Department for Business, Energy & Industrial Strategy

Consultation on proposals to amend the Pubs Code

Response form

The consultation is available at: https://www.gov.uk/government/consultations/options-to-amend-the-pubs-code

The closing date for responses is 5 September 2021, 23:45.

Please return completed forms to:

Pubs Code Team
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET

Email: pcareview@beis.gov.uk

Please be aware that we intend to publish all responses to this consultation, subject to redactions we may make for legal reasons.

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If you want information, including personal data, that you provide to be treated as confidential, please explain to us below why you regard the information you have provided as confidential. If we receive a request for disclosure of the information, we shall take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the department.

I want my response to be treated as confidential ☐

Comments: Click here to enter text.

About You

Name: Punch Pubs & Co
Organisation (if applicable): Punch Pubs & Co
Address: Jubilee House, Second Avenue, Burton upon Trent, DE14 2WF

	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)

Questions

Question 1

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

Comments: We are entirely unclear of the purpose of this proposal or indeed what issue it this attempting to resolve. It would create a bureaucratic and unnecessary burden that offers little value. The introduction of Parallel Rent Assessments for prospective tied pub tenants operating within an open market would be completely unnecessary and, worse still, could be wholly misleading. Open market transactions rely on a willing landlord offering an opportunity and a willing tenant opting to take on the opportunity, the Code already ensures that such willing tenants have sought professional advice, received all relevant information and completed their own sustainable business plan in relation to the opportunity available on the open market. The principle of 'no worse off' is already achieved by virtue of the open market freedoms and free access to explore other opportunities and options within the market that the prospective tenant can enjoy. This is a distinctly different situation to the position of a tenant requiring a statutory release at such junctures as a rent review by way of MRO for example. A Parallel Rent Assessment for prospective tied pub tenants would simply confuse and, potentially, mislead a tenant through detailing terms that are not available on the open market for that asset. There is also a cost and complexity to undertaking PRAs that does not justify the exercise. It is also worth noting that this issue has already been considered and was, in our opinion, rightly dismissed ahead of the Code's introduction.

Question 2

What are your views about encouraging a trial period – for example 3 months - to help a prospective tied tenant to 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 had 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.

Comments: We would be interested to understand the problem that exists and which this is looking to resolve, and any body of evidence associated with such. At present we offer a 'cooling off' period for the majority of our new tied agreements which allows a reduced break option across the initial 180 days of the agreement term. In addition, the majority of our agreements offer a no-fault mutual break option for the duration of the agreement term should either party wish to exit from the agreement. We are aware that this is not commonplace across the tied pub industry and we would add that such commercial terms are at the discretion of a landlord and form part of the competitive features when operating in the market. The success or otherwise of the terms that a commercial landlord decides to offer in the market with will be determined by the response of the market when compared to the alternative options available. The introduction of standardised commercial terms is detrimental to the competitive nature of the market and the commercial landlords operating within it. It is also worth noting that any 'trial' period would be likely to prevent either tenant or Pub Co investing until a longer-term agreement is reached.

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.

Comments: No comments aside from qualification period for entry should be mirrored by the qualification period for exiting from the scope of the Regulations.

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.

Comments: Again, we would be interested to understand the problem that exists which this is looking to resolve, and any body of evidence associated with such. At present any tied pub tenant who occupies a tied pub that is sold whilst they remain in occupation is informed of their extended protection under the Code. The focus here should be on ensuring that the impacted tenants are fully aware of their extended rights rather than attempting to raise awareness within the PCA office. It should be remembered that where a sale of a tied pub is made to an unregulated landlord, by virtue of not falling under the Code they will be a smaller entity and purposefully exempt from the Code requirements due to the proportionality of the administrative burden the Code represents. To start to impose bureaucratic burdens such as those proposed goes against the considerations made when installing such thresholds. Regulated POBs already provide quarterly estates reporting to the PCA office covering pub numbers including disposals and acquisitions, and it is our view that this should be sufficient.

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.

Comments: Again we are unclear as to what problem this is attempting to resolve. We suspect that this proposed amendment is founded solely on assumption rather than evidence. Additional regulation should only be introduced to address a problem for which there is clear evidence. This proposal does not feel either proportionate or necessary, and it would create another bureaucratic burden that offers little value. The introduction of Parallel Rent Assessments for tenants operating with extended protection would be completely unnecessary and would simply confuse and, potentially, mislead a tenant through detailing terms that are simply not available nor relevant to the transaction being dealt with. In such circumstances it should be remembered that the tenant still retains rights of dispute resolution either via the lease itself or by low fixed-cost resolution schemes such as PIRRS. A rent review or agreement renewal will only ever be resolved and agreed at the point in which you

have a wiling lessee and a willing lessor. It is therefore completely within the gift of the tenant to only agree to a rent event at the point that they are satisfied to do so. The proposal for a tenant with extended protection to be entitled to a PRA goes against the proportionality considerations within the Code, placing an administrative burden on landlords beyond the requirements of the Code regulations.

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.

Comments: The issue that the proposal is attempting to address is that the Code currently does not allow enough time for negotiations to take place prior to the referral window lapsing. This has resulted in referrals being lodged as effectively place holders in order to reserve a right whilst negotiations take place. This artificially inflates referral numbers and causes administrative burden on both the PCA and parties involved. The focus of any amends here should be to allow sufficient time for negotiation to take place without the pressure of a referral window expiring but also allow for a process that can expedite matters in the event of no dispute. The key to achieving this is allowing parties the flexibility to agree extensions where necessary or to cut the process short where not required. Both example 1 and 2 look to achieve this by introducing longer negotiation windows with the right to refer reserved throughout.
It is our view that, whilst both proposals have positive elements, neither proposal offers an entirely correct solution. Our proposal would be for an MRO process that operates as follows:

1. TPT gives MRO notice within 21 days of MRO event occurring
2. POB provides full response as per current Code requirements within 28 days
3. If the full response rejects the MRO notice, a TPT has 14 days to refer the matter. In the absence of a referral the process comes to an end.
4. Where the MRO notice is valid and an MRO proposal is provided, a formal negotiation window commences of three months.
5. At any point past the expiry of the 1st month of the negotiation window a TPT is able to notify the POB that they believe negotiations to have been exhausted and they require a final MRO proposal to be provided within 14 days
6. Parties are able to extend the negotiation window through mutual consent
7. In the absence of negotiations being cut short, within 14 days of the expiry of the 3-month window (or mutually agree extension) the POB is required to issue/confirm their final MRO proposal.
8. Upon receipt of a final MRO proposal the TPT has 14 days to either accept or refer. If neither accepted nor referred the process comes to an end.

The rationale for the above process is that it retains the majority of the current structure that both TPT's and POB's have grown accustomed to. In addition, it removes the time pressure of an expiring right of referral that subsequently drives behaviours and introduces the right for a TPT to shorten (or extend) the negotiation window in the necessary circumstances. The requirement for confirmation of a final proposal provides an equivalent of a 'best and final' offer as per alternative dispute resolution methods and also provides an awareness marker to prevent processes lapsing through TPT ignorance. Discussions around relevant factors of reasonableness can take place within the negotiation window at a point in which a TPT will already be aware of the proposed MRO terms and conditions. This is consistent with the 'no worse off' principle, enabling a willing lessee to engage a landlord on a FOT proposal, with the landlord proposing terms and then engaging in negotiation. The key difference being that the alternate option here is not the ability to explore the wider market opportunities but rather the potential reversion to their tied arrangement. In the absence of a POB being held to account by the market alternatives, a TPT enjoys a right of referral in order to provide the required balance and uphold the scrutiny that open market conditions would normally cater for.

In addition to the above, further thought needs to be applied around the costs associated with referrals. At present there is evidence of some tenant advisors gaming the legislation in order to generate fees through spurious referrals. This is due to the imbalance of cost apportionment against the POB. POB's already feel a burden of referrals via the Levy apportionment, referrals cost awards should follow the success or otherwise of each party in the award and be apportioned accordingly as a result. The risk of costs would assist in removing spurious referrals and prevent an unnecessary drain on parties' time and resource.

Question 7

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

Comments: No issues with this proposed requirement. We have always provided the MRO rent as part of the MRO full response. In addition, a copy of the MRO rent assessment is also already being provided as part of the MRO proposal. This was voluntarily adopted by the regulated POBs to assist TPT understanding.

Question 8

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

Comments: The removal of this term would have the unintended consequence of 'uncommon' terms being put forward which could contradict the deeply seated market principles of a willing lessee and a willing lessor. This requirement is fundamental in upholding the 'no worse off' principle enshrined in SBEEA 2015 section 42(3)(b) in that the requirement itself, subject to reasonability, allows for a true comparison between the existing tied terms and the proposed FOT terms and so it must remain. The 'no worse off' principle is to ensure that a TPT is no worse off than they would be if they were not subject to a product tie (meaning the situation that they would be in were they a Free of Tie tenant on the open market). The requirement that MRO terms are not 'uncommon', subject to reasonability, ensures that any proposed MRO terms are consistent with those that would be offered to a Free of Tie tenant in the open market. The removal of this term would remove a vital link in enabling a proper comparison between the two models.

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.

Comments: This is a welcome correction of what we imagine to be a drafting error within the existing Code. Amendments are required to address the unintended economic and logistical consequences that have been created. At present, as a regulated Pub Owning Business, we are forced to adopt a 56 week/13-month pricing period solely due to the specific wording. The impact of the current definition impacts both the price increase periods within Punch but also results in an ever-changing price increase window for our tied pub tenants. This impacts business planning for all parties, as opposed to having a more static price increase window each year that can easily be planned for by all parties and consumers alike. In regard to the Comparison Period, our recommendation would be for this to fall within the previous 52 weeks of an invoice being received, and not unintentionally create a 56-week price comparison window. The solution to this is to simply amend the comparison

period to be four weeks starting on the anniversary of the invoice date rather than ending on this date.

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.

Comments: We are fully in agreement that taxes and duties should be excluded from price increase calculations. The clearest evidence for this was as seen with the Sugar Levy. Passing on the full price increase of the Sugar Levy would have resulted in the POB being in breach of the significant increase threshold under Regulation 5. This lack of exemption for extrinsic increases imposed a financial impact on POBs by forcing them into having to subsidise price increases intended for both the TPT, and ultimately the consumer, in tackling obesity. In the case of the Sugar Levy, this resulted in Punch having to absorb a significant element of price increases in order not to breach the price increase thresholds. This is clearly counteractive to the intentions of Government led obesity and health initiatives. Our recommendation is for the exemption of extrinsic increases, as defined in Regulation 7(6), to be further applied to Regulations 3-6 in regard to the wider significant increase provisions.

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.

Comments: In relation to extrinsic increases, Regulations restricting price increases should relate solely to increases governed or instigated by the POB and not those outside of the POB's control. The existing Regulations unnecessarily place the POB at risk of supplier/extrinsic price increases which they may not be able to fully pass on due to price increase restrictions. The Significant Increase thresholds should not be an avenue that permits a supplier to exploit a POB's ability to pass on price increases, specifically in a market where suppliers are often also POB's themselves operating in a competitive market. Again, an example of this was seen with the Sugar Levy. Our recommendation is for the exemption of extrinsic increases, as defined in Regulation 7(6) to be further applied to Regulations 3-6 in regard to the wider significant increase provisions.

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.

Comments: An effective appeal route is a necessity for legislation dealing with complex and unsettled law. Current issues of conflicting interpretation have not been helped by the existing arbitration process. Outsourcing to third party arbitrators, whilst assisting the PCA office in managing case load, has done little in the way of ensuring consistency of awards, principles or costs. That said, whilst the right to appeal is paramount for both parties, it is also paramount that such appeals are heard at the necessary level in order to resolve such matters with the required authority. The appeals so far in the High Court have been decisive and have promoted improved clarity. It is arguable that the legislation needs more High Court decisions over the coming months, as there are still several areas of uncertainty in the interpretation of the Code (for example, in the time limit in which a TPT can bring referrals under SBEEA 2015 section 49 (4), which has been the subject of differing interpretations). In terms of the possibility that appeals be heard in the First Tier Tribunal, it being stated that the First Tier Tribunal jurisdiction is generally to hear matters afresh, we have several concerns in this regard. Firstly, in terms of the length of time it takes to resolve a dispute, referrals can already take up to a year or more and to re-open matters afresh could greatly extend the time taken to resolve disputes. Whilst we have found the arbitration process to be sometimes inconsistent, if a party to an

award can simply have the matter re-heard in the First Tier Tribunal, then that calls into question the whole point and effect of the arbitration itself, it becomes simply the first stepping stone in a much longer process. The First-Tier process can also be the subject of a further appeal to the Upper Tribunal. Secondly, the cost principles in the First Tier Tribunal are similar to those in present referrals in that the POB could only recover costs where the TPT has brought a vexatious claim. There would be little incentive for a TPT not to continue with a referral already held to be unfounded in the arbitration, again rendering there being little point in the original referral. Thirdly, the frame work for current referrals is the Arbitration Act 1996, allowing for a more summary, and less formal and complex, means of dispute resolution ,with a high burden required to bring an appeal (serious irregularity/a decision being obviously wrong/ of general importance and at least open to serious doubt).We consider that an imbalance would be created by wholly changing the appeal route to the First Tier Tribunal, calling into question the whole means of the Arbitration Act route as a means of dispute resolution.

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.

Comments: For the reasons set out in our previous answer, we consider that the appeal route should not be changed and should remain in the High Court, in keeping with the existing Arbitration Act 1996 procedures. Despite this, we also see potential means of altering the present system to allow for further transparency/accessibility with appeals and protection on costs for TPTs. By way of background, there has already been effective co-operation between the POBs and the PCA in terms of modifying the effects of the Arbitration Act/Pubs Code procedures without statutory intervention, one such example being the agreement for the removal of anonymity in the publication of arbitration awards, which otherwise could not have been published. It has been stated in these present proposals that applications for leave to appeal on a point of law are private, unless the court orders otherwise, so parties in other arbitrations cannot make comparisons with their cases. In a similar manner to how anonymity in the publication of awards has been removed by consensus between the POBs and the PCA, this could be a simpler means of removing anonymity in applications for leave to appeal. In a similar vein, POBs have agreed to notify the PCA when an appeal has been lodged regarding an award of an external arbitrator. As well as the means of consensus for removing barriers to transparency as above, there is the further option of the use of statutory instrument in limiting TPT's exposure to adverse costs. For instance, the effects of adverse costs orders under the SBEEA 2015 and Arbitration Act have been mitigated by the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016 and similar statutory intervention could be introduced to the present appeal system, without fundamentally altering the balance of the current system.

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.

Comments: We refer you to our response to Question 13 above.

Thank you for taking the time to let us have your views. We do not intend to acknowledge receipt of individual responses unless you tick the box below.

Please acknowledge this reply ☒

At BEIS we carry out our research on many different topics and consultations. As your views are valuable to us, would it be okay if we were to contact you again from time to time either for research or to send through consultation documents?

☒Yes ☐No