choose to progress to the second stage, at which the tenant and the pub-owning company would engage an independent assessor to determine the Market Rent Only deal.

Jo Swinson MP, BEIS Minister of State, letter 23/1/15 to Toby Perkins (Labour Shadow BIS Minister):

This week we have tabled a number of amendments to the clause [42]. These are designed to ensure that the Market Rent Only option clause is workable and legally robust, and to mitigate unintended consequences. The amendments do not change the original policy intent of the amendment.

This was then confirmed by the then Minister, Anna Soubry:

Anna Soubry MP, BEIS Minister of State, letter to Greg Mulholland MP 13 Feb 2016

"As you say in your letter, the MRO option provides the right for tenants to seek an independent assessment of the commercial rent on a free-of-tie basis and then have the right to pay that sum and only that sum to the pub-owning company – and our proposals provide for exactly this".

Yet this is simply NOT the case in the operation of the Pubs Code.

There are many more examples that show that the Government promised to introduce a genuine Market Rent Only option as we had defined it and successfully voted into the Bill, yet tenants do not now have access to that.

Flaws in the MRO process that are undermining a genuine MRO option

The original process suggested to BIS (following the Government being forced to accept the Market Rent Only option after the November 2014 vote) was designed to be reasonable, allowing for negotiation and for both parties to agree a deal on any basis, during the process. However fundamentally, to be genuine, the process had to be finite, with a maximum period from which the tenant could take and start paying the market rent only to the pubco and it also had to be devised so as to avoid the pubcos being able to delay or thwart this (and so that the pubco could not prevent the legal right to an independent rent assessment).

Unfortunately, despite promising to honour the will of the original clause and its intention, the process devised by BIS was deeply flawed and actually itself undermines the legal right to a genuine Market Rent Only option by allowing pubcos to delay, halt and thwart the process in effect denying the tenant any access to it at all (and giving them only options of staying tied or accepting a pubco dictated free-of-tie lease). That is demonstrably not a Market Rent Only option, indeed it is very clearly a pubco thwarting (and alas being able to thwart) the right of the tenant to an independent rent assessment within the set timescale and to then start paying only the market rent at the end of the finite process.

The key principle of the legislation

British Pub Confederation - [Redacted]

As is clearly stated as the background principle to the legislation and in the legislation itself, the underlying fundamental principle of the reforms is that the Tied tenant would be no worse off than the free of tie tenant. **This is a principle that cannot not be arrived at any other way other than via a genuine Market Rent Only option.**

The principle is one that has been set in RICS Guidelines for many, many years and was again clarified in 2011 following the RICS Forum Panel meeting and arriving at the conclusion, that if the guidelines on setting rent were followed correctly the principle that “the tied tenant should be financially no worse off than the free of tie tenant” should be arrived at.

So unless this is resolved and the Pubs Code and code process is rewritten to ensure there is a genuine Market Rent Only option, then the basic principle of the legislation is being thwarted.

Conclusion – No MRO in England and Wales

So do clearly and demonstrably, we do not have a genuine Market Rent Only, indeed in reality, we do not have a Market Rent Only option at all, merely an unnecessarily confused and complex process whereby tenants can request a pubco free of tie lease offer, on unfavourable terms set by the pubco and with no prospect of getting even to an independent rent assessment within the finite timescale.

We will be advising all tenants of that fact and also all MPs who voted for the Market Rent Only option. They have all been misled.

We urge you to now look into this matter and when the Code is reviewed, to ensure it is changed so that finally, the promise made by Ministers to Parliament and to pub tenants are delivered.

I and we look forward to hearing from you.

Yours sincerely,



Greg Mulholland
Chair, British Pub Confederation

On behalf of the British Pub Confederation

cc Paul Newby, Pubs Code Adjudicator
Rachel Reeves MP, Chair of the BEIS Select Committee
Toby Perkins MP, Chair of the All-Party Parliamentary Save the Pub Group
[Redacted] CAMRA