Pubs Code Consultation September 2021

By the Pubs Advisory Service Ltd

By Email to: pcareview@beis.gov.uk

The Rt Hon Kwasi Kwarteng MP

Mr Kwarteng,

With reference to Section 46(1) of the Small Business Enterprise and Employment Act 2015 you are responsible for the review into the code and so it is to you that we write.

PAS represent independent business owners many of whom rent from regulated pub companies.
We have consulted with our clients and supporters and used our unparalleled experience of dozens of PCA Arbitrations in the preparation of this response.

We and the people we represent who run independent pub business across the country look forward to seeing reform of the code and PCA.

If I can be of any further help please do not hesitate to contact my office.
[Redacted]

Pubs Advisory Service Ltd

Terms of Reference covering the questions and review:

The Code regulates the relationship between large pub-owning businesses and their tied tenants. (The Government) having identified previously the unfair practices used by the companies is meant to ensure that commercial transactions under the code are carried out at **arm's length**. The lack of arm's length transactions is clearly identified in the Governments own Impact Assessments.

The POB's are being allowed to direct the MRO vehicle and terms despite a DOV being the historically most common simplest and cheapest option to release ties.

New agreements cause many issues which DOV's do not, in brief:
They impose tax liabilities on the TPT.
They remove disregards on valuable tenant's improvements.
They remove TPT's rights to contractual tied rent reviews.
They remove TPT's earlier DOV's (such as) the right to upwards and downwards rent reviews.
They impose unreasonable costs on the TPT.

The MRO agreements proposed do not match open market FOT agreements which the POB's themselves enter into when they are tenants.

The code and PCA have failed on both counts to uphold the intent of the regulations and allowed the proliferation of highly technical legal arguments to cloud the primary objectives of the reforms which was to ensure arm's length transactions and a transfer of profit could take place. Ongoing disagreements come at the expense of the tied tenant. Elongating disputes imposes significant additional costs and denies the timely exercise of the MRO rights contained within the underpinning regulations: the TPT remains locked into their current lease throughout and pays the price for doing so.

Further, the PCA holds a completely biased view on new agreements for tie release – a view which favors the POB's preferred method when it comes to making MRO offers. The PCA support a pub company myth that tied and free of tied pubs are completely different "animals". The PCA routinely fails to supply information to TPT's, they operate opaquely and perpetuate the information asymmetry which TPT's labored under before the code came in. This seems to be a legacy laid down by the first PCA who was themselves a Pub Company supplier, [Redacted].

As it stands the code and the PCA removes tenants' ability to contract under fair and lawful dealing and at arm's length, this is anti-competitive and distorts the market for pub lettings.

Question 1

What are your views about Parallel Rent Assessments for prospective tied tenants? Please provide the reason(s) for your answer.

During the first consultation tied tenant representatives and or tenants raised the issue of a PRA, back then they showed the Government officials a simple way to do it. The officials at BEIS said they would look at it, this was in 2015.
It was further made clear by tenant representatives that if Government have found a better way to do PRA then to let us know. As it was they never came up with any other version and the then Secretary of State said we don't need one and so PRA was dropped from the code. It is therefore not a surprise that Govt now see it as a problem, however the first problem was in ignoring tenants and tenant representative views in 2015 and proceeding to bring in a code without a PRA.
The version of PRA sent to BEIS in 2015 is (we think) still the best way to do it and it should be introduced as a matter of course. Given that the Government have had 6 years to consider the matter we feel that a swift decision be made to incorporate the version previously sent to BEIS and is attached to this response. (See PRA Summary PDF)

Question 2

What are your views about encouraging a trial period – for example 3 months - to help a prospective tied tenant familiarise themselves with the running of a new tied pub before entering into a commercial contract? Please provide the reason(s) for your answer.

The concept of a trial is moot, if the rent and or beer prices under the trial period are not equivalent to the actual prices paid under any substantial agreement entered into later on it will be misleading. Further, 3 months is not a representative time to consider properly the ebb and flow of the business. In any event most pub companies have cooling off periods for new agreements which are for the most part greater than 3 months proposed - i.e., 6 months. It would be better for the tenant to experience the actual substantial agreement terms and instead give new tenants a right to be able to give notice to their landlord on day one of any new agreement and to be able to withdraw their notice to quit before the deadline should they choose to stay on after the first 6 months. The Landlord remains free to offer other notice or colling off periods should they wish to do so.

Question 3

What are your views about reducing the current 6-month period in the previous qualification period? Do you think that a 3-month period in the previous financial year

would be appropriate or would you support a different period? Please provide the reason(s) for your answer.

The qualification period should not be anchored or set to a “financial year” criteria, it should simply be that once a POB has owned over 500 tied pub for more than 3 months they are regulated, the 3 months would give them ample time to move to being compliant and or speak with the PCA and recruit a CCO. In any event it is our view that there should be no deminimus at all and anyone who rents out a tied pub should be regulated – this being comparable to the Scottish Pubs Code.

Question 4

What are your views about a requirement for the landlord selling the pub to notify the PCA of any tied tenant(s) with extended protection? Should the PCA be informed when extended protection has ended? Please provide the reason(s) for your answer.

Yes, the PCA should be notified and when the protection has ended. We also think that any TPT who has exercised their right to MRO but not completed it at the point of sale, should be allowed to complete and or conclude the process. The “sale” should not end the rights of TPT who have given a valid notice under the code. In any event it is our view that there should be no deminimus at all and anyone who rents out a tied pub should be regulated – this being comparable to the Scottish Pubs Code.

Question 5

What are your views about a Parallel Rent Assessment at the rent assessment or lease (or licence) renewal stage for tenants with extended protection? What type of information should be set out in a PRA? Should there be a right to refer disputes related to the PRA to the PCA and, if so, on what grounds? Please provide the reason(s) for your answer. The Government would in particular welcome evidence in respect of the number of tenants and pub companies dealing with matters related to extended protection in order to help decide whether this is a proportionate measure.

A PRA should be supplied to tenants with extended protection, we refer the Minister to the PRA we have supplied and attached to this response. In all other respects the POB should be supplying the information under schedule 2 to TPT’s to level the playing field and meet with the intention of the code to remove information asymmetry and ensure transactions are at arm’s length.

Question 6

What are your views about the examples set out above and what might work or what might not work? Do you have other suggestions on how the MRO process could be changed using existing powers? Please provide the reason(s) for your answer.

Firstly, there should be no deadlines, TPT’s should have the right to request MRO at any time for any reason. This is primarily because the intention behind triggers and “events” was to stop the floodgates scenario of all TPT’s requesting MRO on day one of the code, and as seen in the last 5 years a minority of TPT’s exercised their rights so this was never

an issue. If a TPT gets it wrong (in opting for MRO) they will fail and the pub will be handed back to the Pub Company who can re-let it, this is a situation no true capitalist could argue with and is evidently a self-policing mechanism.

Given we are no longer at day one of the code or in need of “phasing in” code rights, the threat of being swamped or the floodgates opening has abated and was in any event over-stated, ergo there is no need to retain triggers or events just make it a simple choice. As seen less than a third of TPT’s used an MRO right in a 5-year period despite 99% of TPT’s having an MRO opportunity.

Further, TPT’s in England and Wales must not fall behind TPT’s in Scotland who have learned from the issues in Eng/Wal and have a Scottish Pubs Code with no MRO triggers or events. If triggers and events are left in place there will be a wide disparity in the pub letting market. This has been supported by the recent academic work from York University which also points out the Scottish pubs code advantage (see attached [Redacted] PDF).

In terms of the main timings as currently upheld, they are anticompetitive and lead to a direct loss of arm’s length transactions. They impose duress and in combination with the MRO offers simply prevent people from acting prudently and willingly. This is the polar opposite to the intention of the code and as identified in the Government impact assessments. As enacted the code upholds an unlevel playing field for the parties and has failed to reform the sector, truly the worst of all worlds.

We raised the timings issue with the PCA in correspondence with their office and in Arbitration, they refused to act and in fact laughed it off on one occasion despite a clear power to use s47 SBEE ACT to ask the Secretary of State to amend the timing. To suggest changes to the main steps via the code review is utterly disingenuous as the issue of how 14 days was putting pressure on parties was well known from 2016 and the power to change it was ignored by both regulators Mr Newby and Ms Dickie.

The suggestion outlined (i.e., 3-month delays) is simply a fudge to the PCA not using their existing powers under s47 SBEE ACT – the damage of the 14-day limit has been done to everyone thus far and this proposal from BEIS is not adequate redress for the chronic failure of the PCA to act and or use its powers in the years gone by.

Question 7

What are your views about requiring the inclusion of rent in an MRO proposal? Please provide the reason(s) for your answer.

A rent offer should be supplied to tenants at MRO, the POB should be supplying the information under schedule 2 to TPT’s to level the playing field and meet with the intention of the code, i.e. to remove information asymmetry and ensure transactions are carried out at arm’s length. It is our experience that every MRO offer made had a rent stated. The PCA can use its powers under s47 of SBEE act to ask the Secretary of State to close loopholes there is no need to consult on such issues when they identify them as clearly they have already.

Question 8

What are your views about removing the requirement that terms should not be 'uncommon'? Please provide the reason(s) for your answer.

The government is looking at this in completely the wrong way, you can resolve the problem and remove all legal hurdle's and keep to the legislative intent fully intact by directing that tie release is by a simple DOV for all MROs as the default compliant offer. The code is after all meant to give a real choice of supply terms everything else is superfluous. Therefore, if the landlord wishes to propose a host of other changes (such as new lease vehicles, or surrender and regrants etc) they can, but crucially the TPT retains the right to have only a basic code compliant tie release to their tied agreement to fall back on. This leaves the tenant and landlord in clear water in which to to negotiate on a level playing field. The POB and the TPT are now in an arm's length position and the TPT can walk away from all/any alternative proposals made to them and but still sever the tie at a base level if they are not tempted by any other proposal made by the POB by introducing a "fallback" position.

Question 9

What are your views on amending the definition for the 'comparison period'? Please provide the reason(s) for your answer including, where available, views and evidence on whether pub-owning businesses are adopting a 13-month pricing period and the impact this has on business planning.

We consider that the mechanism works fine as it encourages the tied pub company to strike market leading deals and pass on the benefit of their buying power. The modifying values in Part 1 of the code should be reduced, so at *regulation 3.3* the value in the formula should be reduced from +3 to +1.5 in *regulation 4.3* it should be reduced from+8 to +5 and in *regulation 5.3* it should be reduced from+20 to +15

Question 10

What are your views on excluding taxes and duties from the significant price increase calculations? Please provide the reason(s) for your answer.

Duty can change on a range of other drinks, so we do not agree to excluding taxes and duties. This will encourage the tied pub company to lobby harder and pass on the benefit to the tied pub tenants.

Question 11

What are your views about excluding other unavoidable costs from the significant price increase calculations? Please provide the reason(s) for your answer.

They are all avoidable if the supplying tied pub company lobby harder, strike market leading deals and pass on the benefit to their tied tenants.

Question 12

Do you think there should be an alternative appeal route to the current High Court or should the latter be retained? Please provide the reason(s) for your answer.

We look at this in a different way, firstly any appeal should be against the PCA and not the tenant, TPT's should not be put to defending spurious legal actions which will delay access to MRO / going free of tie. In any event almost all appeals would be rendered moot if the Govt take the tenants points made above and remove triggers / events and allow TPT's access to a fallback tie release position – see our answers to Questions 6 & 8 and the opening comments on arm's length transactions. Allowing the bigger party, the right to High Court appeals simply ensure that transactions are not being held at arm's length and reduces the commercial opportunity by delay. Allowing appeals also undermines the point in the PCA itself if parties can go to the High Court at the end, then maybe they should do that day one and avoid the additional long, slow unclear arbitration route and trade that off against getting a greater MRO trading time. Ongoing disagreements come at the expense of the tied tenant. Elongating disputes imposes significant additional costs and denies the timely exercise of the MRO rights contained within the underpinning regulations: the TPT remains locked into their current lease throughout and pays the price for doing so.

Question 13

If you believe that the appeal route should be changed, what do you think it should be changed to? Are there other ways to make an appeal more accessible and potentially less costly without changing the appeal route? Please provide the reason(s) for your answer.

There would be no need for appeals if the PCA had created decent precedents and golden threads (notably these were dropped by the PCA herself), the POB's would have nothing to appeal on as the exact limits of the code as written would be clear to all upfront. The current process as delivered is not at arm's length and serves only to drag things out and delay tenants moving to free trading with rounds of delays as Government fudges the intent of the legislation. Ongoing disagreements come at the expense of the tied tenant. Elongating disputes imposes significant additional costs and denies the timely exercise of the MRO rights contained within the underpinning regulations: the tied tenant remains locked into their current lease throughout and pays the price for doing so.

Question 14

Are there any other ways that could be adopted to make the appeal route more accessible and potentially less costly without changing the appeal route? Please provide the reason(s) for your answer.

The costs threat is a curious point to raise as we do not know of any TPT who was hit with costs order at the High Court when facing appeals, so it's rather odd to be concerned about it given there is no evidence it has ever happened. That said it is the time it wastes which costs TPT's money as they remain on the wrong rent and tied. So with costs the TPT should be compensated for the delays as it is not of their doing. Further, this has rather been answered in Q12,8 and 6 which would reduce any chance of appeals from happening.