Consultation on proposals to amend the Pubs Code

Following the first statutory review of the Pubs Code and the Pubs Code Adjudicator

Submission by Greene King
2 September 2021

	Respondent type
☐	Tied pub tenants
☐	Non-tied tenants (please indicate, if you have previously been a tied tenant and when)
☒	Pub-owning businesses with 500 or more tied pubs in England and Wales
☐	Other pub owning businesses (please describe, including number of tied pubs in England and Wales)
☐	Tenant representative group
☐	Trade associations
☐	Consumer group
☐	Business representative organisation/trade body
☐	Charity or social enterprise
☐	Individual
☐	Legal representative
☐	Consultant/adviser
☐	Trade union or staff association
☐	Surveyors
☐	Other (please describe)

Contact Information
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INTRODUCTION

- Greene King is the UK's leading brewer and pub retailer and has brewed our beer in Bury St. Edmunds, Suffolk and sold it through our pubs for over 200 years. Today we employ 40,000 people and we operate c. 2,600 managed and tenanted pubs, restaurants and hotels across England, Wales and Scotland. Our leading managed brands include Greene King Local pubs, Hungry Horse, 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.

- Greene King is one of the six pub-owning businesses (POBs) covered by the statutory Pubs Code and Adjudicator due to the size of our tenanted estate. As of 31 August 2021, Greene King (through its various group companies) owned 820 tenanted pubs in England and Wales which are let out on a range of leases, tenancies and franchises. This represents approximately 9% of the regulated tenanted tied pubs in England and Wales.

OUR SUBMISSION

- Since our submission to the first statutory review of the Pubs Code and the Pubs Code Adjudicator, POBs have been dealing with the Covid-19 global pandemic, which has had a devastating impact on the tenanted and leased pub industry, amongst many others.

- Greene King has invested more than £25m in supporting its tenants, primarily through rent concessions but also through credits on beer purchased from Greene King, purchasing PPE (personal protective equipment) for each pub and replacing unopened beer that went out of date during lockdowns with fresh stock on reopening, funding BII membership to access other support, and partnering with the Licensed Trade Charity, which provided much needed mental health support.

- Greene King supported the Pubs Code Emergency Periods, which had the effect of pausing and protecting the Pubs Code rights for those tied pub tenants of regulated pub-owning businesses during the national lockdowns.

- The pubs sector was one of the hardest hit by the pandemic. While the removal of restrictions means our pubs are once again able to trade at normal capacity, it will be a long road to recovery.

- The tenanted and leased pub industry remains fragile, with trade still behind pre-pandemic levels and the industry facing continued financial challenges. This includes the changes to the business rates holiday that came into force in July 2021, moving from 100% business rates relief to 66% (up to a total value of £2m per business), and which will return to full rates in 2022, and the increased rate of VAT for the hospitality industry which comes into force on 30 September 2021. At a time when many pubs are struggling to survive, these costs will have a significant impact.

- When considering the responses to this consultation, we urge policy makers to reflect on the original policy objectives of the legislation (the 2015 Act and the Pubs Code), namely to make sure that TPTs were treated fairly and lawfully, that they are no worse off than tenants of free-of-tie pubs, and that there is a statutory means to seek redress when warranted. Again, we

believe that the current framework is delivering this. The Code is not, and should never be, an attempt to distort the market and arbitrarily cushion TPTs, nor deliver a scenario whereby free-of-tie tenants receive the same level of support as TPTs.

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

The use of a Parallel Rent Assessment was fully consulted on during the Pubs Code and Pubs Code Adjudicator Government consultation in 2015 and 2016. Government itself concluded in Part 1 of the consultation that;

> *"7.11 For these reasons of cost, complexity and proportionality, the Government has decided not to pursue the discretionary power to introduce a separate PRA procedure within the Pubs Code. The right to request MRO in the circumstances required by the Code will already deliver the principle of ensuring that the rent assessment procedure leaves an existing tied tenant no worse off than a free-of-tie tenant. The information and transparency requirements in the Pubs Code will ensure that prospective tenants have all the information they need in good time to make an informed decision on whether or not to enter into a tied agreement."*

In Part 2 of the consultation Government also identified that a prospective tenant would receive a rent proposal and the information set out in Schedule 1 and 2 of the Pubs Code and concluded that;

> *"6.33 The Government believes that these arrangements provide proportionate protection for prospective tenants – who will also have the ability to consider and compare the deal on offer with other tied or free-of-tie deals available in the market; and therefore to establish that the deal being offered to them is both fair and leaves them no worse off than if they were to opt for a free-of-tie tenancy."*

Greene King believes, for the reasons that we outline below, that the conclusions reached in the Consultation response remain as true now as they did then and it is unclear on the issue that is attempting to be addressed by introducing a PRA with prospective tied tenants five years into the operation of the Pubs Code. Greene King does not believe that there is a requirement to provide a prospective tenant with a PRA as they already have a choice ahead of entering into a tied agreement.

When a prospective tied tenant approaches a POB to operate one of its pubs, the POB is bound by the obligations of the Pubs Code to provide a very substantial amount of information about the pub, the Schedule 1 information, which includes rent details. A prospective tied tenant can take this information and make a real-world comparison with other information available in the open market-place and has the ability to 'shop around'. At this point the prospective tied tenant is not bound by a legal agreement, and therefore has a genuine freedom of choice to satisfy themselves of the "no worse off" principle. The introduction of a hypothetical PRA is artificial and provides no relevance for the prospective tenant and will introduce confusion to the process of taking on a new pub business as the free-of-tie PRA option would not be available alongside the tied offer presented by the POB.

It should be noted that for an existing tied tenant, the mechanism to test the "no worse off" principle is through the Market Rent Only (MRO) option, which replaced the PRA as the "no worse off" test during the passage of the secondary legislation, and therefore Greene King

would query what evidence has emerged requiring the need for reform in this area. We do not consider that it is necessary to introduce a second means of doing so.

Nevertheless, as previously mentioned, a PRA for prospective tied tenants will present further complication and confusion to what is already a very burdensome process for the whole industry. The following sets out further reasons as to why a PRA is not required for prospective tied tenants.

a. Tie/free-of-tie is not a binary choice

The assumption that lies behind the proposal is that it is possible to draw a straightforward financial comparison between one set of terms and another. In practice, there is much more variation in the tenanted pub sector (and the pub sector more generally) than between a tied tenancy and a free-of-tie tenancy. Tied tenancies may be fully tied (i.e. the tied tenant is required to purchase all alcoholic drinks, non-alcoholic drinks and other products from the POB (or a nominee)) or the tie may be partial. The tied tenant may in fact only have a very limited tie – potentially only to buy certain cask conditioned beers, for example. Therefore, there are no fixed comparators.

The free-of-tie market has also been the subject of considerable change. By way of example, turnover leases are becoming more common. Under a turnover lease, rather than paying a fixed rent, the tenant pays a variable rent, which is dependent on the turnover of the pub (potentially with a minimum rent). These types of tenancy are now relatively common in the retail sector and have become more common for tenanted pubs as they provide an alternative means of risk sharing to the traditional tied tenancy agreement. Typically, a turnover lease will have no tie and no provisions for reviewing the rent since the rationale for a rent review (to ensure that the rent keeps pace with inflation and the rental value of the pub) does not apply where the rent varies according to the performance of the business.

Greene King, along with other POBs, also offer pubs on management operator contracts. The management company operating the pub on behalf of Greene King is paid to do so and does not pay rent at all to Greene King for the pub.

Additionally, in franchise agreements the nature of this arrangement is such that the franchisor/landlord supplies all (or at least the majority) of the products to the franchisee necessary to run the franchise. The franchisee is therefore "tied" for all of these products. It makes no sense therefore to require the POB to have to issue a PRA based on a "free-of-tie" version of a franchise.

What this illustrates is that to present the choice between a tied tenancy and a free-of-tie tenancy is to assume there is a straightforward binary choice. That is not the correct counterfactual scenario. It might be what the proposal envisages but in practice there will be multiple counterfactual scenarios of which the scenarios above are just examples.

b. The PRA will not achieve the policy objective of allowing the TPT to test the "no worse off principle"

The policy objective behind the PRA appears to be to enable the TPT to test whether they are "no worse of" at any points in the relationship. This is not explicitly stated in the consultation document but it was mentioned in the pre-consultation communications with POBs.

However, merely preparing a rent assessment of the kind that is prepared to accompany an offer of MRO will not achieve this because it will merely be a calculation to support a free-of-tie rent. It will not actually tell the TPT whether they will actually be worse-off and the POB does not have access to that information to address that question (see below). And because a free-of-tie option is not being offered, the TPT is not going to be obtaining the information to be able to answer the question either.

In addition, the rent that would be payable under a free-of-tie lease may not be the only relevant financial consideration for a TPT. Free-of-tie leases contain very different terms to tied tenancies and leases (for example they tend to be on fully repairing basis) and this can also have a significant effect on the rent (for example if the property is going to require a significant amount of maintenance and repair during the term of the lease). In the case of MRO, the POB needs to provide the proposed form of lease and the TPT is then left to choose whether to go free-of-tie (taking into account the pros and cons of doing so and seeking professional advice as appropriate). However, this will not be the case with a PRA where all that is provided is a rental calculation but without that additional information necessary to make the "no worse off" assessment.

c. The POB is unlikely to have information in its possession to provide an accurate PRA

While the POB will have information on the costs of running a tied pub (because this is within its own knowledge) in a free-of-tie arrangement the costs to the tenant will be much less certain. This is most obvious in the area of products and services that are subject to the tie. In preparing a tied rent assessment, Greene King can predict reasonably accurately the cost of buying these tied products (and services) because it sets the prices for those tied products through the price list. Where there is a service that is being provided (such as the certification of gas and electrical installations) and then recharged to tenants through a service charge the cost of the provision of that service, which the tenant would otherwise have to purchase under a free-of-tie tenancy, will also be known and calculated on an individual pub. Where a service is provided free of charge, such as the business advice that Business Development Managers provide routinely to TPTs, the cost to Greene King of employing those Business Development Managers will also be known and can (in theory at least) be apportioned in an appropriate manner across the pubs for which the Business Development Manager is responsible (although this is not currently included in a rent assessment because it does not need to be).

By contrast, in preparing the PRA, the POB will not know the price at which the tenant could purchase those same products. It is not data that it collects. It has no means, for example, of checking what a particular wholesale provider of beer, wines and spirits would charge for the products, which the tenant might wish to sell. Greene King happens to brew beer and to sell beer to supermarkets, cash and carry businesses and other potential suppliers to a tenant. It also supplies beer directly to pubs, so it does have some information on the wholesale prices that it charges. But it does not have information on other products such as beer supplied by other brewers and on other alcoholic and non-alcoholic drinks. And POBs who are not brewers will be in an even worse position to determine the cost of supplies.

Indeed, the price differences may well depend on the purchasing power of the particular tenant business. A prospective tenant with nine other pubs (owned as free houses or on free-of-tie tenancies) may well be able to negotiate a better price for the supply of beer and

other drinks to the 10th pub (which is the subject of the prospective tied tenancy with Greene King), than it would otherwise secure if it only operated that 10th pub. Greene King will have no information about the particular trading terms of that tenant (which could include a free trade loan with particular purchasing arrangements) that would make the PRA meaningful.

Likewise, where the tie includes the provision of services, Greene King will have information as to the price to Greene King of securing the services of a particular company to service and maintain the gas and electrical installations in its pubs. However, to secure that price, Greene King will have used its own bulk purchasing power to secure a better deal for its tenanted estate than the tenant of an individual pub will be able to obtain. The same goes for other services such as licensing and business rates advice. So using information within Greene King's own knowledge is unlikely to be a safe way to calculate the PRA.

The risk therefore is that PRA is in fact wholly unrepresentative of the actual level of rent which the TPT would have to pay if the pub were let on a (hypothetical) free-of-tie basis. Worse, it may well be quite inaccurate. Because rents of pubs are calculated using the RICS profits method of valuation, the costs of operating are directly relevant to the rent that the tenant pays. This is the same whether the tenant is tied or on a free-of-tie basis. Under the profits method, the parties use the fair maintainable trade (FMT) to be made by a reasonably efficient operator (REO) in order to calculate the divisible balance, which is then apportioned between the landlord and the tenant. The part apportioned to the landlord is the rent. Accordingly, if the actual costs are greater or lower than those assumed in the PRA, the result will be wrong and, depending on the level of inaccuracy, it could be very wrong indeed.

d. It is not possible to express the differences between tied and free-of-tie agreements in purely financial terms

Greene King understands the objective behind the proposal is to ensure that prospective tied tenants have a means of measuring subsequently whether or not they are "no worse off" under a tied agreement than a free-of-tie agreement. However, it does not believe that the use of a PRA will achieve that outcome, as the PRA can only be used to measure differences that are capable of being expressed in purely financial terms. The proposal pre-supposes that it is possible to reduce the comparison to a set of financial matrices. Tied tenancies and free-of-tie tenancies are fundamentally different in the relationships that they create. These differences are not just financial and tangible; they are intangible and while some of the benefits that a tied agreement confers on a tied pub tenant (known as SCORFA[1] benefits) can be measured in monetary terms, many are incapable of measurement and have defied definition despite attempts over many years (including in litigation) to do so.

For example, while it is possible to measure the actual financial benefit that a tied tenant has received by way of rent relief during the Covid-19 pandemic, it is not possible to express in financial terms or put a specific figure on the value to the tied tenant of the potential for future rent relief and other financial support that the tied tenant might receive in a future crisis. Indeed, the support Greene King has provided over the last 18 months has gone above and beyond just rent and financial relief. It is impossible to place a finite value on the other support Greene King has provided to its tied tenants during this time which has

[1] Special Commercial or Financial Advantages

included advice on accessing Government support, check-in conversations supporting well-being and mental health, access to third party partners for additional well-being support, replacement of out of date stock, supply of PPE, online training, general advice, communications and reference materials. This additional support has helped to provide a sense of security and reduce the pressures that Greene King's TPTs were faced with.

The availability of this type of support from a landlord with a direct interest in the performance of the pub has a real, albeit intangible value and is one of the attractions of a tied tenancy compared to a free-of-tie agreement. A tied tenant will find a tied agreement attractive for the very reason that when things get tough they are more likely to receive support, which will be more generous from a pub-owning business than from a landlord under a free-of-tie agreement. But this is not a benefit that is capable of being quantified in a PRA.

In short, the PRA will never accurately represent the differences between the two to make any assessment of whether the prospective tenant is "no worse off" meaningful.

e. The proposal will significantly increase the administrative burden across the industry

A prospective tenant already receives a substantial amount of information and documentation before entering into a new agreement, as required under Schedule 1 of the Pubs Code. Greene King works hard to ensure the prospective tenant is understanding of the information provided, and ensures that independent professional advice is sought, which must be considered in the preparation of their business plan.

The administrative burdens on POBs will increase very significantly. Greene King has estimated that based on the granting of c.300 new agreements, it would take an additional 1,200 working hours (management and administrational time) to collate information, prepare and co-ordinate the delivery of PRAs as part of the Schedule 1 information. Additional system development will also be required, and it is likely that Greene King would need to consider a change in roles and responsibilities leading to an operational restructure between its operations and estates teams. This will likely result in the need to increase the number of estate manager roles (who are all chartered surveyors) in the business. We estimate that the cost to Greene King would be approximately £250 - £300,000 in year 1 with a large proportion of these costs ongoing annually to take account of the additional estate manager roles. The additional working hours and changes in our ways of working would come at significant cost for no good reason or tangible benefit for a prospective tied tenant. These costs will have a significant impact at a time when POBs are attempting to recover from the global pandemic.

f. PRA is a retrograde measure and will impact prospective tenants obtaining independent professional advice

Regulation 10(2)(a) talks about the advice covering, for example "*business, legal, property and rental valuation advice*". However, it omits to provide any information as to the precise scope of that advice.

As a minimum, however, Greene King would expect that the advice would include an explanation from a business adviser and/or a solicitor of the differences between a tied and free-of-tie tenancy so that the tenant can decide whether they would be better off by

entering into a free-of-tie tenancy. Although, such a tenancy would not be offered at the particular pub in question. Nevertheless, suitable business advice ought to include an assessment by the business adviser and the prospective tied tenant as to whether seeking a free-of-tie tenancy on a different pub would be more suitable for the tenant. In that respect we consider that the prospective tenant can satisfy themselves whether they are no worse off than under a free-of-tie tenancy because they have access to that independent professional advice.

One of the significant achievements of the Pubs Code is the professionalisation of the entry process with prospective tenants approaching the taking on of a tenancy of a pub in a more business-like planned way. Greene King, along with other POBs, has worked hard to improve the business planning of its tenants and prospective tenants. Tenants are now seeking professional advice routinely, business plans are being stress tested and their overall quality has improved. Prospective tied tenants are going into tied tenancies more informed than ever.

The unintended consequence of a PRA might, however, be retrograde as this measure could actually discourage prospective tenants from seeking independent professional advice, relying heavily on the PRA as a substitute for considering whether they would be better off by looking for an alternative pub on a free-of-tie basis.

In conclusion, Greene King sees no proper policy rationale for further intervention in pre-entry information, and for the reasons explained above, does not support the provision of a PRA.

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. As this approach is voluntary, we are interested to hear stakeholders' views about the incentives for both pub-owning businesses and tenants in agreeing this sort of trial arrangement. We would particularly welcome comments from individual tied tenants who completed a trial period prior to signing their tied agreement and what they thought worked well and what could have been better. We would also be interested in hearing from pub-owning businesses about whether they have arrangements in place, or planned, to allow prospective and new tied tenants a trial or opt-out period before finalising a tied arrangement.**

Greene King is unsure on the issue that Government is trying to address and would suggest that seeking to apply a trial period for prospective tied tenants, whether voluntary or not, may well be *ultra vires*.

a. A trial period is unnecessary as alternatives already exist

It is not obvious from anything that has been published that there is a problem that justifies such intervention in the market. The pub sector offers good business opportunities for new market entrants wanting to run their own businesses but who may lack prior experience. As a result, the market has developed a range of different options for new entrants, many giving the prospective tenants agreement break provisions. By way of example, Greene King's most common agreement is its standard tenancy which provides a six-month tenant only rolling break provision exercisable at any time.

The Pubs Code provides sufficient safe-guards to ensure a prospective tied tenant is not entering an agreement without the required information and advice.

b. The Pubs Code already includes provisions for short agreements

Over and above longer types of tenancy agreement in the market-place, there is the option for the POB and prospective tied tenants to enter into a short agreement (within the meaning of Regulation 14). Most POBs have such agreements – short fixed term tenancy agreements or tenancies at will – that provide another means of allowing a prospective tied tenant to try running a pub without committing to a more permanent form of agreement.

Greene King has a 12-month agreement, contracted out of the 1954 Act, with flexible break provisions, starting with as little as 4 weeks up to 12 weeks' notice, which can be tenant only or mutually available.

c. Greene King provides significant support to new tenants

Greene King has a robust recruitment process to ensure that the tenants who are appointed are right for the pub and will succeed. The process includes provision for general meetings to ensure the prospective tenant is clear on what it means to run a pub, and further formal meetings with Business Development Managers and senior management to assess their suitability and to scrutinise their business plans for sustainability. In addition a final meeting is also held, known as a pre-agreement meeting, where a final check is undertaken to ensure the prospective tenant has a clear understanding of all aspects of the agreement, covering theirs and Greene Kings obligations, as well as reiterating the Pubs Code. Throughout this process the prospective tied tenant has the ability to ensure the agreement is right for them too.

It is recognised that it can be tough running a new pub, and that is why Greene King operates a programme known as the 'first 100 days', which provides tenants with a high degree of support from their Business Development Managers, the training team and other representatives of Greene King during the early days of running their Greene King pub, to ensure they are confident in its operation and future success.

Investment is also made to make sure that a pub is ready for trading. This also provides a good opportunity to consider a larger investment (whether that is a sparkle or a more significant level of investment tied to the grant of a new tenancy or lease) to improve the profitability of the pub. Greene King would be concerned that the unintended consequence of a statutory trial period would be that this would deter investment in improvements to the pub until that trial period had ended. That would at the very least cause practical difficulties with the pub having to shut just at the point when tenants were getting going. It may also mean that there is a reduction in levels of investment once a pub has been let.

d. Setting contractual terms in tied tenancy agreements goes beyond the scope of the Pubs Code

Section 47(1) of the Small Business Enterprise and Employment Act 2015 provides that the Secretary of State may make regulations about terms of a tenancy or other agreement between a TPT and a POB. However, their jurisdiction to do so is limited to the following:

i. Terms which are inconsistent with the Pubs Code;

ii. Terms which purport to penalise the tenant for requiring to act in accordance with a provision in the Pubs Code;
iii. Terms which provide for a rent assessment to be initiated by the POB only or which is upwards only.

These are dealt with in Regulation 57 which provide that such terms are void.
Beyond these terms, the Secretary of State has no power to prescribe or imply terms into a tied tenancy agreement. They have powers to set out what terms are to be included in an MRO-compliant tenancy but not in relation to a tied tenancy beyond what is contained in Section 47(1). Our solicitors consider that any attempt to do so would be *ultra vires*.

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.

Greene King has no strong views on this point. However, it is noted that it takes time for a company to alter its procedures to be compliant and therefore suitable time for the POB should be allowed to ensure that processes can be developed, IT systems created/ developed, staff trained and documentation produced.

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.

Greene King already provides the PCA with data on pubs sold each quarter. We see no reason why this should be included in statute, although we would have no objection to following a form of industry best practice. Additionally, care needs to be taken as to the precise point at which information is provided. This should only arise at the point when the sale has been completed. This is because even though contracts may be exchanged, it is not until the sale has been completed that the extended protection arises and if a sale aborts then this would create confusion and unnecessary administrative work for both the POB and the office of the PCA.

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.

Greene King has experienced no issues in relation to the extended protections provisions and sees no reason as to why a PRA for tenants with extended protections should be provided. It is unclear what issue is attempting to be addressed. Greene King considers that the purpose of the extended protections is to ensure that the tied tenant is treated fairly on exit from a regulated environment. There is no ability for a tied tenant with extended protections to access a free-of-tie option and therefore there is no reason why a PRA should be provided.

As per Greene King's response to Question 1, the introduction of a hypothetical PRA is superficial and provides no relevance. If there are disputes at the point of rent review or renewal the tied tenant has the dispute mechanisms within their agreement to rely on, and if the agreement is protected by the Landlord and Tenant Act 1954, the tenant will have the right of referral to the Court and any associated alternative dispute resolution processes. It should also be noted that where the new landlord follows the Pub Governing Body voluntary code, the tied tenant will have the provisions of the voluntary code to rely on and the Pubs Independent Rent Review Scheme (PIRRS).

It is suggested that perhaps the focus should be towards the non-regulated POBs or other landlords to ensure they are aware of their duties when acquiring a previously regulated pub.

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.

It is well documented in the statutory review submissions made by all stakeholders that the 14-day window under regulation 32(4) is too short and does not provide sufficient time for a tenant to take legal advice and conduct meaningful negotiations. In order to preserve their position and artificially extend the timetable, a tied tenant will make a referral to the PCA, which has the effect of the tied tenant and the POB having time to negotiate more fully. Greene King welcomed the introduction by the PCA of the 3-month stay of proceedings to enable parties to continue their negotiations.

Greene King welcomes the recognition that the MRO timetable is restrictive once the MRO proposal has been provided and welcomes the opportunity to comment on potential improvements with the MRO process timetable. It is important to highlight, however, that any change in process must be simple and clear to understand by all parties.

Neither of the examples set out in the consultation document provide a favourable alternative to the current process (as modified by the PCA). There are concerns around timetabling, ensuring it's not so restrictive that it prevents parties from entering into meaningful and evidence-based negotiations, but that it's not too long thus elongating the procedure without reaching conclusions leading to further delays and different points of dispute.

a. Alternative proposal

The majority of PCA referrals that Greene King has been subject to have resulted in amicable negotiations which have had the effect of the referral being withdrawn. Therefore, this proves that more time is required upfront in the process. However, it is recognised that a specific time frame should still be applied, otherwise it is likely that matters may drift and not reach a satisfactory conclusion.

As an alternative to the examples set out in the consultation document, it is proposed that a referral should not be permitted within the first 28 days of receipt by the tied tenant of the MRO proposal calculated from the day after the end of the 'period of response'. This provides the parties with 28 days in which to start having meaningful discussions about the content of the MRO proposal, namely the terms and conditions of the MRO agreement and the vehicle used to deliver the MRO option. After this point the window to make a referral should open and remain open, up to and including day 56 of the negotiation period, enabling

discussions and negotiations to continue. This would provide the tied tenant with the comfort that they may make a referral at any time up and until the end of the negotiation period, providing a longer window than what is currently available. It is hoped that this would remove the unnecessary referrals currently made within the first 14 days of the negotiation period and enable parties to have meaningful discussions before taking any further action.

Proposed steps:

1. Tied tenant gives MRO notice within 21 days of an MRO event occurring.
2. POB provides MRO full response within 28 days of receipt of the MRO notice.
3. No referrals permitted within the first 28 days of the negotiation period.
4. From day 29 of the negotiation period, the TPT has the ability to make a referral to the PCA in regards to the full response if they choose, if agreement is not reached.
5. The window for referral remains open until day 56 of the negotiation period.
6. All other unamended, Code provisions would continue to apply, including rent determination through the independent assessor process.

b. Statutory guidance on terms and conditions

As a side to considering the MRO proposal referral timetable, we would urge Government to provide more information on what constitutes reasonable terms and conditions. This would assist all parties in their negotiations and reduce the level of unnecessary PCA referrals.

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

Greene King already provides details of its MRO Rent Assessment in the format of the Schedule 2 requirements in its MRO Full Response. It would be beneficial for this to be incorporated into the regulations for clarity.

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

We understand and have experienced at first hand the problems associated with the use of the term "uncommon" in determining whether a term is reasonable. We agree that the existing definition means that terms which may be perfectly reasonable in all other senses may be rendered uncommon simply because they have yet to be found in free-of-tie leases of pubs or at least in the samples put before the arbitral tribunal.

Indeed the outcome of a particular arbitration award may well depend on what evidence is put before the arbitral tribunal. Since the Pubs Code came into force POBs, including Greene King, have been collating examples of free-of-tie leases that can be put into evidence. However, this is rather an arbitrary exercise and is very dependent on what they have been able to gather together since there is no central register or bank of such evidence. Some may also be rather historic. In addition, tied tenants and those who represent them, may not have such materials available to them. So there is a potential information imbalance.

In addition, the parties may seek to introduce expert evidence to assist the arbitral tribunal in deciding what is market practice and common. Again, this will depend on the expert's own experience and knowledge of the market and so the same issue arises.

The result therefore may be that in one particular arbitration the arbitrator determines that a particular term is common while in another award the arbitrator decides that it is not. This potential for inconsistency of outcomes is undesirable.

The effect of this term (as was seen in the award made on 20 March 2020 by the PCA in Ei Group v Anonymous) is that an MRO compliant lease will be in the "rearguard" in terms of the development of lease terms. However, conceptually there is no reason why this should be the case. A term need not be common to be reasonable but if it is reasonable there is no reason in principle why it should not be included. Does it matter, for example, if the lease contains a term that has been developed purely in response to MRO and so is not common in other free-of-tie leases of pubs, but which is otherwise reasonable? We would suggest not.

And how long does one have to wait before it can be said that a term is in fact "common"? Take for example pandemic clauses. This is a clause under which the obligation to pay rent (or a proportion of the rent) is suspended for a period of time where the tenant is unable to trade due to a public health emergency such as we have experienced with Covid-19. Pandemic clauses have become more frequently used in leases of retail properties and we are starting to see some usage in leases of free-of-tie pubs (where landlords have not necessarily offered the type of support and rent suspension that we and other POBs have provided to their tied tenants). The use of pandemic clauses has grown over quite a short period of time but it is questionable whether they can be said to be common (even in retail). There are also issues to decide as to whether a term is reasonable but surely it cannot be right that it simply fails the reasonableness test because it might not yet be "common"?

That said, simply removing the issue of commonality from considerations as to reasonableness leaves an arbitrator and the parties in a difficult position with no guidance as to what is reasonable. In practice, in many cases the fact that a term is common, or market practice, will itself be evidence of reasonableness, but if the only consideration is reasonableness, without further guidance, then this is going to make it very difficult for arbitrators to decide the outcome in individual cases in a consistent manner. It will also make it hard for POBs to draft MRO agreements that are compliant and for tied tenants to know when to challenge their terms. We would only therefore be in favour of the removal of this provision if it is replaced with clear guidance as to what makes a term reasonable.

We would therefore urge the Government to include within the Pubs Code a list of (non-exhaustive) factors that need to be taken into account in determining whether terms are reasonable. This is perfectly possible to do. For example, it is found in consumer protection legislation such as the Unfair Contract Terms Act 1977 and the Unfair Contract Terms Regulations 1999. The alternative is that the PCA is required to publish statutory guidance under Section 61(3) of the 2015 Act. This will ensure that the principles set out are applied more consistently. We would recommend that whether or not the term is common in free-of-tie leases of pubs should be listed as a relevant factor.

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.

The comparison period requires changing to remove the anomaly where current annual price changes undertaken by POBs is not in fact annual but occurs each 56 weeks with the result of the price increase rolling forward 4 weeks each year. We do not believe that this was the intention of Government.

We recommend therefore that the comparison period is between the current invoice (CI) and the one for the same item that is closest (before or after) to the date that is exactly one year prior to the date of the CI. The precise wording of the statutory provision should be left to Parliamentary Counsel to draft but we would ask that it be circulated to POBs for a final sense check in advance of it being laid before Parliament.

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

We believe that price increases caused by factors beyond the POBs control, such as increases in tariffs, taxes or supplier price rises should be excluded from the calculation in the same way that duty increases are. If a POB is unable to pass on extrinsic price increases they are artificially protecting the tied tenant from the effect of commodity price increases or other statutory price increases that may arise, which would otherwise be passed on to consumers without there being any clear policy rationale for this. Therefore, we would propose adopting the same wording used in regulation 7(6), where an "extrinsic increase" is set out.

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

We would repeat the comments in response to Question 10. The principle that should be applied here is that where we have no control over the cost of obtaining products on the open market, these costs should not be taken into account. That is not just the cost of the products themselves but also increased transport costs. Recent examples of problems have been seen in relation to transportation costs to and from Northern Ireland, where supermarkets and other retail businesses have experienced additional costs. We are also potentially going to be facing additional supply costs in importing products from the European Union, which can impose tariffs on such products and over which we have no control. There is no reason why logically these costs should be taken into account, since otherwise POBs would have to absorb them.

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.

Greene King has not had any cases go to a final award and so the issue of an appeal has not so far arisen. We do not consider that creating an alternative appeal route is a significant issue for us. If this were a possibility, however an alternative approach would be for appeals to be routed to the Upper Tribunal (Lands Chamber). This Court deals with property in its widest sense and it is also a senior Court equivalent to the High Court.

We would not be in favour of appeals being routed to the First Tier Tribunal. This tribunal does not generally operate as an appellate Court and its decisions would not be legally binding on another Court or tribunal/arbitrator. It also hears appeals *de novo* and we would not be in favour of this. The Pubs Code has already been the subject of much criticism for being overly legal, complicated and having time-consuming and expensive procedures. This would cause further delays and complications.

Ultimately there needs to be closure. Where an arbitrator makes a serious error then it is right and proper that there should be a right of appeal. However, the existing provisions of the Arbitration Act 1996 provide an effective means of filtering appeals and we see no reason to change the existing process.

Finally, our solicitors have also noted that there is a practical problem in that appeals against arbitrations are governed by the Arbitration Act 1996, and therefore a change to the definition of "*Court*" would be required in order to nominate an alternative tribunal to the High Court. This would seem to require primary legislation to amend the 1996 Act and could not be dealt with by secondary legislation under the 2015 Act.

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.

See answer to Question 12 above.

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.

See answer to Question 12 above.