THE LICENSEES ASSOCIATION

Consultation on proposals to amend the Pubs Code

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

[Redacted]

23 July 2021

Question 1: What are your views about Parallel Rent Assessments for prospective tied tenants?

Any rent assessment provided to a prospective tenant, be it a tied rent assessment or a market rent one, will only be of any value if it genuinely reflects the market place. We know this to be demonstrably not the case from rent reviews, where the Pubco (POB) provides both a Rent Assessment Proposal (RAP) and then a MRO proposal, these are simply negotiating positions and not realistic income, expense and consequently rent levels. Without independent scrutiny there will be little point in the POB providing a parallel rent assessment that will only be advisory because the POB can artificially make the tied rent look better than it actually is. This could do more damage than good.

Without independent scrutiny of the parallel rent assessment we would urge caution of this approach. That said we do believe that there is a strong argument for the parallel rent assessment being provided as long as it is independently verified. This is not a simple RICS qualified sign off as currently exists as we know that these are POB employees who already produce inflated RAPs and MRO offers which favour their employer. Indeed we have argued that the current RICS sign-off places a veneer of respectability to RAPs that is not warranted.

Prospective tenants should be urged to take independent, industry specific advice both on the agreement and importantly the rent assessments. All too often advice is only taken on the agreement from the tenants legal representative and not from independent industry accountants, or trade associations that can advise in the round.

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?

Whilst any trial arrangement is to be welcomed, especially if mandated, there are also some issues that accompany it. Many hospitality businesses are a seasonal aspect and the profitability and workload could suffer from either under or over estimation based on a three moth period. I one year break clause may offer protection for tenants, allowing a full picture where seasonal elements are at play.

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?

The current qualification period is clearly ambiguous and needs changing. The reference to a previous financial year creates the possible extension of qualifying period by a year depending on when the threshold is declared. There will be an incentive on any newly qualifying Pubco to massage the completion date to ensure the longest qualification period of 18 months and this will be a clear detriment to their tenants who won't get the comfort of code protection. Reference to "previous financial year" should be removed with an obligation of the POB to report to the PCA when any threshold is reached within one month and then a three month qualifying period to be set from when the PCA is informed of the threshold being met. This removes ambiguity of year end dates.

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?

Landlords selling pubs that have code protection should inform the PCA of any sale and the PCA should keep a public log of all pubs where extended protection is afforded to the tenant. This will ensure any tenant is aware as well as their advisors who may otherwise not know of any extended protection. Equally there must be an obligation of the new landlord to inform the PCA when extended protection comes to an end to ensure any log is kept up to date.

We also have concerns that MRO rights are not protected. The incoming tenant will have factored in the protection of MRO rights when taking out their lease with the regulated landlord (acknowledged by the proposal to provide a notional FOT rent assessment in Question 1). This is often a long-term commitment from the tenant to a lease with personal guarantees attached and most will have considered the ability to be able to negotiate in parallel to ensure a fair rent is set with a FOT option. To have this right removed could leave tenants disadvantaged by any sale. Whilst we recognise where the sale is to a landlord who is genuinely a brewer themselves there are other factors we see no reason to remove access to MRO rights where the sale is to a non-brewing landlord. Removal of the right risks us stepping backwards, protection was brought in for a reason and should not be easily removed. We do not consider it an infringement of the property rights of the business concerned. The ability to operate a tie is a privilege that should not be abused. There are a number of companies who operate outside of both the regulated code and the self regulated code and a sale to any of these is already creating issues within the sector. We would be wise to close this door and not give it a further green light.

With reference to a new landlord providing a PRA at the point of review or renewal raises the same issues as we highlight in Question 1. Further to this we are unsure why access to the numbers on a notional FOT-PRA will allow the tenant a stronger negotiating position.

It only has any value if it can be validated and used. We do consider that it's value may be increased by the ability of the tenant to refer the PRA to the PCA.

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?

With reference to a new landlord providing a PRA at the point of review or renewal raises the same issues as we highlight in Question 1. Further to this we are unsure why access to the numbers on a notional FOT-PRA will allow the tenant a stronger negotiating position. It only has any value if it can be validated and used. We do consider that its value may be increased by the ability of the tenant to refer the PRA to the PCA or the Pub Governing Body (PGB)

With reference to content the PRA should contain the same detail as the tied rent assessment.

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?

We believe the timings of the MRO process are unduly restrictive especially when considering the 14 days allowed for a tenant to make a referral to the PCA (many take annual holidays of 14 days, clearly showing the need for this to change).

We would also urge caution when looking at agreed extensions whilst there is no compensation for lost profit fro a tenant agreeing to a market rent beyond ant rent review date and we highlight this later.

Question 7: What are your views about requiring the inclusion of rent in an MRO proposal?

An MRO proposal should include the proposed rent and terms. Excluding any element of this undermines the ability to the tenant to negotiate meaning fully in parallel.

Question 8: What are your views about removing the requirement that terms should not be 'uncommon'?

The tests of reasonableness and non-detrimental should be sufficient. A tenant is unlikely to be able to counter the test of uncommon without incurring professional advice and expense. Even having done so it is ambiguous and we would recommend its removal.

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 are relaxed about the proposed change.

Question 10: What are your views on excluding taxes and duties from the significant price increase calculations?

We are relaxed about excluding taxation and duties from the significant price increase calculation, though we would urge that this is a simple exclusion and not one based on a percentage or margin percentage that could lead to a larger disregard. If the tax is 2p in the £1 then it should not be applied at any higher level than that incurred by the landlord.

Question 11: What are your views about excluding other unavoidable costs from the significant price increase calculations?

The proposal to exclude supplier price increases is bizarre. The landlord has the ability to negotiate the price they pay and should do so to both their benefit and that of their tenants. excluding supplier costs from the significant price increase is a licence to exponentially increase the price to the tenant and transfer the profitability of a site further from tenant to landlord. This would make a mockery of the process.

Question 12: Do you think there should be an alternative appeal route to the current High Court or should the latter be retained?

We would welcome any appeal route that was not financially restrictive for tenants. High Court can place a possible financial risk to a tenant that would deter them. We have examples of POB's stating they will appeal any arbitration decision in a manner that could be seen as applying financial pressure to tenants. Because of the imbalance of power within the tenant/landlord relationship this is of great concern to The Licensees Association.

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?

We consider any appeal to the First Tier Tribunal to be preferential to that of an appeal to the High Court in the first instance. This must not be used as an option by the POB to delay access to a market rent. We wood also urge consideration being given to compensation to the tenant for loss of profit if a market rent is achieved after the renewal date. This is easy to calculate and will ensure any incentive to delay for the POB is removed.

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?

Referred as above.

Matters Arising:

An area of great concern to The Licensees Association and our members is that of loss of profit compensation for tenants who achieve a market rent beyond the rent review date. This was a glaring omission from the original code and it remains a glaring omission by not being consulted on. This creates an incentive for the POB to kick matters into the long grass, doing so creates a greater pressure on the tenant to accept a tied deal were the POB or Tenant is compensated back to the review day. Until this glaring gap is closed we have a system that remains lopsided and unfair to the tenant by design.

We fail to understand why this matter has not been addressed. It's not a difficult figure to work out, we know the amount of product purchased, the difference in the rents, the tied purchase price and the new price the tenant will be purchasing at. These are the only variables required to arrive at the compensation amount for lost profit to the tenant. In most cases, there will be lost profit, it is the reason why the tenant is going for a market rent. Why should the POB benefit belong the rent review date from a tie when the tenant seeks a market rent? We urge that this is addressed as a priority.