

## PUBS CODE CONSULTATION SEPTEMBER 2021

By [Redacted]

By email to : [pcareview@beis.gov.uk](mailto: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 I write.

As a TPT heavily involved in supplying evidence to the 4 Select Committees and Public Consultation that lead to the Pubs Code and PCA creation, we attempted to enact our rights under the Code in [Redacted] 2016 at the earliest convenience.

From that point the whole process took until [Redacted] 2020 for us to achieve MRO.

Should you require further information or help please do not hesitate to contact me at [Redacted]

Regards

[Redacted]

### Terms of Reference covering the questions contained within the review:

The Code was intended to regulate the relationship between Tied Pub Tenants and their Pub Owning Business Owners. After Government had identified huge volumes of evidence proving unfair business practices used by POB's, regulation was introduced to ensure that these commercial transactions were carried out fairly and at arms length, a matter identified previously as clearly lacking, in the Governments own Impact Studies.

POBS have been allowed much latitude and time to circumvent the Code and to direct the MRO vehicle and terms to the TPT detriment, causing cost and delay to mount for the TPT, despite a simple Deed of Variation having historically been the most common, simplest and cheapest way to release "Ties." The PCA despite having a duty under CiArb Rules to prevent cost and delay to the TPT under arbitration has tacitly allowed this to happen.

The preferred POB vehicle is a lengthy, and unwieldy New Agreement that causes many issues which a simple side letter or DoV by reference would not.

They remove a TPT's previous right to upwards and downwards rent reviews

They force unreasonable legal costs onto the TPT.

They impose Tax liabilities on the TPT that they were hitherto not required to pay.

They remove former rental assessment disregards on costly tenants improvements to the property.

The New MRO Agreements proposed by POBs do not even match the open market FOT agreements that they themselves enter into as tenants of other POBS.

The PCA has constantly failed to uphold the overarching principles of both the Code and the SBEE Act. It has allowed POBS to use highly technical legal arguments to obstruct progress for TPT's, causing more cost and delay to prevent TPT's achieving an equitable MRO. In our case we lost nearly 4 years MRO profit. Despite the PCA's promise to us that our case management would yield "Golden Threads" and ensure future process would be more expedient, cases actually slowed down, and so called "memory" of what was learned, was seemingly forgotten.

Failure by the PCA to uphold the core principle of ***"Tied Tenant should not be worse off than if they were not subject to any product or service tie."*** is mirrored by it's consistent inability to report well documented inconsistencies in the Code and unfair business practices as per R.47 of the SBEE Act and S.40 of the Enterprise Act 2011. It would seem that the Office is working to unofficial policy as highlighted by the PCA losing several High Court cases where the Rt Hon Judges have told the PCA that she does not have the powers to perform the aforementioned overarching principles. The PCA's inability to ensure adherence to the above principle is further supported by the fact the it has **no "test" or measure of performance to prove TTNWO has indeed been adhered to or achieved.**

It seems that the PCA has fallen for the industry myth perpetuated by POBS that tied and free of tie pubs are completely different businesses when in fact, all that changes is the underlying profit. Please remember that increased Profit distribution to the TPT was the intention of the Impact Studies and MRO amendment.

The PCA's willingness to placate and listen to POBS at the exclusion of non conflicted Tenant Representatives is highlighted by her allowing POB CCO's to continue to misrepresent Duty Paid Sediment to TPT's that was subject to her consultation and subsequent guidance, which continues to be ignored by CCO's several years on.

The Code as overseen by the PCA removes a TPT's ability to contract under equitable, fair and lawful dealing at an arms length. It has allowed POBS to continue business as usual, is anti-competitive by they are allowed to continue to distort the market, its structure, cap ex values, pub lettings, routes to market for uniquely British small Brewers and restrict a TPT's earning potential.

## QUESTION 1

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

PRA's were in, then out, back in, and then out again, much like the central plank of MRO.

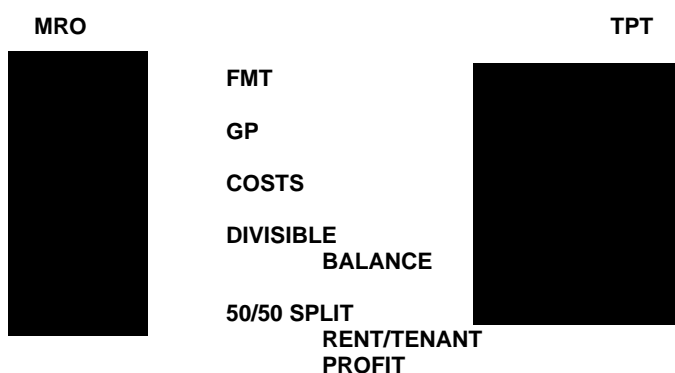
But as per the commonplace information asymmetry and opaque provision by POBS to provide Schedule 2 information ( I have never seen any information provided by a POBS that bears any semblance of reality despite their vast estates and experience, as highlighted by my response to the Duty Paid Sediment Consultation). So a PRA will always be fudged by a POB unless it is used as a **TEST**.

For example, the Independent IA Assessment for [Redacted] was conducted by [Redacted].

[Redacted]

Nether the less, for this example we will stick to using the [Redacted] figures as I believe it will be useful to show how this simple test or equation will act against them.

The IA decided upon a Fair Maintainable Trade Figure that supported a £[Redacted] rent based on FMT of £[Redacted]. Using the [Redacted] figures for a Pub with this FMT in 2019 we can work back the TTNWO rent which I believe should then inform the PRA or indeed TEST that the POB has fulfilled it's obligations under the Code.



Ergo the TPT no worse of should expect to earn the same as the MRO tenant, thereby the rent should be significantly lower. This is the view that should be presented to the tenant in order for them to make an informed decision.

If the POB try to distort the GP or costs it will impact the Divisible Balance to such an extent that the Tied Rent would fall dramatically/exponentially.

If Government were moved to formulate this as a test and indeed afford the TPT backdated rent, as POBS are afforded under my lease terms, had we opted to stay Tied, the POB would have owed my Company £[Redacted] per annum for 4 years, backdated to the date of Rent Review. This is of course a subject considered under Impact Study but left unanswered. Having raised this with the former portfolio Minister Richard Harrington it was passed to [Redacted] of BEIS who subsequently stonewalled me on the subject.

It is also worth noting that SCORFA is not included in this equation, and while they are difficult to value, most are discretionary and often not written into a lease. Those that are, were considered by the OFT in it's reply to the CAMRA super-complaint to amount to an average of only £1500.

## 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.**

3 months is no time to gain a considered opinion of a pub business. However, it is largely irrelevant as POBS continue to mislead the real potential earnings from a pub, its GP is misrepresented as wastage (ullage) and sediment are still not transparent, this misrepresentation impacts on the final rent. If these figures are not transparent a TPT will never get an accurate picture of the business.

### **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 "financial year" criteria is a misnomer, once a POB has reached the 500 limit on ownership for more than 3 months they should become regulated. However if BEIS were serious about providing fair dealing the de minimus limit would be scrapped to offer ALL Pubs the same level of protection as has been afforded them in 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.**

In short, yes. But as with the above, there should be no de minimus at all and anyone renting 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 issued to a Tenant resembling my above simplified equation. In my own situation we were provided a PRA that was ca £[Redacted] out on line cleaning. This did not include Duty Paid Sediment. These PRA's need to be held to accountancy standards and reasonably accurate as per the Schedule 2 direction.

### **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 MRO process could be changed using existing powers? Please provide the reason(s) for your answer.**

Deadlines have been an obstacle to MRO completion. POBS have used them to "con" tenants by elongating negotiations. TPT's should have the right to MRO at anytime. The initial concern was that this would open a floodgate of claims/trigger event. The reality has been minimal uptake. If a TPT makes a deadline mistake he/she will fail and the POB will get the Pub back. This plays into their hands as they can circumvent the Code by reletting on a 5 year Tied agreement that falls outside the rent trigger event.

With a much fairer Scottish Code it would seem obtuse that English TPT's would potentially have weaker protection than our Scottish cousins. To deprive a TPT their rights under the Code because they were say 1 day late on a 14 day deadline is egregious when the impact would be so significant on the weaker party. This is another area of contention that the PCA could so easily have resolved using hers and Newby's powers under s47 SBEE Act.

### **QUESTION 7**

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

RICS guidance stipulates that rent assessment considered

- ii) in an arm's length transaction, iii) after proper marketing, and
- (iv) between parties each of whom has acted knowledgeably, prudently and willingly

However, if asymmetry of information is allowed continue in the supply of incredibly unrealistic PRA's that bear no semblance to accountancy standards, the rent assessment will always be skewed in the POBS favour. The PCA has

powers under s47 of the SBEE Act to ask the Secretary of State for more powers to enable the Office to dig deeper into POB figures and shadow P&L's

#### **QUESTION 8**

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

Again, this is another fudge that plays into the POB'S hands, A TPT should be able to use the legislation to gain a release from the TIE by a simple Deed of Variation. The Code was after all intended to give TPT's a genuine choice, all else is unnecessary. A POB should be allowed to negotiate other terms, but a TPT should have, at the very least a default right to a basic Code compliant tie release to fall back on. The TPT should be able to walk away from any term they deem to be of detriment above and beyond their existing tied lease and not be coerced into terms dictated by the party with the most negotiating strength.

#### **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.**

This mechanism works fine, but if anything the modifying values in Part 1 should be reduced, so that 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. This will force POBS to offer market leading deals.

#### **QUESTION 10**

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

Duty can change dramatically between drink categories but it has also been used as an excuse to add compound RPI to wholesale drinks prices (51% over RPI on beer in under 10 yrs), it should definitely not be excluded

#### **QUESTION 11**

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

If POBS were forced to act positively in a competitive market this would be a moot point. If they lobbied harder for their tenant partners instead of their self interest then could genuinely pass on the benefit to their 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 you answer**

The PCA should not be allowed to hide behind her “two hat” wearing solution- as commented in the High Court. In the first instance the appeal should be against the PCA, not the Tenant. TPT's should not be put to the cost of defending spurious legal actions that the PCA refuses to decide upon. Nearly all arguments centre around simple Tie release versus lengthy, costly new agreements and extended negotiation, nearly always won out by the more powerful party. If the High Court is the default position for the POBS to game the Code they can litigate and elongate disputes to their hearts content, and at fatal cost to the TPT. It makes a mockery of the intention of the Law and indeed Government, BEIS and the PCA Office. They literally laugh at you! without an arms length transaction underpinning the regs, the TPT will be locked into the existing lease and pay massively over the odds 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.**

Had the PCA created the “Golden Threads” she trumpeted, we would have decent precedents that would limit what the POBS could appeal. The current process only serves to favour the POB. It drags out outcomes and buys them time to change their business model to protect the structure and financial benefit of keeping the Tie. If Government were serious about cutting the debilitating nature of this process they would ensure that ongoing disagreements were limited and cut short from creating escalating costs to the weaker party.

#### **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.**

We simply could not have afforded an appeal as the incredibly lengthy time our first appeal took deprived us of 4 years MRO profit. To fight another appeal, with the same delay would have led us into lease renewal, no MRO profit, and as we have seen- refusal to renew in order to game the Code.

Regards

[Redacted]