[Redacted]

**Subject:** Tenant Focus Group Reply Form [Redacted]

Dear [Redacted],

I hope you are well. I am just checking that you received my email dated 11 July, which is set out below for your ease of reference.

When you have a moment, I would be grateful if you could let me have the contact details for [Redacted] who is leading the BEIS Consultation.

Kind regards

[Redacted]

Director

[Redacted]

[Redacted]
**Subject:** Tenant Focus Group Reply Form [Redacted]

Dear [Redacted],

It was really good to speak with you earlier today - I think we could have filled a whole day discussing the MRO process and issues with the Code.

As discussed, I would be very happy to come and meet with both you and Ms Dickie to discuss the issues in more detail. In the meantime, and as you have requested, I have set out below in bullet form some of the issues which I have experienced and my general comments of the MRO procedure:

- **Deadlines -** the number of deadlines in the Code for taking prescribed steps and the ability for a tied tenant to lose its right to go free of tie very easily – if it is not properly advised.
- **Front loading of costs -** lots of the POBs are continuing to try and front load costs for tied tenants before entering into the MRO tenancy in an attempt to make it unattractive – insisting on statutory compliance, some works of repair and decoration being carried out either immediately or within the first 5 years of the term (on lease renewal these works would be rolled over to the end of the term and the landlord has other remedies during the term if the premises are in disrepair) and payment of an increased deposit.
- **MRO vehicle -** some tenant groups have clouded issues by arguing that the only appropriate MRO vehicle is a DOV of the existing tied tenancy. I think it should be judged on a case by case basis. More often than not, the existing tied terms are very onerous and restrictive and those provisions would still remain if the MRO vehicle was documented by way of a DOV.
- **Commonality of terms –** I do not think this is very unhelpful. POBs will rely on their extensive free of tie portfolio to justify that a term is common – but we do not know how the background to those leases and it is likely that they are not reflective of a true open market negotiation. In addition, it is being used by POBs against tied pub tenants to say that if a term is not common – such as a contractual option to renew, upwards and downwards rent review or a landlord's external repairing obligation in the existing tied lease – then that term should not be included in the MRO tenancy because it is not common (even if it is reasonable to do so). However, that term may have been included due to the nature and location of the property but if they cannot overcome the commonality threshold, the term is deemed to be unreasonable and they are not able to argue whether it is reasonable.
- **Experts & Commonality -** the use of an expert to decide commonality simply adds another layer of delay and cost to an already costly process - as the parties have to agree as to who is an appropriate expert to decide commonality, whether it be a surveyor or a commercial property lawyer, the identity of that expert and then agree on the joint instructions. It would be preferable to skip this step and head to whether the term or condition is reasonable.
- **RPI annual rent increases –** these are completely unreasonable and thankfully it has been dropped by a number of POBs. I have never had the opportunity to pursue this all the way during a PCA referral due to client's financial restraints and reaching a commercially negotiated settlement - there may already be provision for RPI in their existing tied lease such that if I can negotiate a capped RPI, they are better off than having a uncapped RPI. RPI has the potential to vastly inflate rents higher than the open market rent. If inflation levels go up it could be disastrous for the tenant. This can be best demonstrated by the case of Arnold -v- Britton and others [2013] EWCA Civ 902 which dealt with the interpretation of a residential service charge clause where it was held that the service charge was to increase by 10% every year. This meant that the service charge contributions would increase from £90 in the first year of the term to £550,000 by 2072, far in excess of the costs likely to be incurred. It was held by Lord Neuberger at paragraph 20 of the judgment that "Experience shows that it is by no means unknown for people to enter into arrangements which are ill-advised, even ignoring the benefit of wisdom of hindsight, and it is not the function of the court when interpreting an agreement to relieve a party from the consequences of his imprudence or poor advice." A court is not responsible for saving party from a bad bargain, or from poor advice. The RPI may be low at present, but history has shown that it can increase to unsustainable levels. This is undoubtedly an unwise clause to agree to as the provision for an annual RPI increase is unreasonable. This is compounded if the rent review provisions are upwards only and there is provision for an annual increase of rent by reference to the RPI as there is no opportunity for the rent to be brought back into line with the open market at rent review. Interestingly, I have not seen any [Redacted] Leases which include the provision for an annual review of rent by reference to the RPI in addition to a rent review.
- **Headline rent –** lots of rent review provisions in the MRO tenancies have a number of unusual disregards and assumptions which often contradict each other and often produce a headline rent on rent review. This is unreasonable.
- **Provision of accounts –** some POBs are seeking to introduce terms in the MRO tenancy where the free of tie tenant has to provide its accounts on request. This is unreasonable.

- **MRO rent and s.43(10) of the SBEEA 2015** – the absence of any disregards under this section means that if a tied tenant has carried out extensive authorised alterations at the premises those works will be rentalised when determining the level of day one MRO rent. This is completely unfair. In addition, even if there is a disregard of improvements at rent review during the MRO tenancy the rent review provisions are usually upwards only such that the rent review disregard is worthless. There should also be a disregard of goodwill. The assumptions and disregards for determining the level of renewal rent at s.34 of the Landlord and Tenant Act 1954 ("1954 Act") could be applied when determining the level of MRO rent. This is a massive oversight in the drafting of the SBEEA 2015.
- **Delay** – there are no real sanctions for delay and no motive for a POB to speed things up. Under the 1954 Act, there is provision for an entitlement to interim rent so that one party can benefit for either an increased or decreased rent during the interim period. Query whether something similar could be introduced here.
- **Alternative Arbitrator** – I have concerns about the quality of the alternative arbitrators and their lack of knowledge and experience with property, leases, how those terms can impact on value and the Code. They are often construction based and used to dealing with adjudications – which are very different.

I hope you find my comments helpful and a useful starting point.

In the meantime, I would be grateful if you could let me have the contact details of [Redacted] who is leading the BEIS Consultation.

Kind regards

[Redacted]

Director

[Redacted]