

Pub companies and tenants consultation

Enterprise Inns plc
Response to Government consultation June 2013

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Our ref: GET/EG

14 June 2013

The Rt Hon Dr Vince Cable MP
Secretary of State for Business, Innovation and Skills
Department of Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
LONDON
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Dear Dr Cable

Pub companies and tenants: a Government consultation

We enclose our response to the consultation document issued by you as Secretary of State for Business, Innovation and Skills (BIS) on 22 April 2013 (the "Consultation").

I am not alone in believing that the Consultation document is a disgrace. Biased and almost totally lacking in genuine evidence, it espouses as truth the opinions of a small but obsessive group who have been campaigning against the large pub companies for over a decade, supported by a handful of MPs, who have disseminated misinformation about the workings of the leased and tenanted sector.

As founder and long serving chief executive of the largest pub company I naturally have strong and passionate views on the pub industry. I was awarded a CBE in 2007 for services to the hospitality industry. I have been vilified and my reputation called into question as the campaigners have sought to achieve their misguided and damaging aims. I am extremely proud of the company that we have built, especially of our employees and the thousands of successful publicans throughout our estate. Whilst taxes suffered by pubs have increased by 19% over the past four years, to around £1 in every £3 taken across the bar, we have worked hard to keep pubs open, investing in excess of £240 million in the fabric of the estate and seeing our true like-for-like income per pub fall by 12% as we have systematically reduced rents and increased discounts offered to publicans.

The consultation process is fatally flawed and its proposals will lead to unintended consequences which would be disastrous for the pub industry:

- It represents a politically driven *volte face* with regard to statements made on behalf of Government by BIS ministers Ed Davey in November 2011 and Jo Swinson in October 2012;
- It proposes a statutory code where none is necessary. This is totally contrary to the Government's policy on deregulation, most recently confirmed by the Deregulation Bill proposed in the Queen's Speech in May this year;
- Self-regulation is demonstrably effective, providing a legally-binding, low cost and widely accepted framework for publicans across the sector. Self-regulation is working;
- The Government presents inadequate, inaccurate and sometimes misleading evidence throughout a consultation process which is flawed and self-evidently biased;
- It takes no proper account of the balance of risk and reward in the pubco-tenant relationship and focuses on pub companies of a certain size rather than the needs of struggling tenants, whoever is their landlord;

- The principle of the tied tenant being no worse off than the free-of-tie tenant is a fabricated concept, impractical, unworkable and having no basis in RICS guidelines or law. The reality is that rents - being a negotiated combination of "wet" rent (profit on the beer supplied) and dry rent - have always been and always will be determined by the market;
- The proposals as drafted benefit successful publicans whilst doing nothing to support those who are genuinely struggling;
- Unintended consequences will include a material increase in pub closures and job losses and a decrease in consumer choice and Government tax revenues

The question, "If the tied system is so good, why not agree to offer free of tie? If you're right no one will want it" is disingenuous. Along with many other pub companies, we already negotiate agreements which are free-of-tie or subject to partial ties. The problem at the very heart of this flawed Consultation is the attempt to impose a Government backed formulaic calculation of rents, overturning the fundamental principle of freedom to contract and free market negotiation.

The facts speak for themselves

The business model...

The relationship between any landlord and tenant has the potential to be fractious. Ordinarily, commercial property landlords have limited interest in the success of the business, caring only about whether the rent is paid and the property obligations are met by the tenant.

The tied model provides a symbiotic relationship where it is genuinely in the interest of the landlord for the publican to be successful. Having agreed a rent based upon the agreed price at which the tenant will buy beer, a rent which will be at a lower level than would be the case in the free-of-tie market, both parties have a shared interest in the pub being successful. In the equilibrium of trade exactly in line with the expectations of both parties, then the wet and dry rent will together represent a fair return and payment for the property. If the publican struggles and less beer is sold, the landlord will receive less wet-rent and the publican will enjoy a lower effective rent. If both sides work together to drive beer sales, then both parties will be happy as a result of higher profits for both.

As a major buyer of beer, the pub company profits not only from the wet rent but also the wholesaler margin, that element of cost saving which would not be available to an individual publican. It is this profit which allows the pub company to offer the many SCORFA benefits, covering investment, training, business support and many other benefits and cost savings.

Unfortunately the phrase, "How can I compete when I pay more for my beer than the pub down the road", tells just a fraction of the story yet seems to be enough to attract the attention of the campaigners, the media and some MPs.

The early days...

The tied, leased and tenanted sector was not invented by the pub companies. It has been around for decades offering a lower cost, lower risk business opportunity to aspiring publicans working in partnership with the resources of a major organisation.

Initially the sole domain of the brewers, the tied business model fell foul of competition law in the late 1980's because consumer choice was limited by the pub owning brewers' insistence that only their products could be sold. This limitation of consumer choice led to the Beer Orders, the break-up of the brewers' estates and the formation of the pub companies. Ironically, it is only among a minority of small integrated brewers where such a restriction of consumer choice is evident today.

A further complaint in the "good old days" was that successful tenants did not enjoy security of tenure and therefore had no ability to build value which could be realised on assignment. Anecdotally, it was not unusual for a brewer to encourage a tenant to build a thriving business only to throw out the tenant and take the pub back into management once turnover reached a certain level.

At the demand of the publicans therefore, the longer term assignable lease was launched, enabling publicans to benefit not only from their day to day cash flow but also the creation of an assignable capital value.

The good times...

From the introduction of the Beer Orders in 1988 through to the smoking ban introduced in 2007, times were, broadly-speaking, pretty good for pubs, publicans and the burgeoning cask ale market.

Of course, there was the inexorable and damaging increase in levels of bureaucracy and red tape, beer duty and other taxes only ever moved in one direction, business rates and utility costs were on the rise and the supermarkets developed the taste for driving footfall by selling alcohol at irresponsibly low prices. Furthermore, consumers consistently raise their expectations and pubs have always had to offer a better experience than staying at home.

Nevertheless, great publicans, well qualified, committed, resourceful and supported by their pub companies, were then and still are able to make successful businesses built around the quality of what they have to offer, despite the many challenges that they faced.

A key objective of the Beer Orders, increased consumer choice, was a major success. The new pub companies, unencumbered by the need to fill production facilities, opened their pubs to a wide range of alternative suppliers. We helped SIBA build its Direct Delivery Scheme. In the Enterprise Inns ("Enterprise") estate alone, cask ale sales have increased from around 14% of total beer in 2002 to around 20% today, with consumers now offered the choice of 1500 brands from c.470 different brewers. In the managed houses that we acquired and converted to tenancies in 2001 cask ale increased from 3% in 2001 to 15% today.

These were generally good years for publicans fuelled by consumer confidence and the rising property market, with property values reflected in the premiums that aspiring publicans were prepared to pay to take on lease assignments. Often these premiums, which were paid to the assigning publican, not the pub company, may have been excessive but the financial impact was minimal. In a strong and rising market, a successful publican would build his business and justify the premium paid. Even an unsuccessful publican, for whom the pub did not meet the aspirations of their business plan, would most likely recoup the initial premium on reselling the lease.

The less good times...

Following the smoking ban in 2007, which led to an 8% fall in on-trade beer consumption in the first twelve months, a number of wet-led pubs in particular were faced with real challenges. The supermarkets, realising that going to the pub would be less attractive for the committed smoker, further developed their low-price and bulk purchase offerings to encourage drinking at home. However, good publicans, supported by their pub companies, invested in comfortable outside smoking areas and facilities to enhance the provision of food as non-smoking pubs became the accepted norm.

Enterprise Inns tenant: "when the smoking ban came in, Enterprise provided the capital to purchase Jumbrellas to provide a 'Smoking Solution'. We have also recently agreed another similar project...where Enterprise are providing funding of £30,000 to develop a covering for our patio ... Enterprise have been collaborative and supportive. If they didn't have an interest in our trade (through the beer tie), they might not be so supportive (or the commercial deal might not be so attractive)"

More damaging was the financial crisis, the collapse of the banks and the destruction of consumer confidence. Good publicans had to get even better and their pub companies had to help many of them to survive the difficult economic backdrop to their own businesses.

Enterprise Inns tenant: *"one of our pubs has suffered significantly in the economic downturn since 2008... Enterprise have supported us during this time through a combination of temporary reduced beer prices and temporary reduced rent. This has allowed us to continue to support our business despite reduced turnover"*

The major casualties were found among those publicans who had paid significant assignment premiums to acquire their pub leases at the height of the boom and who then saw that these premiums had evaporated due to lack of market demand.

The inconvenient truth...

It is particularly depressing to see Enterprise painted by the campaigners and their political supporters as the "forces of darkness" in this debate. Of course we will have made mistakes, as would any business of our scale and complexity. However, I am confident that, despite sometimes very difficult circumstances, the vast majority of our team have stood resolutely by our key values of hard-work, integrity and service to help deserving publicans through the current crisis:

- In the four years 2008-2012, Enterprise made discretionary financial contributions to help publicans survive amounting to £57 million;
- Over the same period, on a true like-for-like basis, our average income per pub has fallen by 12%, from £76,000 per pub to £67,000 per pub as a direct result of permanent reductions in dry rent charged and in wet rent through the granting of additional discounts. This reduction in like-for-like income represented a transfer of value from Enterprise to our publicans of around £54 million in the financial year ended 30 September 2012 alone;
- During this time Enterprise has continued to invest in the quality of its training programmes, the skills and commitment of its team and in improving the quality and fabric of the estate;
- Enterprise last year launched its Community Hero Awards programme, committing £1 million over ten years to charitable causes promoted by our publicans and their customers;
- During the same period, Enterprise has met all of its obligations to its banks and bondholders, many of whom are UK pension funds and has reduced the level of its outstanding debts by some £1 billion;
- Members of the Board have seen no increases in basic pay since 2008 and there have been muted increases of around 2% per year for the rest of the employees; and
- Shareholders, many of whom are employees and UK pension funds, have received no dividends since the financial year 2008;

The campaign groups driving the proposals in the consultation document are not representative of the vast majority of tenants. Even the consultation document admits that some 70% of tied tenants would sign up again with their existing pub companies.

Certain MPs, including past and present members of the BIS Select Committee, have promoted the cause of the campaign groups, in too many instances distorting the facts to misinform and mislead. We have on several occasions felt compelled to bring the behaviour of certain MPs to the attention of the Parliamentary Standards and Privileges Committee.

Unintended consequences...

The industry is committed to fair and open dealing with publicans. A statutory code that enforced such a principle would, however, be unnecessary, cumbersome, expensive and contrary to Government policy.

The costs of such a code would eventually and inevitably be passed on to consumers and of course, the substantial compliance costs will be tax deductible in the businesses concerned and therefore lead to a reduction in corporation tax payable.

This would pale into insignificance when looking at the potential for pub and brewery closures, job losses, reduced consumer choice and lost tax revenues that could arise if key changes to the commercial arrangements between pub companies and their tenants were enacted:

- If implemented as drafted, the proposals would be open to challenge under Article A1, Protocol P1 of the European Convention of Human Rights. Interference with property is protected by human rights law in the UK and depriving pub companies of future income would constitute an exercise of "control" by the state over Enterprise's property;
- If a mandatory free-of-tie option were to be introduced and a meaningful number of pubs chose that option, it might not be financially viable for Enterprise to operate a hybrid tied and free-of-tie estate. In those circumstances, Enterprise has the right to release publicans from the tie, at the same time substantially reducing staffing levels, removing all investment, pub and publican support and, as then constituted as a property company, becoming a non-tax-paying Real Estate Investment Trust;
- If the transfer of value were to be implemented as envisaged, then many more pubs would become unviable and would be sold. Given the additional overhead costs associated with compliance, it is likely that the viability threshold would be raised. Sales of unviable pubs would particularly hit rural communities and pubs of a style and scale that might suit newcomers to the industry. Without funding available from the banking sector, it is likely that most pubs sold in this way would be transferred to some alternative use. Without the support of the expertise and resources of a pub company, the industry would be far less attractive to newcomers and those who did join would experience a high rate of failure;
- The guest ale option is entirely unwarranted, as tied pubs demonstrably provide an excellent route to market and sell more cask ale than free houses. Without a pub company network small brewers would be unable to compete in terms of distribution and technical services and would always be beaten on price by the large national and international brewers;
- Outlawing the machine tie would lead to reduced quality, reduced pub takings, reduced tax takings and the potential for the return to the tax evasion and criminality that has been present in the gaming machine industry in the past and which remains a serious risk today.

6.

Where to next...

I hope that the evidence presented by all sides will be critically evaluated and that good sense will prevail.

There are no competition issues in the current system and there is no justification for statutory intervention. The well-established legal principle of freedom of contract means that Government has no place interfering in freely negotiated business to business contracts.

The Industry Framework Code works and has the support of all major groups within the pub industry. If BIS really want to make a difference to pubs, the Department should work with the industry to promote 100% awareness of the Industry Framework Code and PIRRS and PICAS, which are already in place and working well for the benefit of publicans.

Individual company codes of practice will be subject to a triennial review and reaccreditation. I would support the Industry Framework Code being subject to the same independent and rigorous examination to ensure that it remains fit for purpose.

It is an essential aspect of responsible Government that politics should not be allowed to interfere with common sense and the law. The industry has been a political football for too long. This might be a game for certain campaigners and MPs but it is certainly not for the many publicans whose livelihood would be put at risk by Government's proposals.

Yours sincerely
Enterprise Inns plc

G E Tuppen CBE
Chief Executive

Encs



I. The Issues

This section of our Response considers the fundamental failures at the centre of Government's proposals. It also tells the more positive story of how Government can effectively help struggling tenants overcome the obstacles to successful business development.

We present a series of issues, before moving on to deal with the specific Questions put in the Consultation. In our responses to those Questions we also offer some recommendations to Government which Enterprise Inns believes would further improve the position of struggling tenants.

Government recognises that, especially in these recessionary times, tenants face a variety of challenges. They can be helped in a variety of ways. This proposed Statutory Code is not one of them.

- A. Fundamental flaws
- B. The absence of evidence
- C. The economic case cannot be made
- D. Why pubs fail and what can be done to help them
- E. Who would benefit from a Statutory Code?
- F. How Government can help pub tenants

A. Fundamental flaws

We begin by demonstrating that the Consultation is fundamentally flawed so that it cannot be used to defend any policy decision. The picture it paints of the industry is not supported by any hard evidence. Repetitive assertions of bad behaviour by pub companies are not substantiated by facts. Much of Government's argument is circular. In these circumstances, the statutory intervention proposed would be manifestly without reasonable foundation and open to legal challenge.

The Consultation is fundamentally flawed

1. The Consultation does not identify an adequately evidenced problem in the pubs industry for which statutory intervention would be justified. The lack of any meaningful empirical evidence of harm suffered is starkly apparent and represents an unreasonable failure by Government to take account of market circumstances.
2. The remedy proposed in the Consultation is extreme and will result in very severe consequences for pub companies and many unintended consequences in both the leisure industry and the wider social community. The failure to put forward any clear concept of detriment or adequate evidence of actual detriment being suffered in the industry would be a serious legal flaw in any regulatory regime emerging from this Consultation.

Enterprise Inns tenant: *"Over the last few months I have been reading, with total bemusement, that both the Government and the BII have been looking to regulate the way that Pub Companies and their Tenants are allowed to conduct themselves in business seemingly without talking to or asking the opinion of the many happy and successful Tenants across the country"*

3. The Consultation makes many serious assertions of apparent fact, all of which appear to suggest that the existence of detriment to tenants and to the pub market in general is proven. In fact, what little evidence is actually described does not go to prove such detriment, with the result that there is effectively no detriment described in the Consultation.

- 3.1 Unsubstantiated references to detriment as being proven – The Consultation (including the Foreword) contains many assertions that the tenanted pub model is causing some form of detriment in the marketplace, usually expressed as some form of hardship allegedly experienced by tenants. These assertions are listed in table format in Enterprise Inns' Annexes to response to Government Consultation¹. Many of them contain an explicit or implied reference to some form of underlying evidential information to support their claims. In fact, other than the references to the BII hotline calls, no concrete evidence is ever provided, as can be seen in the "evidence" column of the table.

The absence of underlying evidence means that statements which are presented as assertions of fact are in fact speculative and unfounded, which frequently results in a circular logic where conjecture and inference are presented as conclusive fact. To give three connected examples from different points of the Foreword, the Secretary of State declares that *"It has become clear to me that the self-regulatory approach...has not been sufficiently far-reaching"*, *"the evidence I have received makes it clear that in too many cases tenants are being exploited and squeezed"* and then *"what is clear is*

¹ See Enterprise Inns' Annexes to response to Government Consultation 2013, pages 1-15

*that it is the abuse of the tie...that is causing problems in certain circumstances*². This treble use of the word “clear” suggests that the Secretary of State is basing these statements on hard information which represents incontrovertible evidence, but that evidence is nowhere to be seen, unless the BII hotline is meant.

3.2 Evidence that any legal obligations be applied only to pub-owning companies of a certain size. There is the separate issue (see below on the 500 pub threshold at paragraph 46.1) of a suggested minimum pub ownership threshold to trigger the regulatory obligations. Aside from the BII hotline, the only support for such a threshold is that it is proposed by a “wide range of stakeholders” (at paragraph 4.15 of the Consultation). It is absurd to base a threshold meant to trigger penalty-based regulation on nothing more than the fact that a number of people have requested it, without analysing the reasons for those requests. However, the absurdity here is compounded by the fact that the stakeholders listed in paragraph 4.15 do not represent a “wide range”. They are in fact a narrow range of linked stakeholders (see below at paragraphs 158-164) whose own interests converge in a desire to see large pub-owning companies subject to onerous regulation.

3.3 The evidence of calls to the BII hotline – The scale of evidence of detriment referred to in the entire Consultation is confined to a % breakdown concerning an unspecified number of “complaints” to a hotline (which is in fact adduced in relation to the proposed 500-pub threshold). This was in fact a misrepresentation, as the Government later acknowledged that the number of “complaints” was in fact “calls” to a helpline. It transpires that most calls were simply enquiries for advice and only four calls over a period of four years were categorised by the BII as “grievances” relating to Enterprise Inns. The Government fails to appreciate that the high level of total calls from Enterprise Inns’ tenants requesting advice is unsurprising given that we actively encourage our publicans to sign up to the BII and use its resources and that we pay the first yearly fee for new tenants. It is only logical that they should avail themselves of that option more than is likely to be the case with the tenants of pub-owning companies which do not encourage its use.

The calls are called “complaints” by Government but no example of the nature of such alleged complaints is provided. This is not evidence, but simply a more detailed assertion based on absent evidence.

3.4 Unsubstantiated references to market failure or similar – On a number of occasions, the alleged detriment is described as a market-wide problem³ to the extent that it is even suggested that only statutory regulation is capable of redressing such market failure⁴. To suggest that the actions of the owners of tenanted pub estates are somehow responsible for potential market failure is a swingeing accusation so that we have tabulated these occasions separately.

Again, such grave accusations are nowhere substantiated, which is unreasonable given that (as the Consultation itself admits in the tabulated examples⁵) commercial pressures on this market are caused by broader trends in the economy as well as by lifestyle changes and given too that the industry has recently been given a clean bill of health by the Office of Fair Trading (“OFT”), the specialist regulator for comparable issues.

² See Enterprise Inns’ Annexes to response to Government Consultation 2013, pages 1-2, entries 3, 5 and 7

³ See Enterprise Inns’ Annexes to response to Government Consultation 2013, pages 17-22

⁴ See Enterprise Inns’ Annexes to response to Government Consultation 2013, page 18, entry 7

⁵ See Enterprise Inns’ Annexes to response to Government Consultation 2013, pages 17-22

- 3.5 References to increase in detriment which are not proven – we have tabulated references to an increase in detriment⁶. These references are no more substantiated than other references to detriment, but they have a particular relevance given that, in an industry which has been scrutinised many times and which is already subject to self-regulation, the only justification for any form of enhanced intervention is where the government can empirically demonstrate that the market has grown worse or that a predicted improvement has not happened. Only in these circumstances can radical remedies such as those proposed be justified in this industry.

Statutory intervention would be manifestly without reasonable foundation

4. The Consultation is a classic case of the disproportionate use of a political sledgehammer being used to crack a nut, in a market where it has often been demonstrated that no true issue exists. Moreover, this is taking place in an attempt to fix an industry which has been declared on two occasions by the Government not to be broken. In November 2011, when presenting the Government Response to the House of Commons Business, Innovation and Skills Committee's Tenth Report of Session 2010-2012: Pub Companies, Ed Davey acknowledged that self-regulation was working.⁷ More recently in October 2012, Jo Swinson's office expressly acknowledged in an email to The Publican's Morning Advertiser that all the commitments on self-regulation had been achieved.⁸ In such circumstances, without comprehensive and unassailable evidence of material harm, statutory intervention is manifestly without reasonable foundation and represents an actionable abuse of process.
5. The evidentiary flaws found in the Consultation and described throughout this Response represent an unreasonable failure to take account of relevant circumstances and any legislative act which contained such flaws would give grounds for an application for judicial review.
6. Enterprise Inns has asked the Department of Business Innovation and Skills ("BIS") numerous questions and the Treasury three questions related to the Consultation and Impact Assessment in order to ascertain exactly what evidence is supporting the Government's position. We have received some responses and look forward to receiving the remainder. We shall review all the responses and we reserve the right to comment further on both the evidence issue and any other point revealed by BIS' disclosures. We have also asked BIS to clarify the findings of both the Regulatory Policy Committee ("RPC") and the Reducing Regulation Committee ("RRC") upon being presented with the Impact Assessment. Have the RPC and RRC been consulted since the Government admitted its misrepresentation of calls to the BII helpline for advice as 'complaints'? This misrepresentation has still not been corrected on BIS' website in either the Consultation document or the Impact Assessment. Considering that the only new empirical evidence (since the various BIS select committee reports) relied upon in the Consultation are the calls to the BII helpline, does the RPC and RRC still consider that statutory intervention is appropriate, reasonable and justified?
7. In the absence of evidence, BIS has established not only the full Consultation questionnaire, but also a simpler online "survey monkey" questionnaire. The stated purpose is to garner views to enable BIS better to understand the likely impact of its proposals. The sentiment is admirable. Unfortunately, the questions are in all cases closed and leading, prefaced by biased and unproven assertions. The full Consultation document does give respondents the space to provide real evidence and express views based on facts. However, no reliance can be placed on any attempt to extract "statistics" from any yes/no replies to the leading questions themselves. Further, the online questionnaire (which campaign groups are promoting heavily among the

⁶ See Enterprise Inns' Annexes to response to Government Consultation 2013, pages 23-28

⁷ <http://www.official-documents.gov.uk/document/cm82/8222/8222.pdf>

⁸ <http://www.morningadvertiser.co.uk/General-News/Exclusive-Government-washes-hands-of-self-regulation-deal-over-pubco-tenant-relationship>

already-converted) is not capable of providing any objective information. Any reliance on responses to it would simply compound Government's fault in the conduct of the Consultation.

B. The absence of evidence

In the absence of evidence, Government seeks to adduce layers of views and opinions through its main Consultation and its online questionnaire. There too the attempt fails. Both questionnaires are introduced by biased and misleading statements, presented as though they reflected proven truths, but having no basis in fact. The questions thus introduced are closed and leading. No useful, objective or reliable data could emerge from responses to them. The main Consultation does at least allow respondents space - as here - to demonstrate their arguments why Government's proposals are absurd.

Collecting opinions – the misleading nature of the Consultation questions and the Online Questionnaire

8. Put more starkly, the questions posed to those responding to the Consultation are misleading and biased towards a particular outcome. The online questionnaire is also misleading and any responses to it should be disregarded.
9. The Consultation webpage includes an “online response survey” - a “*short online questionnaire...for individual tenants and consumers to express their views*”. The stated purpose of the survey is to “*understand the likely impact and effects of these proposals*”.
10. The use of the word ‘survey’ is incorrect and potentially misleading. If it is to be of any evidentiary use, the fundamental requirements of a market research survey include:
 - 10.1 the sample for a survey should be relevant, identifiable, and carefully defined;
 - 10.2 the sample obtained should demonstrably represent the group of people it is intended to represent;
 - 10.3 the context of the survey should be set out fairly;
 - 10.4 the questions should be non-leading and posed fairly; and
 - 10.5 the responses to the survey should be an accurate reflection of the views of the sample.
11. As noted below, BIS’ online questionnaire does none of those things.
12. It is wholly inappropriate to suggest that this process could assist in a reliable “*understanding of the likely impact and effect of Government’s proposals*”:
 - 12.1 access to the survey is wholly uncontrolled;
 - 12.2 the Consultation is not about the effect of any proposals on consumers - the OFT has dealt with that issue in the CAMRA cases, concluding definitively that the pubs market is working well for consumers. Consumers can do no more in this case than present (for the most part uninformed) opinions. Opinions are not evidence on which policy can be based; and
 - 12.3 the information and questions as well as the answer options are not clear and open but biased and leading.
13. The sample for the questionnaire is not relevant, identifiable or carefully defined. Access is uncontrolled. Anyone can take part (completing the survey multiple times) regardless of their knowledge of the facts, their relevance to the Consultation or their ability to understand and

answer the questions. This fundamental point makes the questionnaire unfit for the purpose declared for it.

14. Campaign groups (including CAMRA, which has around 130,000 members) are using every available method to persuade as many individuals as possible to complete the online questionnaire, clearly telling them what answers to give. Few such individuals are well placed to provide an informed and objective view (even if the questionnaire enabled them to do so).
15. The sample obtained cannot demonstrably represent the group of people it is intended to represent. Responses may be anonymous. The categories into which respondents put themselves are very broad. There appears to be no method of validation of the information given - respondents need not be who they claim to be.
16. The responses of those who have personal knowledge of the background will reflect their sympathy or otherwise to the BIS proposals. Such opinions may be better or worse informed as to the real facts, but nothing in the language of the questionnaire will impact on their responses. They will simply restate their existing views. Those who have no prior knowledge will be led by the biased and closed nature of the questions to support Government's proposals.
17. The context of the survey is not set out fairly. The introductory paragraphs present as incontrovertible facts which Government has proved (but which is not the case) that "*significant concerns*" have existed for a decade, that "*in too many cases...tenants are treated badly and exploited...*", that tenants face "*unfairly high rents or beer tie prices*" all of which indicate "*problems between large pub companies and their tenants*". The introduction further gives the impression that Government has been driven to establish a statutory code and adjudicator "*to oversee the problems between large pub companies and their tenants*" and that this is a "*proportionate and targeted intervention*" necessary to "*safeguard the long term stability and sustainability of the industry*". It is with this introduction that the reader goes straight into a series of leading questions.
18. The questions are not posed fairly.

The introduction to Question 2 states as fact that "Self-regulation has been tried since 2004 but has not worked – too many tenants are still being badly treated and facing hardship". The phrasing is authoritative. The statement seems entirely plausible. It creates the perception that this is definitely a market with problems that are sufficiently serious that they require Government intervention in order to be resolved. This perception will drive the answers to this and subsequent questions.

Question 2 asks whether the respondent agrees or not with the government's belief that it should introduce statutory legislation. Clearly, this question is leading. The reader has been told that self regulation has not worked. "Statutory legislation" is presented as the simple fix. The question is also flawed in the sense that it offers simple binary, yes/no response options to a very simple question whereas later questions suggest that the issue is more complex and that other options might be possible. Not only does the question not allow for any nuanced reply, but it does not provide sufficient information to enable the reader to provide an informed and credible response.

Question 3 makes sense only if the respondent has answered "yes" at question 2, although it seems to be asked of all respondents. Question 3 reinforces the proposition that there is a problem which requires a solution, asking only if statute is "*...an appropriate way of tackling this problem?*" So the reader has learned that there is a problem which needs a solution and that there is only one solution offered.

Question 4 asks readers to agree or not with two broad principles presented as moral issues, effectively asking if people should be treated fairly and equitably. The question assumes that there will be a Code with these principles “at its heart”. For the reader not familiar with the factual detail of how to compare different forms of tenancy and the use of industry terms of art, the words used are emotive. Such language makes it difficult for any reader to answer “no”.

Question 5 tells the reader as a fact that “...*some companies abuse the tie...*”. No indication is given of what could constitute such abuse or whether it (whatever it is) is widespread. The question does not ask whether the Government should take action but what form of action it should take. The question is in fact technical, but it is phrased in an emotive way, asking if Mr. A should be no worse off than Mr. B. No explanation is given of how comparisons between tied and free of tie tenants could be made (for example, there is no indication of the extent to which lower rents can compensate for higher drink prices or vice versa, and no attempt to explain SCORFA benefits).

Question 6 offers options “*to help ensure that tenants are treated fairly*” (implying that tenants need this help). Some of these options are highly detailed and technical and could mean little to an uninformed reader. Conversely, many of them sound plausible and helpful, so that the reader is encouraged to select them whether he understands them or not.

Question 7 works in a similar way as regards options for the Adjudicator. All the options are presented in a way that suggests that pub companies need to be monitored and punished and that tenants need to be compensated.

Question 8 sets out Government’s reasons why the 500 pub threshold is the right choice. It refers to unexplained “evidence” that smaller companies behave better and implies that they should not have to bear the costs of correcting the large pub companies’ actions, when the large pub companies can afford it. There is no explanation why 500 is a relevant number. Again the choice is presented as moral rather than factual.

Question 9 describes the highly complex and technical differences between types of tenancy as a simple choice between a long lease which places “*a greater burden on the tenants to repay [sic] the pub*” and a tenancy. The implication is that leaseholders are in a worse position than tenants. Government reiterates that it wants to treat all “fairly”. The question then asks not whether the reader thinks that all should be treated fairly, but whether “*there should be a distinction between leased and tenanted pubs*”. The question barely makes sense.

19. In none of the questions is the reader offered a “none of the above” option. He may think that he must answer all the questions before he can proceed to the next page (as is often the case in online surveys) and tick a box in order to move forward. Since the questions are closed and leading, such box ticking cannot represent any decision or view of the reader.
20. The best that can be said is that there is a significant risk that the framing of the context of the survey and the framing of the specific questions are very likely to influence the responses given to the questions. The language is emotive. Government proposes solutions to what it presents as without doubt a seriously problematic relationship between pub companies and tenants, who are subject to bad treatment, exploitation, hardship and abuse. Those solutions range from the plausible to the almost impossible to understand. But the language is emotive and biased towards a particular outcome. The questions are clearly closed and leading.
21. It is difficult to see how readers completing this questionnaire would disagree with the policy proposed by Government.
22. It is impossible for Government to give any weight to the questionnaire or any responses it receives. Nothing in this survey can contribute to a reliable “*understanding of the likely impact*”

and effect of Government's proposals". Any use of statistics derived from the survey would be wholly misleading.

23. Enterprise Inns has had the benefit of a respected market research analyst and academic in preparing the above critique of the online survey. As a BBPA member we have seen and support the findings of leading market research agency ComRes as to the inappropriate nature of the online questionnaire. Its executive summary says:

"Following an in-depth review of the online survey used as part of the Government's Consultation on the relationship between large pub companies and their tenants, ComRes have several concerns over the suitability of the survey for such work and the subsequent validity of any findings drawn from the results. It is our view that the survey in its current form is not of sufficient quality in terms of survey design and structure to be able to support Government action in introducing a Statutory Code and Independent Adjudicator to oversee the problems between large pub companies and their tenants.

The key concerns are as follows:

- The survey uses leading introductory statements and questions in direct contradiction to rule B14_3 of the Market Research Society Code of Conduct which explicitly states that reasonable steps should be taken to ensure that 'respondents are not led towards a particular point of view'. It is our view that the survey in its current form leads respondents to give survey answers that are supportive of the Government's position because of the way the questions are asked.
- In many cases, the survey presents a positive case for a course of action and then asks the respondent whether or not they support such action without presenting the alternative view. This means the Consultation could appear to provide evidence of support for certain action where no such support exists.
- In the majority of cases, the survey does not present the respondent with a clear option to indicate that they 'don't know' or have 'no preference' for a course of action, contradicting rule B14_2 that efforts should be made to ensure that 'respondents are able to provide information in a way that reflects the view they want to express, including don't know/prefer not to say where appropriate'. This could lead to respondents giving answers to questions they are not qualified to comment on, creating issues over the validity of findings drawn from the results.
- Survey routing is often misleading or inadequate meaning respondents do not answer questions relevant to them and are led to answer a certain way. This is crucial to the validity of the Consultation's findings as it means that results could be based on survey responses from those that do not possess an informed view on the subject matter at hand or even those who have a vested interest in certain results being achieved.
- There are significant concerns about the use of Survey Monkey as a survey vehicle and the security of the survey which call into question the validity of results gathered and therefore the credibility of any findings drawn from the Consultation."

24. The full ComRes report is appended to the BBPA's submission to this Consultation.

The Consultation violates the legal principles of proportionality and evidence

25. The European Courts have defined an overriding principle of proportionality according to which a measure will not be proportionate unless it can be shown to be necessary to achieve the relevant objectives and unless it avoids imposing an excessive burden on those it affects. This was for instance articulated by the European Court of Justice (“ECJ”) in *R v Minister for Agriculture, Fisheries and Food, ex parte Fedesa* [1990] ECR I-4023:

“The ECJ has consistently held that the principle of proportionality is one of the general principles of Community law. By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; where there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.” (para 13).

26. The requirement that a penalty or remedy be commensurate with a legitimate objective implies that the purpose of the remedy, and the harm it is meant to redress, be clearly defined and substantiated. The need for evidence of harm in these terms is shown by the use of the word “established” in another ECJ case:

“However, measures are justified only if it is established that they are necessary in order to attain the objective of protection referred to in [Article 6 TFEU] and that such protection cannot be achieved by means which place less of a restriction on free movement of goods within the Community” (*Commission v Belgium Case 155/82* [1983], paragraph 12).

There may be some uncertainty as to how, in UK law, the EU-derived principle of proportionality overlaps with the longer-standing UK law concept of unreasonableness, although, since the implementation of the Human Rights Act 1998, courts have been increasingly willing to acknowledge that the proportionality principle is accepted as relevant in a UK law context⁹. UK court judgments which reference proportionality also refer to the need for remedy measures: *“...the measures adopted have to be proportionate, i.e. restricted to what is necessary to attain [a] legitimate aim...Furthermore, measures at issue have to be well-founded - providing relevant evidence, data...and all other relevant information...”* (*R (Lunt) v Liverpool City Council* [2010] 1 CMLR para 79)¹⁰.

27. In any event, the traditional UK principle of reasonableness, as expounded in *Associated Provincial Picture Houses Ltd. v Wednesbury Corporation* [1948] 1 KB 223, is also relevant to the BIS Consultation. The test in *Wednesbury* has three limbs. A decision by a public body will be unreasonable where:

- 27.1 the public body, in making that decision, took into account factors that ought not to have been taken into account; or
- 27.2 the public body failed to take into account factors that ought to have been taken into account; or
- 27.3 the decision was so unreasonable that no reasonable authority would ever consider imposing it.

⁹ See e.g. *R v Parole Board ex part Walker*, [2007] EWHC 1835 (QB) para 38.

¹⁰ At this point in *Lunt*, Mr Justice Blake is in fact quoting a European Commission summary of ECJ case law. The same point is made in *Southampton Port Health Authority v Seahawk Marine Foods Ltd* [2002] EWCA Civ 54 at paras 34-35 and in *R (Royal College of Nursing) v Secretary of State for the Home Department* [2010] EWHC 2761 (Admin) at para 109.

28. A remedy based on unsubstantiated claims of detriment will represent, above all, a failure to take account of evidence under the second of these limbs.
29. In summary, a failure (a) to define harm or (b) to provide evidence of harm sufficient to justify a remedy means that (under the proportionality principle) any remedy will impose a disproportionate burden on the subject of that remedy and represents (under the reasonableness principle) an unreasonable failure to take into account all the circumstances of the relevant activity. The application of the two principles in tandem can be seen in quotation from the *BSKYB* case at paragraph 50 below. We explain in more detail below how the Consultation fails to address the true market circumstances in these two senses. Any remedy which reflected the Consultation in these terms would give grounds for an application for judicial review.
30. BIS itself invokes the principle of proportionality. It declares (at 3.11 of the Consultation) that its overriding aim is “*to regulate proportionately*” and “*to ensure that measures taken are proportionate, targeted and fair*”. In considering whether BIS has met its aim to regulate proportionately, its proposals are to be assessed in accordance with the above criteria. They are found wanting.

No infringement of a clear legal principle

31. BIS itself rules out the most obvious legal category for a finding of marketplace detriment: competition law. It acknowledges both that there is no competition law issue and that it is not intervening on competition law grounds, since the competition regulator (the OFT) stated that there was no competition law infringement (and indeed no consumer detriment) in its October 2010 final decision on a CAMRA super-complaint (see 3.9 and 3.10 of the Consultation). Nor does BIS seek to make any allegations in relation to any potential infringement of unfair contract legislation.
32. But BIS does use competition law terminology (the pubcos have “market power”) and relies on the Groceries Code and Adjudicator as its main precedent. What then does BIS think is the appropriate basis for intervention? We repeat that BIS has not provided evidence either of harm or - since it cannot prove a mischief - of what could constitute a remedy to support struggling tenants.
33. BIS distinguishes “fairness” as the basis of the perceived need to “do something”. As we demonstrate throughout this Response, that perception is misconceived.

No definition of “unfairness”

34. The statements in the Consultation regarding detriment to (above all) tenants and (by implication) consumers do not contain an allegation that any activity of a pub-owning company breaches a specific, statutory, legal principle. Arguably, the evidential requirement to demonstrate harm would be different and even lowered, if such a breach were in question. For instance, in order to demonstrate the existence of harm meriting intervention, it may be enough to adduce the quantity and quality of evidence established in specific rules or cases relating to any particular legal infringement alleged.
35. Again, the notable feature of the allegations of harm in the Consultation is that they involve purely factual statements that certain features, as a matter of concrete circumstances, are not working. They do not make any allegations relating to any ascertainable legal principle which could determine the nature or parameters of such marketplace detriment. At 3.10 of the Consultation, BIS justifies its proposals by reference to “*intervention on grounds of fairness*”. The concept of “fairness” is nowhere defined or linked to an existing legal principle enshrined in any legislation.

36. BIS relies heavily on analogies with the use of the fair dealing provision in the Groceries Supply Code of Practice. That Code resulted from adverse findings in a competition investigation, which is not the case here. That Code uses the principle to safeguard against excessive transfer of risk from retailer to supplier, which is not the case where the viability of the tied tenant and his supplier are interdependent. No guidance is given on the interpretation of this “fairness” concept to the pub industry.
37. We comment further on the principle of fairness at our response to Question 7i which should be read in conjunction with this section.

Findings of “unfairness” can only be based on empirical evidence

38. Given the exclusively factual nature of the grounds for the proposed intervention and the underlying and undefined concept of fairness, the allegation that this market requires strict regulation can only be justified if there is compelling and clear evidence of such unfairness. The requirement for robust evidence is even stronger where allegations are of an exclusively factual nature and where those allegations are underpinned solely by such a generic and nebulous concept. In other words, the absence of a clearly delineated concept of wrongdoing means that the bar is raised when it comes to empirical evidence of any form of wrong which may require a remedy such as the regime envisaged by BIS. As already noted, the Consultation lacks any base in empirical evidence.
39. There is a competition law precedent to support the view that the lack of an “in principle” infringement reinforces the need for hard evidence of detriment. This precedent is found in the distinction between a competition law infringement “by object”, i.e. an inherent or automatic infringement which need not be evidenced by reference to market detriment, and a competition law infringement “by effect”, which does require such evidence. The doctrine has recently been articulated by the ECJ in *T-Mobile Netherlands*, Case C-8/08, 4 June 2009: “...there is no need to consider the effects of a concerted practice where its anti-competitive object is established” (paragraph 30). The converse of this principle is found in another ECJ judgment (*Beef Industry Development Society* also known as “*Irish Beef*”, Case C-209/07 and referenced in *T-Mobile*): “...where...an analysis...does not reveal the effect on competition to be sufficiently deleterious, its consequences should then be considered and for it to be caught by the prohibition, it is necessary to find that those factors are present which show that competition has in fact been prevented or restricted” (paragraph 15).
40. The principle as described in *Irish Beef* applies in this case. BIS itself has stated that its proposals are not a competition law issue and has made no other allegations relating to a form of in-principle detriment relating to a definable legal breach. All of the allegations in the BIS Consultation relate to concrete marketplace effect, which must therefore be rigorously shown. Although the principle in *Irish Beef* is a competition law concept and although there is in competition law no definition of “unfairness”, we believe that the concept of a competition law infringement by effect is closely analogous to the “fairness” principle as instanced by BIS.
41. There is, separately, legislation regarding unfair contractual terms, but that is not invoked. Vague references to unfairness do not obviate the need for clear and robust evidence; they increase it.

Does the Consultation propose a form of disguised competition law enforcement?

42. The BIS document is contradictory. It rules out a competition law analysis (as quoted above from 3.9/3.10 of the Consultation), yet its allegations do involve factors which are of an arguable competition law nature. So the Consultation (despite having ruled out competition law enforcement) itself raises points which have competition law relevance and must therefore be addressed as competition law issues to some extent.

43. There is an extent to which the Consultation is trying to introduce a form of indirect competition law enforcement. The issues which it addresses are most obviously issues which should be confined to the competition law sphere (unless there is clear evidence sufficient to justify an exceptional market intervention – which there is not – see paragraphs 31 to 41 above).
44. BIS is of course precluded from launching a competition law market investigation (or, if it tried to launch one, it is likely to fail given the precedents). Therefore, it could be argued that BIS finds itself obliged to dress up what is in spirit a competition-law-style market review as a non-competition-law initiative.
45. The confused role of competition law in its analysis is perhaps behind the reference by BIS at paragraph 24 of its Impact Analysis to a “competition assessment” which “*will be completed as part of the final assessment*”. It is of course extraordinary that a proposed regulatory regime which is expressly not a competition law issue should contemplate any exercise which refers to competition elements.
46. The confusion surrounding the competition law dimension of the Consultation is also relevant to four distinct issues:
 - 46.1 The 500-pub threshold. BIS proposes to apply the code only to companies owning more than a defined number of pubs - expressed as a “market power” threshold. It is incongruous to refer to a concept (market power) which is normally a competition law tool in a document which purports not to be based on competition law grounds. This is all the more confusing as a 1% threshold (which is how paragraph 4.15 describes this threshold) is far below any threshold found in any competition law case or guidance to define market power. 1% is indeed below the *de minimis* levels (of 10% or 15% depending on the context¹¹) which determine when non-hard-core infringements may have an appreciable effect on competition. In other words, a 1% threshold would, in competition law terms, be the opposite of market power. The imposition of such a threshold would therefore involve a stricter form of market-share regulation than is allowed for under competition law, which is excluded from the scope of the Consultation. This would be a perverse outcome when the UK’s competition regulator has recently found there to be no relevant market defects.¹² Further, the application of a threshold is not justified in any terms, except by vague reference to calls to the BII hotline and to the fact that certain self-interested “stakeholders” have asserted the advisability of a threshold (see paragraphs 158-164). It should be noted here that there is no other inherent link between any particular size of company and the detriment loosely alleged throughout the Consultation in terms of hardship for struggling tenants. A company with five pubs in a local region will be just as much in a position to exert potential commercial pressure on a single tenant as will a company with 500+ pubs nationally. Quite apart from the general unreasonableness of the proposed regulation, the threshold in question is unreasonable on this basis.
 - 46.2 Market failure – on a number of occasions, the Consultation refers to, or implies, a form of detriment suffered by the pubs market generally. These references equate to a “market failure” argument. Issues of market failure are addressed by competition legislation and, in 2010, the competition regulator found that the market was not failing consumers. It is absurd to reverse that conclusion and decide there is after all material unfairness without seeking to determine the issue by reference to the competition regulator and/or without clear-cut empirical evidence.

¹¹ See <http://ec.europa.eu/competition/antitrust/legislation/deminimis.html>

¹² Again, see 3.10 of the Consultation on the October 2010 OFT final decision on CAMRA

- 46.3 The regulation of ties – the Consultation places constraints on the use of a drinks tie under one of its overriding objectives (see paragraph 2(a) of the code) and prohibits all non-drink ties (paragraph 29, which particularly affects the gaming tie, whereby the pub-owning company shares the revenue from gaming machines). We make the following observations on competition law aspects of ties:
- (a) Tying arrangements are prohibited under competition law, although the circumstances under which that would arise would usually depend on a market power threshold being exceeded.
 - (b) Equally, a tie could be found to infringe consumer legislation, such as unfair contract laws, but that is not instanced in the Consultation.
 - (c) As with market power above, a rule emerging from this Consultation which affected ties would represent a case of competition-style legislation through an unofficial, indirect channel. It would also be a case of regulation which was more onerous than anything applied by competition law enforcement. It would be an arguable abuse of power not to leave regulation of such commercial terms to the expert regulator.
- 46.4 Comparison with the Groceries Code Adjudicator – the use of an adjudicator is expressly modelled on the Groceries Code Adjudicator (“GCA”) (see paragraphs 4.8 and 6.2 of the Consultation). This implies that the proposed regime is analogous to the regime involving the GCA. This is a dangerous analogy, since the use of a GCA originates in the 2008 Competition Commission market investigation into the Groceries sector, i.e. in an instrument of competition law enforcement in which all the evidence listed in Enterprise Inns’ Annexes to response to Government Consultation¹³ was adduced. Further, the evidence in that market investigation was used to substantiate a wide range of clearly defined practices which led to an “Adverse Effect on Competition” finding which was linked to the buyer power of the retailers in question¹⁴. In other words, the 2008 Report established a defined and evidenced concept of detriment and was the opposite of the regime contained in the Consultation.
47. We note that at the Parliamentary hearing on 10 June 2013 the Chairman (if we understood him correctly) took issue with a comment that differentiated the proposed pubs adjudicator from the role of the GCA. The Chairman said that the GCA “*was not a competition issue, it was an issue of balance of power within the industry and the appropriate balance of risk and reward*”. We disagree. It is wrong to say that the fair dealing requirement to be enforced by the GCA is somehow divorced from competition law. The GCA Act is purely functional/procedural and contains nothing new on the conceptual background, which is in the Groceries Supply Code of Practice Order. It is true that the “fair dealing” provision in isolation does not make explicit reference to competition law, but the preamble to the GSCOP Order is quite clear that everything in that Order tracks back to the adverse effect on competition in the Competition Commission report.
48. Any reliance on competition law principles - however broad - must also conform to the requirements of proportionality. Again the Consultation fails the test.

¹³ See Enterprise Inns’ Annexes to response to Government Consultation 2013, pages 32-33

¹⁴ 11.410 and 9.7-9.21 of the 2008 report show the link between the Adverse Effect on Competition and buyer power

49. It is notable that the UK Competition Appeal Tribunal and the competition law authorities have applied the general EU principle of proportionality in their decision-making¹⁵.

50. In *British Sky Broadcasting Group plc v Competition Commission* [2008] CAT 25, paragraph 54 the CAT cited with approval the following statement of principle taken from Wade & Forsyth which it describes as the “no evidence rule”.

“...the limit of ... indulgence is reached where findings are based on no satisfactory evidence. It is one thing to weigh conflicting evidence which might justify a conclusion either way, or to evaluate evidence wrongly. It is another thing altogether to make insupportable findings. This is an abuse of power and may cause grave injustice. At this point, therefore, the court is disposed to intervene.

“No evidence” does not mean only a total dearth of evidence. It extends to any case where the evidence, taken as a whole, is not reasonably capable of supporting the finding; or where, in other words, no tribunal could reasonably reach that conclusion on the evidence. This “no evidence” principle clearly has something in common with the principle that perverse or unreasonable action is unauthorised and ultra vires.”¹⁶

The *BSkyB* judgment provides a lengthy exploration of evidence requirements, but the exploration ultimately all relates back to paragraph 54, quoted above.

51. The UK competition law authorities reflect the EU principle of proportionality in their declared policy on remedies.

- 51.1 In considering how to address market-wide issues in its market studies, the OFT has stated that it is guided by this principle:

(a) *“A market study may conclude that on balance, at the time of the report, the market, or aspects of the way it functions, can be given a clean bill of health. A clean bill of health will mean that some or all of the potential consumer detriment identified during the project proposal stage is not substantiated by the information obtained, or that intervention would not be proportionate to the detriment.” (Market studies – Guidance on the OFT approach, OFT 519, June 2010, para 5.3)*

(b) *“When the findings of a market study by the OFT give rise to reasonable grounds to suspect that a feature or combination of features of a market in the UK prevents, restricts or distorts competition, and a market investigation reference appears to be an appropriate and proportionate response, the OFT is able to make such a reference to the Competition Commission.” (para 5.13)*

52. The Competition Commission’s own (recently revised) guidance evokes the principle of proportionality in detail, reflecting for instance the criteria in cases such as *Fedesa*, described above (and indeed acknowledging *Fedesa*). The guidance states that *“In considering the reasonableness of different remedy options the CC will have regard to their proportionality...In making an assessment of proportionality, the CC is guided by the following principles:*

¹⁵ For instance, the CAT in *Tesco plc v Competition Commission* [2009] CAT para 6 quoted and applied the statement from *Fedesa* at paragraph 25 above. The CAT has also applied the principle in *Barclays Bank plc and other v Competition Commission* [2009] CAT para 27 and *BAA Limited v Competition Commission* [2009] CAT para 35, [2012] CAT para 3

¹⁶ Administrative Law, Tenth Edition, Wade & Forsyth, Oxford University Press 2009, pp 229; Wade & Forsyth cite the following cases in support of their statement: *R v Criminal Injuries Compensation Board* 1997 SLT 291, *Allinson v General Medical Council* [1894] 1 QB 750 at 760,763, *Lee v Showmen’s Guild of Great Britain* [1952] 2 QB 329 at 345, and *R v Roberts* [1908] 1 KB 407 at 423

- 52.1 *is effective in achieving its legitimate aim*
 - 52.2 *is no more onerous than is needed to achieve the aim*
 - 52.3 *is the least onerous if there is a choice between effective measures*
 - 52.4 *does not produce disadvantages that are disproportionate to the aim.” (Revised guidelines for market investigations, April 2013, paras 342-344).*
53. The Competition Commission’s guidelines contain extensive commentary on its approach to types of evidence and on the methodology of its assessment of evidence in reaching its conclusions on potential remedies. This commentary is summarised in Enterprise Inns’ Annexes to response to Government Consultation¹⁷, which by way of example describes the evidence cited in the Competition Commission’s 30 April 2008 Report on its *Groceries Market Investigation*.
54. BIS claims that it needs somehow to make the playing field level for different types of publicans. As the economic evidence we set out below also demonstrates, BIS’ concept of “equivalence” and attempts to explain how that concept might be put into practice to make the “competition” more “fair” is unworkable. BIS’ reliance on the vocabulary of competition law and on competition law remedies serves only to confuse the matter further.
- The Consultation takes a competition remedy - the Groceries Code and Adjudicator - and simply misapplies it
55. Any market-wide regulatory regime should respect the principles of proportionality and reasonableness as a matter of general legal compliance. More specifically, such a regime should respect the criteria applied by those agencies whose specialist role is to assess the fair working of markets. In the Consultation, BIS has held up the outcome of the Competition Commission’s 2008 Report as a model and the guidelines published by the Competition Commission set the standard for linking remedies to clear evidence in market reviews.
56. As this response points out again and again - because BIS’s failure is repeated many times - that evidence has simply not been provided.
57. The Consultation has many failings. In this context in particular (i) it does not define the detriment it alleges; and (ii) it provides no substantive evidence for any detriment, when the need for clear and pertinent evidence is all the stronger given the lack of clarity around the definition of detriment. The Consultation’s conclusions are therefore highly disproportionate in the light of any detriment ascertained. Put another way (applying the principle of unreasonableness), the lack of evidence represents an unreasonable failure to take account of market circumstances.
58. These failings are exacerbated by the confused use of competition law arguments, such as an argument that “market power” will be regulated through an arbitrary triggering threshold which is far below any market power threshold in existing competition law cases, which has been chosen by reference to the self-serving comments of industry stakeholders and which is not proven to be linked to any harm.

Property Law Concerns

59. Government has failed to consider the impact of the proposed Statutory Code in relation to current landlord and tenant related legislation and current commercial property market practice.

¹⁷ See Enterprise Inns’ Annexes to response to Government Consultation 2013, pages 31-33

This could potentially put pub companies in a worse position than other commercial landlords and benefit certain pub tenants in a way that other tenants are not protected as well as leading to distortion in the market place which may have a significant adverse impact on pub companies, their shareholders and their lenders. A number of these measures also have the potential to add significantly to cost and cause delay. See in particular paragraphs 8.8 to 8.32 in relation to Consultation question 8(i) below.

ECHR Article 1 Protocol 1 challenge

60. If implemented as drafted, the Government's proposals would be open to challenge under Article 1, Protocol 1 ("A1P1") of the European Convention of Human Rights (the "ECHR"). Interference with property is protected by human rights law in the UK. Depriving pub companies of future income would constitute an exercise of "control" by the State over Enterprise Inns' property and therefore A1P1 is engaged.
61. The Government has failed to demonstrate any mischief to justify statutory intervention in the pub industry. The Government itself in 2011 concluded that a strengthened system of self-regulation, including making the IFC binding and setting up an independent arbitration service, would deliver the objectives of the Select Committee. That strengthened system has been delivered by the industry. The additional information which has been collated by BIS since November 2011 is very thin and unconvincing. An example of its quality is the "hundreds of complaints" to the BII helpline attributed to pub companies which turned out to be merely enquiries for advice.
62. There has been no attempt by the Government to determine if any actual individual complaints against large pub companies are well founded or to check if complainants used the self-regulatory system for redress and if not, why not.
63. There has been no specific identification of weaknesses or defects in the self-regulatory system. In fact, the provisions of the Statutory Code more or less mirror the provisions of the IFC (save for the misconceived and simplistic principle that a tied tenant should be no worse off than a free-of-tie tenant).
64. There has been no assessment of whether self-regulation has improved the position for tenants, is inadequate or is simply not being used. If the latter is found to be the case, the answer may lie in an awareness campaign rather than statutory intervention with the risk of drastic unintended consequences.
65. The stark lack of independent evidence (especially in relation to the assessment of the self-regulatory system) in the Consultation paper is telling. Without proper justification the proposed Statutory Code is manifestly without reasonable foundation and would likely result in a set of unintended consequences which would have very serious adverse consequences for pub companies, tenants and the wider industry including brewers, services and supply companies and consumers.

C. The economic case cannot be made

If there is no evidence of behavioural harm which requires a remedy, is there at least an economic case for intervention? Again the answer is no. We present only high level economic argument, but it is sufficient to show that Government's proposals are from the economic standpoint unworkable, would not achieve any sort of "equivalence" (whatever that term means) and have the capacity to result in unintended consequences bad for the industry.

The economics of Government's options are wrong

66. Government's legal analysis is unsustainable. So too is its economic approach to the perceived problem.
67. The simple core step by which BIS seeks to balance the commercial effects of two quite different tenancy models is to:
 - 67.1 reduce the price of beer paid by the tied pub to the level paid by a free of tie pub (i.e. reducing the wet rent); and
 - 67.2 increase the rent paid on the tied pub by a "corresponding" amount (i.e. increasing the dry rent).
68. However BIS also expects that there will be a net transfer from pubcos to tenants of around £100m per annum. If this is so, the interpretation of what is meant in increasing the dry rent by a "corresponding" amount is not clear.
69. In seeking to understand how Government proposes to implement a solution based on such principles of "correspondence" and "equivalence", Enterprise Inns has had some high level input from economic advisers. The comments below remain at a high level and supplement the report prepared by CompassLexecon on behalf of BBPA members, which is annexed to BBPA's response to the Consultation and which Enterprise Inns endorses.

The BIS options

70. The relationship between the BIS Proposals Option 2 ("Equivalence") and Option 3 ("Mandatory Free of Tie") is not entirely clear, but appears to be something akin to the following.
71. Option 2 (BIS Equivalence Proposal) states that the income of an actual tied tenant should, via changes in the prices of three key variables, be equalised to the income he would receive if he were free of tie.
72. The three key prices relate to the wet rent (the purchase of beer), the purchase of various benefits (SCORFA), and the payment of the dry rent. The actual tied tenant should:
 - 72.1 pay a price for beer that is the hypothetical price that would occur if beer were sourced by the pub on the open market. It is assumed that this would be lower than the price the tied tenant currently pays;
 - 72.2 pay for SCORFA (though it is uncertain whether these should be purchased at cost or value);
 - 72.3 pay a "corresponding" increase in dry rent (though it is uncertain what is meant by "corresponding", which, given the £100m transfer, would seem to be something different from the natural interpretation of "equal and offsetting").

73. Option 3 BIS Mandatory Free of Tie Proposal intends that each tenant should have the option to elect actually to go free of tie (FOT) and actually to buy beer from a supplier other than the pub company landlord (though presumably it could choose to purchase from his landlord or from a landlord's designated exclusive supplier from among all its options if that seemed to him most advantageous). The tenant would also presumably pay a "commercial" free of tie rent for the pub.
74. The tenant would then:
- 74.1 buy beer and cider on the open market at a "no-tie actual market price";
 - 74.2 as in Option 2 pay for SCORFA (again, unclear whether at cost or value); and
 - 74.3 pay higher dry rent (presumably increased by an equally "corresponding" amount (whatever that means)).

The "no less favourable" test is biased and distorts competition

75. BIS proposes imposing a requirement on pub companies owning more than 500 pubs (representing around 1% of the total stock of pubs) that obliges them to give tied tenants a deal that leaves a tied tenant "no worse off" than a free of tie tenant.
76. However, if what BIS wants to do is to create a level playing field between the tied and untied models, the relevant test should in fact more accurately be "no less favourable and no more favourable".
77. If treatment of tied houses were (in any regime, situation or subset) more favourable (and this is what "no worse off than" implies) this would be distortive of competition against free houses.
78. In the following paragraphs we assume that the concept is in fact "equal treatment" (neither less favourable nor more favourable) not "equal or superior" (at least as favourable as/no worse than) treatment.

What are the differences between Option 2 and Option 3?

79. But how is that comparison price in Option 2 reached? There are many challenges/uncertainties here, including (i) how to decide what would be the actual price paid by a publican in the same situation as regards size of establishment and volume and range of beer delivered so as to provide an understandable and implementable comparison; and (ii) how to deal with the fact that, if the market were reformed in this way, the free beer price might (indeed quite likely would) for various reasons change.
80. Provided that both free houses and tied houses continue to exist, one could potentially envisage that a certain fraction of the pub market would actually bargain rent and beer prices, whilst the remaining, complementary fraction would operate as tenants at rents and beer prices benchmarked to the freely bargained open-market rates.
81. At a practical level, this faces the difficulty that different brands of beer sell at different prices and that all pubs are different and hence have different free market rentals, and also that there is not going to be a unique free market price negotiated. But even assuming away such practical but significant problems, the free houses would negotiate with brewers or wholesalers, whereas the tied tenants would expect their landlord to supply beer on the same basis as the free house sector publicans acquire their beer.

82. But if there were true equivalence of the tied tenant to the free house, this would mean that beneficial aspects of the tie, including risk-sharing benefits are lost to the tenant, and “equivalence” would effectively collapse into the de facto abolition of the tie.
83. The number of complications, implications and scenarios is undoubtedly large. But, by way of illustration, one severe problem would arise if any independent wholesaler achieved greater scale or bargaining power with brewers than the smaller (or least effective bargainer) of the pubcos subject to the policy (which could be as small as 500 pubs). In this situation, under Option 2 the pubco would – as we understand the proposal - be obliged to supply on terms equal to a wholesaler whose cost of beer from the brewer the pubco would be unable to match. At that point, the only sustainable financial solution for the pubco would be to remove the obligation on the pubco to supply the tied tenant and allow the tenant to deal direct with the wholesaler – but again that effectively abolishes the tie for these pubcos.

Unclear that this could create a level playing field

84. The proposals could only create a truly level playing field between tied houses and free houses if they were to yield the same outcomes in the same situations. But if this is the case, and genuinely free houses continue to exist, this will effectively change the position of tied houses to be economically equivalent to free houses.
85. BIS Option 2 can only provide a level playing field with free houses by essentially abolishing tied houses, and everything that comes with them, with implications discussed below.

Option 2 requires a new institutional infrastructure

86. More generally, whereas Option 3 simply leaves rents and prices to the market, the Equivalence proposal potentially requires an entire institutional structure to compute “equivalence”.
87. Quite apart from the issues of the beer price and the “corresponding” change in dry rent (again, whatever that means), the number of factors to be considered in relation to the SCORFA benefits (and is that cost or value?) is huge. Assuming a case by case (which may not just be pubco-by-pubco but pub-by-pub) analysis is required (and we cannot see how else the philosophy can be implemented - see below) and individual beer prices and rents have to be set, the administrative burden is likely to be very high indeed. At best option 2 mimics option 3 but with huge bureaucratic implications.
88. The Consultation presents anticipated costs of the establishment and running of the office of the Adjudicator. The Adjudicator would consider a few cases a year. What, then, of the costs day to day of working out “equivalence” in every other case?

Where tied and free of tie contracts have different advantages in terms of lower fixed and variable costs, “equivalence” cannot be defined independent of an assumed beer throughput for the particular premises

89. The essential situation is that a tied tenant typically pays a lower “dry rent” than a free tenant but pays a mark-up on beer supplies (“wet rent”). It follows (assuming for this purpose that SCORFA are neutral) that the relative attractiveness of the two tenancies depends on the quantity of beer sold at those premises by that tenant. There exists a critical beer volume V^* at which the two situations yield the same payoff. For $V > V^*$, the free house does better (as on high beer volumes the low beer price dominates) but for $V < V^*$ the tied house does better (as on low beer volumes the cheaper rent dominates).
90. The equal treatment principle cannot easily be implemented because beer sale volumes are uncertain.

91. In theory it would be possible to set a mid-point volume so that the average tied house, which sells the average volume V^* , is equal to the (average) free house. However this would leave below-average performing tied houses worse off than the average free house (but, critically, better off than a free house selling the same low volume of beer).
92. How could this possibly work in practice? The comparison requires calculating what each individual pub "should" be able to sell assuming equal management skills in a world where almost each pub has different prospects. But this is possible only in theory - for example, to the extent that certain publicans have occupied a pub for a period of time, management quality and pub quality may be largely inseparable.

Equivalence on expected value is not anyway economic equivalence because the risk profile of the different contracts is different

93. Even if equivalence could be achieved in terms of expected value (for "mid-point" beer sale volumes), the two contracts are not economically equivalent because the free of tie proposal has higher variance of pub profits and hence higher risk.
94. Conversely, given that risk must carry some premium, financial equivalence in expected value terms is economically biased against free of tie providers. This is because the free house tenant, who has a higher fixed cost but a lower variable cost, faces high variance of profits. Since the publican cannot diversify this risk, the average return of the free house must exceed the average return of the tied house by an amount equal to the compensating risk premium.
95. This would not be easy to calculate, but given that individual publicans have poor access to capital and are risk averse, this risk premium is likely to be significant.
96. In terms of implementation, a tied tenant pays a lower dry rent than a free house but also pays his wet rent. Accordingly, any tied tenant who sells less than the "midpoint" volume of beer is getting a better overall deal than a free tenant selling that volume of beer would be receiving from the market. Moreover, the tenants suffering hardship (whom the proposals should really be designed to assist) will disproportionately be those selling less beer than the "midpoint", and hence are already getting a better deal than the free of tie pub selling the same volumes.

The BIS policy, if it succeeds in transferring value to tenants, will likely lead to more pub closures than would otherwise occur

97. The current profit levels of pub companies are essentially determined by:
 - 97.1 the supply of pubs;
 - 97.2 the market concentration of the pub companies;
 - 97.3 the market supply of aspiring publicans, whence the demand for pubs; and
 - 97.4 the "structure" of contracts, specifically the relative level of fixed and variable costs.
98. The policy change does not (in the first instance) obviously change 1, 2 or 3. Accordingly it is not immediately obvious why equilibrium profits of pub owners should, if left to the market, fall by £100m (the BIS assumed transfer), as opposed to remaining broadly constant.
99. We do not see how the proposals shift £100m from pubcos to tenants other than by the implicit introduction of price regulation on the dry rent on pubs (preventing full rebalancing for the average pub).

100. Absent such rent regulation, then (apart from the effect of the change of risk profile arising from rebalancing) the supply and demand for pubs has not changed and one would expect dry rents to fully rebalance.
101. However pub companies are free to reallocate their real estate between different uses, and between different pub management models.
102. In the medium term a pub closes when the gross profits that can be earned on the pub are lower than the rent. (We ignore here any issues other than the “pure” economic analysis.) A pubco cannot then charge rent for the premises on the basis of use as a pub, so that rent must be set by a non-pub use of the premises. This could be residential housing, (although the next best use will vary from site to site and the argument is not affected by the identity of the next best use).
103. If now the rent that can be charged on a pub is restricted, certain premises which could have generated higher returns as pubs than residential housing will now earn a lower return as pubs than residential housing. Accordingly, the policy will lead to the closure of pubs that, absent the policy, would have stayed open.

The policy hinges on a mistaken premise

104. A pub that loses its publican has to find an alternative use. If that alternative use is a different publican to operate the pub who could break even at the existing rent, this shows that the problem of the first publican was the comparatively lower efficiency of that first publican, not the conduct of the pubco. If by contrast that alternative use is a non-pub use, this implies that the market rent achievable for a non-pub use exceeds the return that can be achieved by pub-use and hence that the reallocation of the building from pub-use to alternative use is economically efficient and this pub is always going to close as a pub.
105. But when - as is here the case - the property asset is mobile between alternate uses (pub and non-pub) regulating the return in the pub use to below what could be earned absent regulation will (directionally) reduce the number of pubs that remain open and accelerate pub closures.

BIS fails to recognise that the tied model is the optimal risk sharing mechanism for many tenants

106. The Options (whether Equivalence or Mandatory Free of Tie) fail to address the fact that the low rent, higher beer price is an optimal risk sharing solution for many publicans, and that the proposals are likely to worsen the outcomes of the worst-off landlords.
107. We noted above that the free house and mid-point tied house system, even if equivalent in expected value (and hence on average), differ in their risk profiles, which points to the fact that the beer tie solution may be efficient for many publicans.
108. Many publicans will in general have lower access to capital than pub companies and have higher aversion to capital losses. Anything that undermines the tied model will deny publicans a preferred model, and to the extent that it reduces the supply of individuals willing to become publicans, by removing a lower risk and lower capital operating model, it will reduce the demand for pubs and therefore lead to more pub closures than would otherwise occur.
109. Again, a movement towards a higher rent/lower beer price model will increase, not decrease, the financial difficulties facing below-average performing publicans. This is because the free house model (whether replicated under Equivalence or implemented via Mandatory Free of Tie) increases fixed costs and reduces marginal cost and hence worsens below-average outcomes (and improves above average outcomes). If these proposals are motivated by improving the outcome of struggling tenants, the rebalancing from variable to fixed costs goes in the wrong

direction, and worsens their outcome. And by affecting the supply of publicans will likely lead to more pubs ceasing to be viable.

Endogenous Conduct in response to Policy Change (unintended consequences)

110. In any system, whenever the “rules of the game” change, this changes the incentives of parties, and hence via re-optimisation typically changes their conduct. Moreover the affected parties will adopt the new form of conduct that maximises their profit given the new incentive structure.
111. As noted, de facto rent regulation of pubs will cause pubs to shift to alternative users and hence reduce the number of pubs. This is an instance of a more general phenomenon that policy changes have knock-on or indirect effect as the system and players re-equilibrate.
112. In order to understand the impact of a change, it is therefore necessary to calculate the “new equilibrium”. This is typically:
 - 112.1 uncertain; and
 - 112.2 difficult to ascertain with precision. However if there is a material change in payoffs there is likely a material change in incentives and hence the assumption of a simple before and after comparison is almost certainly incorrect.
113. BIS’ policy is predicated on the assumption that payoffs will materially change in favour of tenants and away from pub companies. If that is indeed the effect, this reduces the incentive of pub companies to allocate pubs to tied tenants, compared to (at least) four other options:
 - 113.1 closing down pubs and allocating the real estate to non-pub uses (see above);
 - 113.2 large pub companies sell to small pub companies or break up into smaller pub companies of 499 pubs. This bypasses the regulation but will remove certain economies of scale and transfer wet rents from pub companies to brewers or wholesalers;
 - 113.3 pub companies decline to offer tied arrangements and instead vertically integrate into the management of the pub. In equilibrium, there would be reduced opportunity for pub lessees and correspondingly increased opportunity for employee pub managers, likely on a comparatively low basis wage with some upside performance related pay, essentially replicating the economic outcomes of the existing situation;
 - 113.4 pub companies exit the pub operation business and operate as simple landlords charging a dry rent, while possibly also owning a pub services business acting as a beer wholesaler. In this case it is likely that economies of scale will be lost, and the profits of brewers will rise and pub companies fall, with no obvious impact on the pub tenant other than the reduced overall demand consequent on higher retail prices.

The proposed “override” is distortive of competition, unworkable and has unintended consequences

114. The BIS proposals incorporate an “override” which is discriminatory, distortive of competition, unworkable and which would have unintended consequences.
115. BIS’ proposal envisages a rebalancing (a transfer) from pub company to tenant. Where two companies with comparable estates have identical revenues and (non-financial) operating costs, the “tipping point” into financial difficulty is different depending on the financial structure of

the company. So the effect of the same transfer on the pub company's continued existence depends on whether the pub company is primarily equity financed or primarily debt financed.

116. In reality it is the free cash flow of each pub company which sets the maximum company-specific transfer it could suffer to continue viable. So Option 2 is unworkable. It requires a pubco-by-pubco evaluation of their precise financial position. In essence a regulatory body would have to be established with micro involvement closer than that of any specialised sectoral regulator. Option 3 has unintended consequences. Established pub companies which bought pubs below current market values would sell those pubs in order to establish a new capital base (and to benefit from a lower transfer out). Pub companies which are equity financed could switch to debt finance to take advantage from a lower transfer.
117. The policy override is anti-competitive, unworkable and creates an arbitrage/bypass mechanism. Pub companies are likely to respond by adapting their business models to that which provides the best result for them under the policy imposed by Government. Therefore the policy cannot operate with an override mechanism.

The policy lacks a mechanism for identifying which pubs should close and which publicans should quit the trade

118. The number of pubs that are viable has been falling over time.
119. The factors causing pubs to close appear to include:
 - 119.1 high beer prices due to taxation, which through demand elasticity, reduces demand for beer;
 - 119.2 cheap supermarket alcohol (home drinking substituting for pub drinking due to a change in relative prices of pub and home drinking);
 - 119.3 regulatory restrictions, notably the smoking ban (forcing those who wish to "smoke and drink" to go elsewhere, likely home);
 - 119.4 general macroeconomic conditions affecting disposable income.
120. Given these factors, it can be expected that there will be a decline of beer sales and closure of pubs. Accordingly, at any snapshot in time, a certain percentage of pubs will become non-viable premises. Indeed if 1000 out of 50,000 premises (2%) close each year, then 2% of pubs cease being viable each year. This also implies that each year there will be 1,000 fewer opportunities for publicans.
121. The question is: how does the market select the 1,000 pubs and 1,000 publicans who "should" depart the trade?
122. In any given year around 1,000 pubs will become non-viable (compared to other non-pub uses). In any given year there will also be the 1,000 least profitable pubs. However the overlap between the 1,000 least profitable pubs and the 1,000 non-viable pubs is only partial.
123. Specifically, of the 1,000 least profitable pubs, some will be viable pubs being operated by comparatively less efficient publicans. And of the 1,000 non-viable pubs, some may make small profits due to exceptionally high quality management (that would be better off in a viable pub).
124. However, the "policy override" has a built in flaw in that it will tend to benefit pubcos with more than their share of a) non-viable pubs and b) below-average management, and hence will

bias survival in favour of precisely the premises and publicans that should be exiting the market.

No evidence that failure is due to the tie

125. The Consultation suggests that problems may arise because variously:
 - 125.1 tenants are poorly informed;
 - 125.2 some tenants enter the pub sector as a lifestyle choice not a commercial business decision;
 - 125.3 tenants apparently do not shop around between pubcos;
 - 125.4 many tenants have low levels of literacy and numeracy.
126. BIS also acknowledges that 70% of tenants would re-sign their tenancy.
127. Leaving aside the debate whether these suggestions are supported by any evidence, the question is whether these points suggest that there is a problem and if there is a problem that it is due to the tie. Insofar as problems arise, they are in the 30%. But this exit rate is not out of line (and may be lower) than the exit rate of small business as a whole, and if it is further noted that these tenants include many of low skills, this is to be expected.
128. Certainly there is no evidence that this is due to the tie. Even the posited lower income of tied tenants than free tenants (and as we show elsewhere the statistics on which commentators base their conclusions on this front are themselves flawed) provides no reliable evidence: free tenants need more capital and hence have likely been more successful in prior careers so the comparison is tainted by an obvious sample selection problem.

BIS has offered no coherent reason as to why the pubco should raise rents disproportionately

129. The OFT has noted that there are multiple pubs owned by multiple operators, and that there is no reason to suppose that there is a risk of consumer detriment. "The government is therefore intervening not on the grounds of competition but on grounds of fairness for tenants."
130. This bypasses a key point. If there is no market power in pubcos, why does competition between pubcos not ensure fair deals?
131. The Consultation talks of pubcos inflating projected turnovers to justify rent rises. This is irrelevant.
132. The pub owner does not have market power according to the OFT, and "ordinary" rent review provisions apply. Ignoring for the purposes of economic argument the fact that it is the provisions of any lease which determine when and how rents are reviewed, a pub company would only seek to increase the rent if:
 - 132.1 it was confident that tenants would remain viable; or
 - 132.2 that there was an elastic supply of reasonably efficient publicans; or
 - 132.3 there existed non-pub uses of the property yielding higher return.
133. BIS has offered no coherent reason as to why a pubco should raise rents disproportionately.

The assertion that no pub should become unviable as a result of the policy is fundamentally flawed

134. BIS claims that *"it is our assessment that no pubs should become unviable as a result of this policy, as profit is only moved from one party to another. If a pub had been viable prior to the policy, the tenant and pub company could reach a commercial negotiation that maintained the pub's viability."*
135. This paragraph, which is pivotal to the entire policy, appears fundamentally flawed.
136. First, the entire policy's purpose is to deny a commercial negotiation by imposing an arbitrator, so its premise is not satisfied.
137. Second, it is accepted by all that pubs are going out of business regularly and routinely. Accordingly, provided that the intrinsic profitability of pubs is on a continuum (which is surely likely to be the case), then of the set of currently viable pubs, around 1,000 (the 2% expected to close in the next year) must surely be on the margins of viability etc.
138. So if the transfer applies to any of the marginal pubs it will accelerate their going out of business. To simplify the example, a transfer of £100m over 25,000 pubs is £4,000 per pub so if applied uniformly it will lead to the closure of all pubs within £4,000 of non-viability.
139. By contrast, if the policy is applied to viable pubs, its purpose here will be simply to make unnecessary and unwarranted transfers to viable publicans that do not need the transfer to remain viable and to remain open.
140. Third, there will be viable pubs with underperforming (e.g. lower quartile) tenants. The £4000 transfer will also keep in business some less efficient publicans who would otherwise be replaced by more efficient publicans. By lowering the average efficiency of publicans (and undermining the natural ebb and flow of publicans), this will again shift the frontier at which pubs become non-viable, leading to further closures.

BIS seeks in fact to impose sub market rent regulation

141. Paragraph 4.15 of the Consultation admits that 500 pubs is roughly 1% market share, and says that this restricts the scope to *"those businesses who have the greatest market power"*.
142. BIS has already acknowledged that the OFT says pubcos (even with 15% share) lack market power yet BIS says businesses with 1% possess the greatest market power. This paragraph is not obviously defensible, and BIS conclusion in paragraph 4.16 that its response is proportionate falls with it.
143. Paragraph 4.24 says *"if the code only covered tied pubs there would be nothing to stop a pub company from removing the tie and immediately increasing the rent to well beyond market rent values"*. This paragraph again lacks coherence. If, absent market power of pubcos, rent in any sector were raised above the market value tenants would not pay it, by definition of the market value. Moreover, BIS ignores the factual reality of the leases which bind pub companies and tenants. These include express mechanisms which determine when and how the parties must engage on rent reviews, so that the pub company has no power to raise rents at will. This policy is actually about seeking to impose sub market rent regulation, with all of its negative consequences.

D. Why pubs fail and what can be done to help them

Government has not presented any evidence that it is the behaviour of certain pub companies in relation to their tied estates which cause many pubs to fail. But pubs are closing. Why do pubs fail? The reasons are many and various and they cannot be put at the door of the pub companies. In times of recession the socio-economic challenges are ever more intense. Some individuals are not suited to the job of publican and some do not have the business acumen to make it work. Where those factors coincide the pub will not flourish.

What can be done to help pubs and publicans? Government does right to focus on the struggling tenant. While the proposed Statutory Code would do little to enhance the fortunes of a struggling tenant who has the capacity to be a reasonably efficient operator, pub companies are already taking steps to help them. The Industry Framework Code and the voluntary review bodies PIRRS and PICAS are working. They are flexible and responsive to changing tenant needs and they put pressure on pub companies. If they are not as well known as they should be, so that tenants are not deriving as much benefit from them as they could, Government with industry's help can easily mend that with awareness campaigns, websites, roadshows and enhanced helplines. Pub companies are already helping tenants - we explain in broad terms below how they do that.

The real reasons pubs fail

144. Almost all retailers are feeling the effects of the recession and pubs are no exception. Thousands of small and medium sized enterprises have suffered and the retail sector has been hit hard with town centre shops closing at a regrettably high rate as social trends shift to out of town shopping centres and online shopping.¹⁸ On average, 14 town centre shops a day were shut by store chains last year.¹⁹
145. *"Overall pub numbers have been in steady decline since at least 1980."*²⁰ CAMRA's most recent survey indicates that pubs are closing at a rate of 26 per week across the UK, an increase from 18 per week in 2012.²¹ CGA Strategy's 2011 survey showed that 6.3% of pubs in the tied lease estates closed over the 3½ years to June 2011 compared with 9% of pubs in the free-of-tie estates. The proportion of pubs closing in the free-of-tie estates is around 40% greater than in tied estates, which is likely to be a result of the business relationship that exists between landlord and tenant in the tied sector as opposed to the arm's length commercial relationship in the free-of-tie sector.
146. Campaign groups and certain MPs are attempting to use pub companies as a scapegoat for the continued decline in pub numbers. This is difficult to reconcile with widespread acknowledgment, including from the Government itself in the Impact Assessment and Consultation paper, that the decline is a result of a vast range of factors including:
 - 146.1 the global recession²² which has affected many small businesses across the country;
 - 146.2 the demise of the high street;²³
 - 146.3 the difficulty in securing investment and bank lending;

¹⁸ The Government has backed a scheme to transform Britain's high streets known as the Portas pilots. <https://www.gov.uk/government/policies/improving-high-streets-and-town-centres>

¹⁹ <http://www.bbc.co.uk/news/business-22708497>

²⁰ Paragraph 15 of the Impact Assessment.

²¹ CGA CAMRA Pub Tracker statistics http://www.camra.org.uk/article.php?group_id=9771

²² Paragraph 3.17 of the Consultation paper; paragraph 1 of the Impact Assessment

²³ The Portas Pilots; <https://www.gov.uk/government/policies/improving-high-streets-and-town-centres>

- 146.4 above average increases in alcohol duty;²⁴
- 146.5 the increasing bureaucracy and cost of regulation faced by pubs (to which this Consultation does nothing to avail, despite the introduction of a Deregulation Bill in the Queen's speech);²⁵
- 146.6 the introduction of the smoking ban in July 2007;²⁶
- 146.7 the increasing cost of utility bills;
- 146.8 increasing business rates;
- 146.9 improving home entertainment;²⁷
- 146.10 changing social trends towards drinking and entertaining at home;²⁸
- 146.11 cheap alcohol available in supermarkets;²⁹
- 146.12 the growth of large branded managed pub chains;
- 146.13 competition from branded and popular restaurants; and
- 146.14 poor weather.

Enterprise Inns tenant: *"we would like to point out that there are far more serious market forces effecting the industry such as (i) supermarkets selling alcohol at irresponsible prices which has affected the on trade and most definitely the off trade; (ii) the smoking ban which killed the community local pub market and seriously affected the gaming machine industry and (iii) although now abolished, the duty accelerator certainly hurt the margins within the pub sector especially tied tenants."*

- 147. Sensationalist headlines over the last few years have only served to increase the difficulties faced by the pub industry by discouraging potential new entrants and investors. In particular, the press has highlighted the number of pubs that are closing without mentioning the number of pubs opening (which are often associated with large branded operators and can have up to 10 times the capacity of a pub which closed) and the alleged poor treatment of tenants. The opening of a modern large capacity venue can itself have a detrimental impact on smaller pubs in the area. People will only buy into an industry that is stable and likely to grow. Investment is notoriously driven as much by sentiment as by hard analysis. Sensationalist headlines are counterproductive. As are publicity stunts by certain individuals and pressure groups who are misleading underperforming tenants into believing that their future prosperity lies in achieving

²⁴ Paragraphs 1, 16 of the Impact Assessment; In January 2011 JD Wetherspoon said it would scale down its 2012 expansion plans due to tax increases, which have contributed to less beer being drunk- http://www.ft.com/cms/s/0489096c-3f76-11e1-8809-00144fcab49a,Authorised=false.html?_i_location=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F0489096c-3f76-11e1-8809-00144fcab49a.html&_i_referer=http%3A%2F%2Fwww.ft.com%2Fcms%2Fs%2F0%2F2ac35c2e-45e1-11e1-9592-00144fcabdc0.html

²⁵ <http://www.morningadvertiser.co.uk/content/view/print/721284>

²⁶ Paragraph 3.17 of the Consultation paper; paragraphs 1, 16 of the Impact Assessment

²⁷ Paragraph 3.17 of the Consultation paper; paragraph 1 of the Impact Assessment

²⁸ Paragraph 3.17 of the Consultation paper; paragraphs 1, 16 of the Impact Assessment

²⁹ Paragraph 3.17 of the Consultation paper; paragraphs 1,16 of the Impact Assessment

a £4,000 rent reduction, as opposed to driving sales, growing market share and building the business while controlling variable costs.

Government has realised that some pubs cannot be economically viable

148. The Government has realised that some pubs are simply no longer economically viable as business enterprises. As recently as 6 June 2013, Prime Minister David Cameron pledged a new “community assets fund” of £250m for local communities to buy pubs and shops. He recognised that some of the funding will go into grants to support projects which cannot be expected to turn a profit.³⁰

Some pubs close because they are poorly run

149. In addition to the various factors outlined above, it is a fact that some pubs close because they are not being properly run and have been allowed to deteriorate into a very poor condition. As one publican put it: “*I know it's tough out there, but a lot of pub closures are due to standards dropping*”.³¹ Many customers will simply choose not to frequent run down pubs. “*The more diplomatic say establishments fail because they do not meet customer needs. Others less subtly argue it is because they are "just crap"*”.³² It is not commercially sensible to sustain a pub business for emotional or sentimental reasons, as is often proposed by campaign groups and ill informed commentators. Some pubs may be inherently unviable and in practical terms have reached the end of their economic lives as public houses. Pub companies can assist their tied publicans to exit their lease without continuing liabilities if a pub becomes unviable. Those publicans may then seek more stable employment and accommodation elsewhere. The same cannot be said of publicans of free-of-tie premises who have often personally guaranteed their business and therefore have a lot more at stake.

Socio-economic and demographic factors

150. There are economic, social and demographic reasons why pubs can become unviable. Pubs become economically unviable when running costs outweigh profits. This can happen as a result of a variety of factors such as high taxes, poor management, competition from other pubs, competition from supermarkets or location e.g. in a diminishing high street.

Enterprise Inns tenant: “*I had to close an Enterprise Inn twelve months ago despite Enterprise offering me rent free and free of tie beer, as the local community just didn't support their village pub and now all I read about in the local CAMRA magazine is how the poor villagers have lost their local when half a dozen of them only used to use the pub on a Friday night.*”

151. Pubs can also become socially unviable. A recent example of this was an Enterprise Inns' pub which was subject to a barrage of anti-social and criminal behaviour. We disposed of our interest in the freehold of the property in March 2013. Enterprise Inns is aware of uninformed comments about that particular pub being made by certain MPs during a parliamentary debate on 23 May 2013 and has requested a formal correction of those comments.
152. Pubs can become unviable for demographic reasons. There are certain areas of the UK where pubs have become less popular. Social trends are also changing which is only exacerbated by

³⁰ <http://www.telegraph.co.uk/news/politics/conservative/10102846/David-Cameron-pledges-250m-for-local-communities-to-buy-pubs-and-shops.html>

³¹ Mark Hopkins <http://news.bbc.co.uk/1/hi/business/8161793.stm>

³² <http://news.bbc.co.uk/1/hi/business/8162943.stm>

supermarkets offering very cheap alcohol prices. Over recent years there has been a decline in the high street with retail shops, churches and post offices all closing. Pubs are no exception.

Pub company investment

153. That said, for pubs that are viable, the industry badly needs investment at a time when bank lending for small businesses has virtually disappeared. It is the pub companies who continue to invest in their pub estates during the difficult times because their interests are aligned with those of their tenants – pub companies want their publicans to succeed. This year Enterprise Inns will invest c.£60 million of capital expenditure across its portfolio for actions such as structural repairs, extensions, new toilets and external enhancements, to name but a few. In addition to the £60 million capex investment, Enterprise Inns spends approximately £5-6 million per year on repairs and maintenance in our pub estate. Enterprise Inns would be forced to reconsider such investment if Government's proposals were implemented.



154. It is misleading, disingenuous and simplistic to promote the idea that an estimated transfer in value of approximately £4,000 (gross) per pub will improve the situation for struggling tenants. What evidence does the Government have to suggest that tenants would use this extra £4,000 (gross) to invest in their pubs?
155. Pub companies as a whole invest some £265 million in capital a year into their pub estates. This is what drives and maintains improvements and the attractiveness of pubs. This in turn results in substantial funds being spent by pub companies in the construction industry. Pub companies will no longer be in a position to do this if the proposals are implemented. On a simple indicative averaging of capex investment, this would mean a significant loss for Enterprise Inns' tenants alone of approximately £10,000 of investment per relevant pub per year. Assuming that tenants were to make the same investments themselves, this would, even with the proposed transfer in value result in an overall cash flow shortfall of between £6,000 - 7,000 per year for the affected tenant.
156. The unintended consequences of the proposals have not been fully considered by Government. They could have a very serious impact on the industry. Foreseeable consequences include pub and brewery closures, lack of investment, reduction in consumer choice, job losses, a fall in tax revenues and potentially the end of a great system which offers a low-cost, lower risk business opportunity for aspiring publicans, fully supported by the skills and resources of a large organisation. Such economic losses bring with them less quantifiable but no less important consequences for social infrastructure, social cohesion and the community.

Enterprise Inns tenant: *"Upon embarking into the Pub trade some nine years ago it is fair to say I have seen radical changes in a relatively short period of time what with an overhaul of licensing laws, supermarkets offering extremely cheap (and some would say irresponsible) prices on alcohol, a vast increase on utility costs, large increases on Sky television costs, and generally more competition across the board in the food and entertainment industry. Throughout my time in the trade I have had excellent guidance and assistance from Enterprise Inns. Working alongside a professional regional manager I have found every stage of any process open, honest and realistic. Aware of difficulties in trade I have had my rent reduced on two occasions by Enterprise and a new lease completed to my personal liking. Enterprise have also helped out on different occasions with contributions to charity events, links to various service providers and an overall willingness to help when required. This system has proved successful for me as the Pub has seen annual increases in trade three years running"*

E. Who would benefit from a Statutory Code?

It is not the struggling tenant who will benefit from the proposed Statutory Code. The lobbyists shout loudly but their cries that “something must be done” appear mostly protectionist of themselves. They bring no specific proposals. There is no indication that they understand the inherent flaws in Government’s policy. Government should ignore the noise and focus on the struggling tenant. It is the struggling tenant who should be at the heart of Government’s efforts

Who will benefit from the proposed Statutory Code?

157. The Statutory Code as drafted does not assist struggling tenants. It does not even focus on struggling tenants. Instead it focuses on pub companies with more than 500 tenanted pubs. The Code will create a two tier system – one set of rules for tenants of pub companies with more than 500 pubs and another set for all other tenants (including all small retail tenants and small businesses). This makes very little sense given that struggling tenants exist across the board, regardless of lease and landlord type.
158. Those who will benefit most from the proposed Statutory Code are a handful of influential publicans and pressure groups/trade associations whose members operate (sometimes several) very profitable pubs. Instead of taking steps to address the challenges faced by those struggling tenants, including promoting and raising awareness of the newly updated robust Industry Framework Code (IFC), which has in a relatively short period of time improved the position of tied tenants in the industry, the Government is proposing to introduce an expensive and misconceived statutory system which will profit a minority of operators who have continually lobbied Government for reform but yet already run very successful pubs.

Sound and fury – the lobbyists

159. The same publicans and pressure groups have been at the forefront of a campaign to discredit pub companies for many years despite the fact that many of them/ their members either took advantage of a tied lease or tenancy agreement with a pub company (with very little initial capital investment) at the outset or, after having made a carefully thought out commercial decision, decided to purchase an assignment of a tied lease from a previous publican (not from Enterprise Inns or another pub company) (and presumably after having performing detailed due diligence and financial analysis of the business).

Enterprise Inns tenant: *“Naturally, I would be delighted if my rent was lower and the beer was cheaper – who wouldn’t? But, I accept the terms of our contracts as we’ve agreed them and have been able to maintain our business throughout some demanding economic times.”*

160. Despite their ability to shout the loudest, the lobbyists are not representative of the interests of the majority of tied tenants in the industry. They appear to fall into three categories (i) successful operators - out for personal gain (ii) inefficient/unsuccessful operators - out to blame pub companies for their business failings; and (iii) those who have been misinformed and misled by groups (i) and (ii).

Enterprise Inns tenant: *"With the economy also starting to falter within a couple of years many operators were caught paying far too much money for assignments of leases - in some cases hundreds of thousands of pounds, remortgaging houses using savings or taking loans. The pubcos were powerless to stop them - the economy and individuals with rose-tinted glasses have led to many pub failures"*

161. It is unclear how the Government will ensure that there is no double counting of any evidence put forward by certain pressure groups, as certain of their members (namely the lobbyists) will likely contribute to the Consultation responses of each one. Many of the lobbyists are members of more than one campaign group. Moreover, the Independent Pub Confederation ("IPC") is an umbrella body bringing together campaign groups representing publicans, consumers and small breweries and its members include the ALMR, Guild of Master Victuallers, the Fair Pint Campaign, the Federation of Small Businesses, Justice for Licensees, CAMRA, Unite the Union and the Society of Independent Brewers.
162. Enterprise Inns has 896 pubs run by multiple operators. Multiple operators are usually very astute business persons who have no need of a statutory regime. Many of these multiple operators have built up a successful business and willingly paid large premiums to take over a tied lease.

Enterprise Inns tenant: *"Our company has been very successful thanks to a good working relationship with Enterprise and because I believe our retail offer has looked to the future. Enterprise has provided us with good properties where we have been able to put our retail skills to work. In a complex business environment where parties willingly contract, a landlord like Enterprise Inns can only take so much of the blame when things don't work out. We have entered into a contractual relationship with Enterprise three times - and have made good profits at every site, each and every year."*

163. The ALMR, which represents multiple operators of pubs among other retail businesses, has been very vocal in lobbying for statutory intervention in the pub industry, giving evidence to the various BIS select committees and even being called to give evidence on 11 June 2013 on the current proposals. We do not understand why publicans who are ALMR members require the protection of a statutory regime.
164. Our records show that we currently have 117 pubs run by 31 ALMR members. The current average annual rent in the 104 tied pubs let on substantive agreements to ALMR members is £52,000. We estimate average profits to be in the region of £55,000. A highly respected operator in Enterprise Inns' estate who is also an ALMR member recently acquired two further Enterprise Inns pubs at assignment premiums of £325,000 and £270,000 respectively in the full knowledge and understanding of the tied obligations contained in those leases. These publicans are not struggling. It is no secret that ALMR members would enjoy a significant uplift in profitability and assignable value if the Statutory Code were enacted. This cannot be what Government intends.

Enterprise Inns tenant: *"Being tied to the draught beers, but paying a lower rent suits us perfectly, as we have adapted to this by expanding our food operation and increasing our wine sales, without aggravating the landlord. Of course it would be ideal if we could be free of this tie, and pay a lower rent but we all have to accept that in our relationship there are no winners and losers, we all have to be the winners!"*

165. Certain lobbyists, having got their foot in the door of a successful pub at the expense of the pub companies, now want to change the commercial arrangement they entered into, regardless of the legal implications. They are looking to change the system for personal gain and not to assist struggling tenants or to benefit the industry as a whole.

Enterprise Inns tenant: *"Please do not let a lot of ill business minded publicans who simply cannot think outside the box spoil things for the ambitious entrepreneur! It is a pity other big companies do not have models that allow people who would not normally be able to start up business do just that!"*

The pub market works well for consumers

166. Some MPs appear fundamentally to misunderstand how this industry operates. Without fully understanding the complexity of the technical business relationship which exists between pub companies and tenants, it is easy for the campaigner to persuade an MP that one pub is paying more money for its beer than another and that it is "unfair". The reality is much more complex. The OFT performed a detailed and thorough investigation into the industry in 2009 and 2010 and found that the industry operates competitively and in the interests of consumers. Moreover, the OFT also concluded (see in particular paragraphs 5.157-8 of the 2010 final CAMRA decision) that there was no significant difference between the costs to an individual publican of operating under a tied agreement as opposed to free-of-tie.
167. The OFT has found on multiple occasions that this industry operates well and to the benefit of consumers. Statutory intervention for the wrong reasons could prove disastrous. The only beneficiaries are likely to be wealthy and already successful (multiple) operators, who would like to use their buying strength and business acumen to build a successful free-of-tie business (but who originally chose to enter into a tied lease with a pub company). Enterprise Inns has no doubt that if the Government's proposals come to fruition the genuinely struggling tenant will continue to struggle and the pub industry will continue to decline.

Enterprise Inns tenant: *"I am tired of the pubcos getting all the bad press, nothing is perfect but at the end of the day they, like myself are in business. I really do think it's about time that those in power start taking responsibility for their actions instead of constantly pointing the finger at others and passing the buck. Without any doubt the decline in pubs is due largely to governments of all parties who have inflicted criminally high taxes, legislation, V.A.T so on and so on. "*

Government should really focus on the struggling tenant

168. If after the Consultation the Government maintains its position that statutory intervention is required, it must establish clear criteria to define a “genuinely struggling tenant”. The genuinely struggling tenant must be distinguished from the underperforming or inefficient tenant who has simply failed to make a success of their business through their own lack of business understanding and engagement.
169. All landlords should have to adhere to rules on the treatment of genuinely struggling tenants, if any exist within their portfolio. The simplistic threshold put forward in the Consultation paper that struggling tenants are those who are earning less than £15,000 per year is not an appropriate nor accurate measure. First, this figure comes from an IPPR survey which is not independent. Second, it is unclear whether this figure is exclusive of accommodation and other benefits which may be enjoyed by certain tenants. Third it does not take into account the geographical differences in earnings across the UK. The figure is far too simplistic, and has not (to our knowledge) been subject to any scrutiny, verification or evidence base other than the responses provided to a telephone survey.
170. The IPPR itself relies on CGA figures. We have only recently learned that the question asked of tenants in such surveys is “*approximately what level of personal income/profit do you earn from your pub*”. There appears to have been no attempt to clarify exactly what the tenant declares and it is up to each individual to interpret the question as meaning his gross or net income, or his profit, or his disposable income after expenses, or something else, so that the survey cannot compare like with like. It is extraordinary to discover that this is the question underlying statistics presented to and by BEC since 2008. These are misconceptions relied upon for years. The question is clearly flawed. No evidence adduced from it can be reliable, as we discuss further in our response to Question 1.
171. RICS should be asked to establish criteria to define a genuinely struggling tenant related to their net profits after all benefits including (where relevant) accommodation have been accounted for.
172. By focusing and campaigning for reductions in wet and dry rent, the lobbyists have misled others in the industry and several MPs to believe that future industry prosperity lies in a rent reduction rather than encouraging and assisting publicans to build a successful business. If the Government wants to make a real difference in this industry it must encourage the latter and ensure that:
 - 172.1 investment into pubs continues;
 - 172.2 publicans are informed of the benefits provided to them by the Industry Framework Code and the availability of the PIRRS and PICAS systems;
 - 172.3 well trained publicans are encouraged to push for higher standards in their pubs;
 - 172.4 opportunities in the industry, qualifications and apprenticeships are promoted;
 - 172.5 supermarkets price alcohol responsibly;
 - 172.6 banks and building societies are encouraged to use available SME schemes to enhance funds available to publicans; and

172.7 increased tax breaks are offered to struggling tenants such as the recently welcomed £2,000 break in national insurance tax³³.

³³ According to an E&Y report commissioned in 2009, in total the UK Government raises £9.2 billion from the production and sale of beer, £3.2 billion of which is excise duty. The tax burden placed on the industry by the UK government is huge. 40 per cent of all European beer taxes are collected in Britain alone.
http://www.brewersofeurope.org/docs/flipping_books/contribution_report_2011/index.html#/1/zoomed

F. How Government can help pub tenants

How can Government help tenants? Pub companies have a range of targeted support. We explain (with evidence) how Enterprise Inns supports tenants and how its efforts are continuing to develop.

Pub companies support their tenants – the example of Enterprise Inns

173. We understand that the ultimate aim of Government is to help and protect struggling tenants. Enterprise Inns fully supports that aim and endeavours to provide meaningful support to its publicans. Our employees have worked hard to help publicans through this difficult time which has been exacerbated by the introduction of the smoking ban followed by the global recession, cheap alcohol prices in supermarkets, changing social trends and four wet summers in a row.

Enterprise Inns tenant: *"Throughout the Tenancy, Enterprise have provided constant support. They offer a number of schemes that benefit the business, and provide free courses developing skills within the industry. There is also a very personal touch, which for a business of this size is surely rare. My area manager is a regular visitor to the pub, and provides great support whenever needed. He champions what we do, which instils a great deal of confidence in us, and our business too as we go forward."*

174. Enterprise Inns listens to its publicans. We always respond to communications from publicans or their representatives e.g. MPs. Enterprise Inns has received 87 letters from MPs³⁴ over the past three years covering a vast range of subjects including, amongst other things, applications for grant aid, tenant debts, repairs, vacant pubs, offers to purchase freehold, rent reviews, squatters in a pub, prices, disturbances and pub closures. Enterprise Inns has responded to and will continue to respond to every letter.

Enterprise Inns tenant: *"We have enjoyed, and benefitted from, a very professional and supportive relationship with Enterprise Inns which we would not have received from a free of tie landlord or indeed owning our own freehold. During difficult trading periods we would have struggled to survive without their support and flexibility"*

175. During the past four years, across the Enterprise Inns' estate of some 5700 pubs in England and Wales,³⁵ our average like for like profit per pub has decreased by 12% - an average of approximately £9000 per pub - as we have systematically reduced rents and increased discounts (discounts on the cost of a barrel of beer have increased 76% from £37 per barrel to £65 per barrel) to help our tenants compete in a world of rising costs and weak consumer confidence.

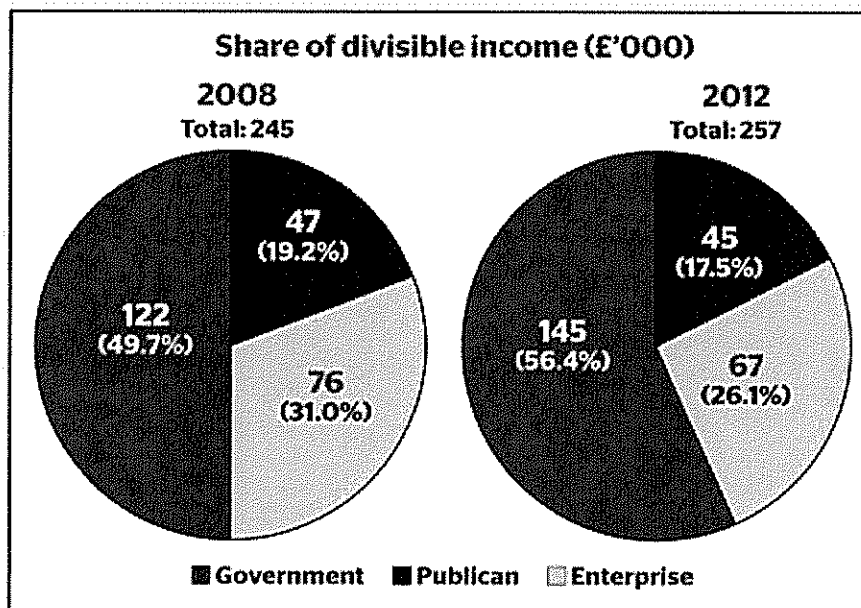
Enterprise Inns tenant: *"Previously, the rent could only increase, but the pubco have changed, so there is flexibility, which we appreciate – and as a result of that our rent has decreased, in the recent review. Furthermore, during the period of harsh economic situation, Enterprise Inns did help our business in couple of occasion by temporary lowering our rent and increase discount on*

³⁴ 71 letters were directly from MPs and 16 letters were from other individuals but copied to one or more MPs.

³⁵ The number of pubs in the Enterprise Inns estate has diminished from c. 7,700 in 2008 to c. 5,500 in 2013.

the beer purchase."

176. Enterprise Inns' income statements filed with London Stock Exchange indicate that revenue has dropped by 21% since 2008 and operating profit has decreased by 36%. Profits have reduced as we have transferred value to our tenants to help them weather the difficult market and due to ever increasing taxes imposed by the Government where we estimate that almost £1 in every £3 taken across the bar goes to the Treasury.



Pub profitability and taxation

Source: Enterprise Inns

Average/pub (£'000)	2008	2012	Change (%)
Publican turnover	333	360	8
Publican discount (£/bl)	37	65	76
Publican gross margin	182	196	8
Gross margin (%)	54.7	54.4	(1)
Publican costs	(109)	(129)	18
Publican rental costs	(37)	(32)	(12)
Living allowance*	10	10	-
Publican profit**	47	45	(4)
ETI profit	76	67	(12)
Government total revenues	122	145	19
Analysis of Government total revenues			
VAT & duty (total to the Government)	87	107	23
Business rates	10	12	20
Employment & company taxes	25	26	4
	122	145	19

*benefit of domestic accommodation

**incl benefit of domestic accommodation

36

³⁶ <http://www.morningadvertiser.co.uk/General-News/Enterprise-claims-increased-taxation-is-biggest-threat-to-tenant-profitability>

177. At the same time brewers have continued to raise prices to offset increases in the cost of raw materials and transport but we have not passed on the full extent of those price increases to our publicans. We increase our prices yearly in line with increases imposed upon the market by brewers. We then pass on those price increases to our publicans with various levels of discount. Over the past 4 years brewery prices have increased by 27% and our discounts to publicans have correspondingly increased by 76% from £37 per barrel to £65 per barrel mitigating the cost of the market price increases for our tenants.
178. Paragraph 22 of the Impact Assessment recognises this: *“While the OFT did find beer prices to be higher in tied pubs, it considered other factors likely to contribute to this such as higher rental costs due to more urban locations. Furthermore they found “Large pub companies’ gross profit margins have decreased between 2005 and 2010 and consistent with this, prices charged to lessees have increased at a lower rate than the prices charged to pub companies by brewers, suggesting that pub companies have not passed on the full extent of price increases at the brewing level of the supply chain”. Across the wider pub market, the OFT found “in the last 10 years, beer prices in pubs have not increased at a faster rate than service sector inflation”.”*³⁷
179. At the height of the recession, Enterprise Inns ran a price freeze on five major brands from February 2009 to July 2009 (at a cost of £700,000 a month). At the same time we were spending approximately £1.4 million a month on financial assistance to help publicans in distress.³⁸

Enterprise Inns tenant: *“one of our pubs has suffered significantly in the economic downturn since 2008. The pub in particular benefited from lunchtime and early evening trade from local offices. In 2008-09, many of those offices were vacated and remained empty for several years. Furthermore, the road outside our pub was dug up 7 times in 18 months causing general noise, dirt and disruption to our business – not helpful when trying to attract a declining local clientele. Enterprise have supported us during this time through a combination of temporary reduced beer prices and temporary reduced rent. This has allowed us to continue to support our business despite reduced turnover”*

180. One of the reasons for the significant drop in Enterprise Inns’ profits over the last four years is because we have provided targeted discretionary support to struggling publicans in the value of £57 million. We have also invested hundreds of millions of pounds to improve our pub estate. At the same time Enterprise Inns has met all its debt obligations. To fund this transfer in value to tenants, Enterprise Inns’ shareholders have not received a dividend since financial year ended 30 September 2008 but appreciate and understand the need to support our publicans and keep pubs open. This is the sort of support that struggling tenants need. Government should address the main issues. The proposed Statutory Code will not rescue tenants.

Enterprise Inns Investor: *“Where there are aligned interests, the pub companies have put their money on the table to support the tenant at great short term cost to their shareholders and in the longer term interest of all parties. In the past 5 years, for example, Enterprise Inns has invested over 25,000 GBP per pub in its pub estate. This figure will rise if the industry operates in a stable*

³⁷ OFT decision and paragraph 22 of the Impact Assessment.

³⁸ See <http://www.guardian.co.uk/business/2009/may/12/enterprise-inns-purge-struggling-landlords>

economic and regulatory environment

181. The following table, which has been reproduced from Enterprise Inns' audited annual report, demonstrates how seriously we take the need to invest into our estate. In the five recessionary years to 2012 we completed £306,000,000 (three hundred and six million pounds) of capital investment into our estate, and incurred a further £24,000,000 (twenty four million pounds) on minor maintenance expenditure.

	2012	2011	2010	2009	2008	Total
Capital investment into pubs	£61m	£71m	£54m	£52m	£68m	£306m
Maintenance into pubs	£6m	£5m	£5m	£4m	£4m	£24m

182. We expect to invest £60,000,000 (sixty million pounds) into our estate in 2013, which will include between 800 and 900 exterior refurbishment projects. We have already completed 400 schemes, and we will continue with real pace through the summer months, working hard to make a difference to the performance of our estate, and the livelihoods of our publicans.
183. Finally, to underline our commitment to building a quality estate we confirmed in November 2012 that we are commencing a three year programme to invest £180,000,000 (one hundred and eighty million pounds) into our estate, to help improve the trading performance of the business. This will have to be put under review in light of the Consultation.
184. Enterprise Inns is not letting anyone down. We are working hard to support our publicans, service our debt holders and pay our taxes. It is our shareholders, the main risk takers, who are suffering by receiving no return on their investment.
185. During this same period which has seen our profits decrease by 12% and, we estimate, our publicans' profits decrease by around 5%, we estimate that the Government's share of takings has increased by 19%, due to increases in VAT, beer duty (42% in four years) and business rates. While Enterprise Inns is pleased that the Chancellor has finally abandoned the Duty Escalator and proposed a £2000 National Insurance break for small businesses from April 2014, the fact is that much damage has been done to the pub industry during these four recessionary years since the smoking ban was imposed and that damage is not the fault of large pub companies.

Enterprise Inns' contribution to UK economy

186. Enterprise Inns employs approximately 500 people and supports thousands of publicans across England and Wales to run their own business with low entry costs and shared risk.
187. Enterprise Inns suffers approximately £35 million annually in corporation tax. We have chosen to be and remain a UK company, creating jobs around the country and in particular at our head office in Solihull. We have not chosen to structure ourselves offshore so as to limit our tax contribution to the UK economy (unlike many other large corporations currently operating in the UK marketplace).
188. Enterprise Inns has contributed to the UK economy for almost 22 years. Over the past five years Enterprise Inns has paid approximately £250 million in corporation tax and employer national insurance contributions.

189. Despite the rate of closures, brewing and pubs are still key contributors to the national economy with a Gross Value Added of £19.4 billion, generating tax revenue of more than £11 billion as at September 2012.³⁹ Further, whilst the level of employment is falling, the sector still supports some 950,000 jobs, highlighting the value of the pubs sector nationally, and its importance to the economy locally.⁴⁰

Enterprise Inns tenant: *“one of the great things is that in many cases we have been able to take on pubs that were either closed or due for closure and turn them around and as a consequence have managed to employ almost 80 people in our local area. Whilst I am aware that this is a small amount given the huge amount of unemployed at the minute but it is definitely a head in the right direction”*

Shareholders and bondholders

190. There is a fundamental misconception in the Consultation paper that pub companies are taking an unfair share of the reward from the tenant/pub company relationship. The last dividend paid to Enterprise Inns’ shareholders (which range from employees to large pension funds) was the final dividend for the financial year to September 2008. Since then, as we have described above, Enterprise Inns has diverted significant financial resources to support its publicans.
191. Despite the drop in profits over the past five years and the slurs of various campaign groups, Enterprise Inns has respected its debt holders, many of whom are UK pension funds, and has never defaulted on any of its debt obligations. Over the last 18 months the market price of our bonds has improved on average by some 40% and the vast majority of our bonds trade at or close to par, representative of market confidence of full repayment.
192. The net asset value per share has remained constant, maintaining the true value for our shareholders. Despite the upheavals in the global stockmarkets and fluctuations in share price, Enterprise Inns’ shareholders have continued to demonstrate their faith in the business, including through their support at AGMs.
193. Enterprise Inns’ investors have already, patiently, supported a transfer of value to publicans driven by the operation of the open market. At the same time Government has continued to extract maximum value during a difficult period for the industry. If the Government pursues an unwarranted further transfer of value from Enterprise Inns our shareholders may demand that the company minimise cash leakage through a strategy that could ultimately change the business model to that of a commercial property company. This would result in reduced headcount, the cessation of all support to publicans, minimal capital investment and the establishment of a real estate investment trust (REIT) which would result in no corporation tax. Enterprise Inns currently suffers about £35million annually in corporation tax.
194. Alternatively Enterprise Inns may be forced to oppose renewals of long leases under ground 30(1)(g) of the Landlord and Tenant Act 1954 and change its business to a managed operation. Or shift pubs to alternative uses and hence reduce the number of pubs in existence. Policy changes have knock-on or indirect effects as the system and players within the system re-equilibrate.

³⁹ <https://www.cambridge.gov.uk/sites/www.cambridge.gov.uk/files/docs/cambridge-public-house-study.pdf>

⁴⁰ <https://www.cambridge.gov.uk/sites/www.cambridge.gov.uk/files/docs/cambridge-public-house-study.pdf>

Enterprise Inns tenant: *"please, if you are serious about saving our pubs and not only my way of life, but an institution which is at the very core of the English way of life. Then stop blaming and punishing the Pubcos, The Pubs, the Landlords etc"*

195. As a premium listed company Enterprise Inns has many influential investors located all over the world. We have written to our major shareholders to inform them of the Consultation process and have invited them to respond.

Enterprise Inns Investor: *"The proposals to change the beer tie to a free of tie system displays a patent lack of understanding of the way any rental relationship works. The pub tenant pays rent through a combination of a traditional fixed rent and a variable wet rent. This aligns the interest of the publican and the landlord. If volumes rise both benefit and if volumes fall both suffer. The variable wet rent protects the tenant in tough times by allowing some flexibility in what is paid to the pub owner. If the wet rent relationship is replaced with a free of tie relationship, the result will be an increase in the fixed rent by the pub owner to compensate for the missing variable rent. There will not be any transfer of value to the publican. Instead the publican will lose the protection of a key variable component to the rental cost. In the case of the weaker publicans highlighted frequently in the Committee's reports, this would be a catastrophe amidst a recession like that recently experienced"*

196. A number of our shareholders are major UK pension funds. The Government's proposals may severely damage the investments made by those pension funds which could have serious repercussions for individuals. This is another unintended consequence of the proposals which does not appear to have been considered at all by Government.

Training and supporting our managers

197. Enterprise Inns employs approximately 500 people in a range of roles across the business. We are not a faceless company. In November 2012 we were awarded "Gold Status" in the "Investors in People" award by the UK Commission for Employment and Skills which is the highest achievable standard. Before that, since 2010, Enterprise Inns held "Champion Status".



198. We employ regional managers to support publicans across our pub estate. The regional managers deal with the operational side of matters and the relationship with the tenant. All regional managers are currently engaged in the BII Accreditation course and all will have completed the course by the end of 2013. All our regional managers are experienced and over the last 11 years, we have had 3 winners and at least 16 finalists of the ALMR BDM of the year award. In addition Enterprise Inns employs Property Managers to deal with issues regarding repair and condition of the properties within the pub estate. Our Associate Regional Manager Programme (akin to an apprenticeship) won a National Industry Training Award.

Support for our publicans

199. Enterprise Inns' employees work tirelessly with publicans across our pub estate to try to ensure that pubs remain open and viable for both parties. The level of support provided to publicans is estimated to cost Enterprise Inns approximately £68 million per year in SCORFA benefits and £60 million per year in investment into the pub estate.

Enterprise Inns tenant:

"Their Business Relationship/development managers are great. They act like an additional member of our business helping to advise & provide information based on their experience within the industry. Their knowledge & support is invaluable as in fairness it is in their interests that we succeed but the whole relationship feels more like a partnership than a landlord - tenant scenario"

200. We provide meaningful support to publicans in a number of different ways, for example through:

- 200.1 capital investment into pubs at a time when investment is unlikely to come from elsewhere;
- 200.2 requiring new publicans to undertake a compulsory 5 day training course on "Building Your Business"⁴¹ to ensure that they understand more about running a business before they invest and helping them run exceptional businesses;
- 200.3 promoting and providing access to external training programmes such as BII Pre-Entry Awareness Training (PEAT)⁴² which identifies the main issues which need to be considered and investigated before signing a pub tenancy or lease agreement including an awareness of the pub tied model, business plans, the different types of agreements available, rental calculations and the legal consequences of breach etc;
- 200.4 providing access to health and safety training such as "Level 2 Award in Food Safety"⁴³ and "Level 2 Award in Health & Safety";

Enterprise Inns tenant: *"If we were just paying rent to a landlord I would ask how much support would we get with things like; how do I set up in business, what accountant should I use, I have never run a business before where do I get my training and is it accredited?, how do I get my business insured and is it a good price, what about utility bills are they competitive how do I negotiate, what about staffing and the law who will help me with that and what about the big one, my business is in trouble please help me...and the list goes on. To me its simple Enterprise are able to assist in all of the above because they have a vested interest in making each individual business a success if they were just a landlord collecting rent and not a business partner I would ask the question how many more Public houses would have closed for good"*

⁴¹ See Enterprise Inns' Annexes to response to Government Consultation 2013, pages 53-54

⁴² See Enterprise Inns' Annexes to response to Government Consultation 2013, page 49

⁴³ See Enterprise Inns' Annexes to response to Government Consultation 2013, page 37

- 200.5 requiring incoming tenants to take independent advice before entering into an agreement with Enterprise Inns, to address as far as possible the concerns raised by the Government in terms of literacy and numeracy skills;
- 200.6 providing access to Enterprise Inns' regional and local team (and see above on their training and accomplishments).
- 200.7 providing various free workshops once a tenant has attended the Building your Business training which are designed to provide ongoing support and the tools, skills and confidence to help a publican run a great business e.g. "Profit Through People"⁴⁴, "Food Retailing, Education and Development"⁴⁵, "Winning in a Local Market Area"⁴⁶ and "Ways of Winning"⁴⁷;
- 200.8 access to our Empower communications platform including monthly newspapers⁴⁸, weekly emails, text alerts and our website which keep tenants up to date with industry news, commercial offers and events throughout the year. 75% of our current publicans are registered to use a special publican channel on our website and 52% actively use the website and service;
- 200.9 encouraging our publicans to become members of the BII or FLVA and covering their membership fee during the first year⁴⁹;
- 200.10 help with the cost of Cask Marque membership by covering 50% in the first year and 50% off renewal fees⁵⁰;
- 200.11 access to a bespoke support services package with includes the opportunity to sign up for health and safety compliance management, cellar cooling and heating maintenance schemes; and
- 200.12 help with marketing initiatives. Most recently Enterprise Inns has distributed thousands of "summer drinks" business support kits to help tenants with summer events⁵¹.

Enterprise Inns supplier: *"For a business of our size, it would not be possible to trade with individual landlords and pubs, on the scale that we do, without the infrastructure supplied by Enterprise Inns. Managing such a wide network of 'clients' would be unfeasible, in terms of logistics, personnel and the ability to generate a sustainable profit as a business. This includes factors ranging from communications, distribution channels, logistics and credit control – all of which are supported by Enterprise, and ensure that their estate of pubs receive well targeted and professional marketing support. You would need to question the ongoing sustainability of many local pubs without this access to quality marketing collateral, where economies of scale are of great benefit to the estate. In addition, it is not only the pubs that benefit*

⁴⁴ See Enterprise Inns' Annexes to response to Government Consultation 2013, page 39

⁴⁵ See Enterprise Inns' Annexes to response to Government Consultation 2013, pages 41

⁴⁶ See Enterprise Inns' Annexes to response to Government Consultation 2013, page 43

⁴⁷ See Enterprise Inns' Annexes to response to Government Consultation 2013, page 45

⁴⁸ See Enterprise Inns' Annexes to response to Government Consultation 2013, page 35

⁴⁹ See Enterprise Inns' Annexes to response to Government Consultation 2013, pages 53-54

⁵⁰ See Enterprise Inns' Annexes to response to Government Consultation 2013, pages 54

⁵¹ See Enterprise Inns' Annexes to response to Government Consultation 2013, page 51

from the infrastructure that Enterprise supply, but also the ability for numerous businesses such as ours to be able to trade in this environment. Having dealt with Enterprise Inns for many years, we have always found them honourable and have always been viewed as an important and valued part of our ongoing development as a business."

201. As well as the ever-increasing participation of publicans in our cost-saving service packages - statutory compliance, cellar cooling and boiler maintenance - we have developed new strategic partnerships to help our publicans by making their business even more competitive and attractive. For example, on the entertainment side this includes free, very high quality wifi, not only saving our publicans typically £500 per annum, but also helping them to grow customer footfall and dwell time; and a discounted Sky entertainment package (potentially saving each participating pub an average of £3,000 per year).

202. With the importance of a quality food offering now well established, we are also introducing a new partnership with Brakes which will bring cost savings, exclusive promotions, business planning, menu design and print services and other business tools to Enterprise publicans.

Enterprise Inns tenant: *"The pub could only open Friday and Saturday evenings as it was only viable to do so on them days and very little return was made. A lifeline was handed to me when Enterprise Inns offered a complete refurbishment that would not affect the rent I was paying and would put me through the necessary training that was needed at no cost to myself. When the refurbishment was complete I had great support to market my business and things changed almost over night when we reopened. It went from almost closure to taking in excess of £15k per week and has transformed my personal and business fortunes. This is something I could not of achieved had I been in a freehold situation and would for sure of gone out of business"*

203. Sometimes the traditional pub tenancy agreement may not be the best way to optimise the trading potential at a pub. We continue to evolve our "managed tenancies" as part of Project Beacon, where we have a much greater say in the operation of the pub. At 31 March 2013 we had 237 Beacon pubs and expect this number to stay around that level, as the number of new Beacon sites will be offset by existing Beacon sites transferring to traditional tenancy arrangements, if the trading potential is realised, and some disposals, if it is not.

204. We have a much closer relationship with publicans occupying Beacon sites and are closely involved in the publicans' operational decisions, retail offerings and retail standards. The sites might not otherwise be viable long term and this might be the last opportunity they get to remain as a pub – a chance to turn the pub around rather than face closure and disposal most likely for alternative use.

Enterprise Inns Beacon tenant *"My partner ran a pub about 20 years ago and I came from an admin and IT background. We had lots of skills but not much money. I emailed lots of breweries and pubs but there wasn't much around for our deposit. Then we found a Beacon site. We went to view it and we have not looked back since. Beacon helps people who wouldn't normally be able to start up their own pub business."*

Enterprise Inns in the Community

205. Enterprise Inns is involved in several charitable ventures and initiatives to the benefit of the industry and the wider community in both Solihull, where our head office is based, and other locations throughout the UK:

205.1 Community Hero Awards: Enterprise Inns has committed £1 million over a period of 10 years to search for publicans who make a real difference in their communities. The scheme was praised by Bob Neill MP in a letter dated 7 March 2012⁵².



205.2 Enterprise Inns supports "Pub is the Hub" which offers advice and support to licensees and rural pubs, PubAid and causes local to our head office in Solihull, which are specifically related to the interests of our staff e.g. national campaigns such as the Poppy Appeal (Royal British Legion), Comic Relief, Children in Need – as well as local causes such as the Ministry of Defence's Red Cross Support Services, Acorns Bereavement Services, Parkview Day Centre, Hunters Hill School, Salvation Army and Birmingham and Solihull Women's Aid.

205.3 Via our Empower newsletter and other promotional material distributed to our publicans, we have promoted the 'Buy Our Heroes a Drink' campaign by the British Forces Foundation.

205.4 Enterprise Inns is happy to support and be supported in developing our responsibilities by a number of external bodies. Some of these are: Carbon Trust, Drinkaware (of which Ted Tuppen is a founder and Trustee and to which Enterprise Inns donates approximately £100,000 per year), eTree, LowC, FTSE4Good, and RIGT.



FTSE4Good

⁵² See Enterprise Inns' Annexes to response to Government Consultation 2013, pages 61

An award winning estate

206. Enterprise Inns is very proud of its award winning publicans and pubs. Despite these difficult economic times Enterprise Inns publicans have won or been nominated/ shortlisted for all sorts of awards including Best New Pub, Pub of the Season, Pub of the Year, Pub Design of the Year Award, Best Hidden Gem Award, Spirits Pub of the Year, Best Restaurant/Pub, Best Customer Services, Licensee of the Year, Most Loved Bistro in the Country, Best Pint, Best Growing Business, and various regional awards such as Best London Pub, Hampshire Hospitality Award, Best Community Pub – West Country, Best Turnaround Pub – North West, and Best Tenanted/ Leased Pub – London, to name but a few.



II. Detailed Response to the Questions raised in the Consultation Paper

Q1. Should there be a statutory Code?

- 1.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section I. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 1.2 There should not be a Statutory Code. The newly enhanced and robust Industry Framework Code (IFC) is working. All major pub companies have confirmed that they regard the IFC as legally binding and the Pubs Independent Rent Review Scheme (PIRRS) and the Pubs Independent Conciliation and Arbitration Service (PICAS) are functioning effectively.
- 1.3 The IFC is a flexible tool which can respond to industry needs and be subject to external independent evaluation. A Statutory Code can not.
- 1.4 The IFC is founded on the principles of protection for tenants, good industry practice and transparency. Imposing a Statutory Code on top of the IFC is unnecessary and disproportionate. Except for the misconceived and simplistic principle of equivalence i.e. that a tied tenant should be no worse off than a free of tie tenant (see arguments below at paragraphs 7.13-7.34), the Industry Framework Code imposes substantially similar obligations on pub companies to the proposed Statutory Code.
- 1.5 Reflecting this, the key themes of Enterprise Inns' Code of Practice are fairness, integrity, honesty, transparency and mutual respect.⁵³

PIRRS

- 1.6 Established in September 2009, PIRRS provides a cost effective alternative to the courts or arbitration in resolving rent disputes between pub landlords and tenants. As indicated by one of our tenants, the PIRRS system imposes tight deadlines and restrictive rules on pub companies to make the process fair.

Enterprise Inns tenant: *"I do agree with the majority of leaseholders, that some regional managers may have let their employers down in the past and I am sure some still do but I am confident that the pubcos take any breach very seriously. I am currently representing myself with a rent review with Enterprise and was advised by them to consider PIRRS, which without the code of practise would of been an upwards only rent review. This is a very generous step in the right direction to assist those of us who have owned our leases for over ten years and are now facing unrealistic rent levels. PIRRS have put some very tight deadlines and pubco restrictive rules to make the process fair and although I have noticed some areas requiring improvement, I think the system is a much welcomed tool in achieving a satisfactory outcome. I also believe that the guidelines of the Royal Institute of Chartered Surveyors (RICS) is used as a benchmark for the open market valuation process by PIRRS and the pubcos and I understand that this too has recently been updated"*

⁵³ <http://www.enterpriseinns.com/COP/CodeofPracticeRevisedOct2012.pdf>

- 1.7 PIRRS is funded by subscriptions raised by a levy on all BBPA members (currently £2.50 per pub/year) and non-BBPA members (currently £5 per pub/year). PIRRS is a limited company, the directors of which are drawn from ALMR, BBPA, BII, FLVA and GMV.
- 1.8 PIRRS operates on the basis that there is a panel of independently selected valuers from which a participating tenant can choose to carry out the determination. We actively promote the availability of PIRRS to our tenants when we are unable to agree terms at rent review.
- 1.9 In the past 3½ years Enterprise Inns has successfully completed 2,164 tied rent reviews. 10 were determined by arbitration and 15 were referred to and resolved under the PIRRS system. Of the 6 rent reviews conducted by PIRRS in 2013 involving Enterprise Inns' tenants, three pubs have had their rent reduced and three have had their rent increased. There are currently a further 7 or 8 cases pending. The percentage of Enterprise Inns rent reviews which were challenged and resolved by arbitration or PIRRS represented some 1% of all Enterprise Inns rent reviews in the period.
- 1.10 The PIRRS annual report shows that the absolute number of disputes that proceed to a determination remain relatively small when compared with the number of rental settlements in the industry as a whole. According to Fleurets Limited, proportionally there are a greater number of rental disputes in the free of tied sector, particularly in respect of the larger managed properties, where the difference between the parties' negotiating position justifies the cost of running the dispute and there is no business relationship beyond that of landlord and tenant.

PICAS

- 1.11 The PICAS system offers an accessible, independent, low cost dispute resolution service to the licensed industry. Capped fees enable tenants/lessees and pub companies/breweries to resolve disputes in a fair and timely manner.
- 1.12 Pub companies are not represented by a legal team at a PICAS hearing –both parties personally represent their case in front of the PICAS panel. The PICAS environment is much less formal and intimidating for a tenant than the proposals under the proposed Statutory Code and Adjudicator which would no doubt involve legal representation for both sides.
- 1.13 PICAS is a wholly owned subsidiary of PIRRS and the PIRRS board oversees PICAS. PICAS is completely independent despite blatant attempts by lobbyists to discredit the process. One MP made particularly outlandish and defamatory allegations against the respected PICAS chairman, Rodger Vickers who felt compelled to respond in an open letter to the Publican's Morning Advertiser in March 2013, in order to hit back at the "mud slinging".⁵⁴
- 1.14 PICAS has offered tenants a low cost way to resolve disputes since early 2012. Enterprise Inns has been/is involved in 8 cases (representing 0.1% of Enterprise Inns' pub estate). In two cases we were found to be in breach of the IFC and were asked to pay compensation of approx. : in each case. One case was determined in our favour, two were resolved through mediation and three are currently pending.

Lack of evidence that self-regulation is not working

- 1.15 Self-regulation is working, as acknowledged by the Government in November 2011 through Ed Davey and again by Jo Swinson's office as recently as October 2012.⁵⁵ The CGA Strategy "State of the Nation" Survey, which surveyed 500 tied publicans across the country, was

⁵⁴ <http://www.morningadvertiser.co.uk/content/view/print/747669>

⁵⁵ <http://www.morningadvertiser.co.uk/content/view/print/690673>

published in June 2012. It demonstrates that the industry is moving in the right direction with self-regulation. In noted in particular that:

- 1.15.1 there has been a noticed improvement in the quality of relationship that business development managers are having with licensees with an average satisfaction score of 6.7 / 10;
- 1.15.2 44% of publicans indicated an increase in support from their pub company (up from 38% in 2011);
- 1.15.3 7 out of 10 (71%) of respondents to the CGA survey said they would sign up with their pub company again. This is a 10% increase compared with 2011 and clearly demonstrates that the majority of publicans are happy with the conditions and support being received;
- 1.15.4 almost 1 in 3 respondents indicated that they are planning to stay in their pub for more than 10 years, an increase from 1 in 4 last year. This is very positive for the trade as it indicates licensees are happy with their current role and are making long term plans to commit to the industry
- 1.15.5 63% of respondents indicated that trade was performing either better than or in line with expectations;
- 1.15.6 there was a noticeable improvement in the number of licensees who saw their income increase since the previous year: 1 in 3 licensees reported an increase in turnover and 1 in 4 outlets saw turnover increase by more than 5%; and
- 1.15.7 there was a huge reduction in the number of licensees who saw turnover decrease by more than 20% (with 10% less respondents in this bracket than in 2011 and less than half the number that were there in 2010).
- 1.16 None of this sits well with the picture painted in the Consultation document.
- 1.17 The question is whether there is evidence of a problem and if there is a problem that it is due to the practices of pub companies or the tie. At best, in so far as problems exist, they reside amongst the 30% who would not sign up again (which may be for reasons entirely unconnected to their relationships with the pub company).
- 1.18 The Consultation paper acknowledges that problems may arise in the industry for the reasons set out in the table below. The proposed Statutory Code does not address and cannot solve these problems because these problems are not due to the actions of pub companies. Enterprise Inns recognises that some of these problems do arise in our estate and we are making every effort to tackle them. Enterprise Inns makes use of a wide range of support tools and mechanisms, far beyond what the proposed Statutory Code envisages.

1. Tenants are poorly informed	<p>Enterprise Inns sent its republished Code of Practice to each publican in our estate by hand in October 2010. The PIRRS system was explicitly included in that Code of Practice and promoted. The latest version of the Enterprise Inns Code of Practice (March 2012) has been given to every new publican ever since and is permanently available online via our website.</p> <p>Enterprise Inns' Code of Practice has had 2,062 unique page</p>
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	<p>views between 30 September 2012 and 10 June 2013.</p> <p>In December 2011 publicans were sent an open and unlimited offer to incorporate the protections and obligations of the IFC (and any successor code) into their agreements. The letter also expressly informed tenants of their right to register a complaint against Enterprise Inns for breach of the IFC with PICAS⁵⁶.</p> <p>An article in our Empower magazine went to every publican in March 2012 by hard copy and email, referring specifically to the availability of PIRRS and PICAS.</p> <p>On 2 May 2012, a further letter was sent to every pub in our estate to remind publicans of the new addendum to our Code of Practice which we published at the end of March 2012, referring to both PIRRS and PICAS.</p> <p>An article referring to the PIRRS and PICAS systems was published in our Empower magazine and circulated by hard copy and email in March 2013.</p> <p>Enterprise Inns does inform tenants of their rights and the availability of the self-regulatory system – we actively promote the IFC, PICAS and PIRRS and our own Code of Practice. If it is alleged that tenants do not know about their rights under the voluntary regime the simple answer is to make them better informed, not replace one code with another.</p>
2. Many tenants enter the pub sector as a lifestyle choice not a commercial business decision	<p>This is hardly a problem which is attributable to pub companies. In any event, although this may have been a genuine reason why tenants entered the pub industry in the past, in our experience Enterprise Inns finds that fewer potential tenants present with social aspirations rather than hard business proposals.</p> <p>Enterprise Inns insists that new tenants seek independent financial and business advice. We contribute £250 to help cover this cost.</p> <p>New tenants must attend training sessions which explain the operation of the tied model before signing an agreement with Enterprise Inns.</p> <p>Enterprise Inns' agreements contain a 6 month cooling off period, during which tenants may serve notice to quit. Enterprise Inns is considering extending this period to 12 months to give more flexibility to new tenants.</p>
3. Most tenants apparently did not shop around between pub companies	<p>No evidence is provided for these claims.</p> <p>All pub companies provide extensive information on their websites for prospective tenants to consult.</p>

⁵⁶ See Enterprise Inns' Annexes to response to Government Consultation 2013, pages 57-58

	<p>In the 8½ months to 10 June 2013 Enterprise Inns' website has been visited 435,992 times. Included in that are 175,937 visits from people visiting for the first time. The website can be used to search for pubs available for let and there have been 650,119 searches of that sort and 6,517 formal enquiries about pubs.</p> <p>Some tenants may already have a tied lease agreement with a particular pub company and if they want to undertake a second pub, might not shop around because they are happy with the relationship they have built with that pub company.</p> <p>Pub companies can neither make prospective tenants "shop around" nor prevent them from doing so. This is not a "problem" that can be laid at the door of pub companies.</p>
4. Tenants may have low levels of literacy and numeracy	<p>This alleged problem appears to be based on an article in the Publican's Morning Advertiser from 2009 which quotes Neil Robertson of BII who stated that, <i>"It's been estimated that as many as 40% of licensees could be struggling with numeracy and literacy."</i></p> <p>Enterprise Inns would not describe this as a problem within our pub estate. Some publicans may not be highly literate as English might not be their first language but this does not equate to low business acumen or "abuse" by pub companies.</p> <p>As mentioned above Enterprise Inns provides pre-entry training and encourages publicans to seek independent business advice.</p> <p>Tenants entering the industry for the first time are required by Enterprise Inns to have a business plan which is verified by an accountant, and may be required to have an accountancy package. There are simple tools which all pub companies can make available to assist any tenant who may be numerically challenged. The same is not true for free-of-tie landlords.</p> <p>The support that is provided in the tied sector far exceeds that provided in the free-of-tie sector.</p>

Misinterpretation of Information

- 1.19 The Government has provided very little evidence to support statutory intervention. Instead what it has quoted is chiefly the biased opinions of a select group of lobbyists some of whom would be set to make unjustified personal gain from the proposals.
- 1.20 The Government has sought to rely on an inaccurate reference to a high level of "complaints" received by the British Institute of Innkeeping ("BII") from tenants of large pub companies. This was in fact a misrepresentation, as the Government later acknowledged that the number of "complaints" was in fact "calls" to a helpline. In any event, it is clear that Government had chosen to rely on the *number* of calls instead of the *content* of such calls.

- 1.21 It transpires that most calls were simply enquiries for advice and only four calls over a period of four years were categorised by the BII as “grievances” relating to Enterprise Inns. The Government fails to appreciate that the high level of total calls from Enterprise Inns’ tenants requesting advice is unsurprising given that we encourage our publicans to sign up to the BII and use its resources and that we pay the first yearly fee for new tenants.
- 1.22 CAMRA issued a press release on 5 June 2013 which purported to set out the findings of a CGA Strategy survey of “over 600” licensees. According to that press release, 60% of the those interviewed who were tied to large pub companies indicated that they ‘earn’ less than £10,000 per year. This was amended in a subsequent press release to 57%. There should be no pubs in the Enterprise Inns estate where a reasonably efficient operator (as per RICS guidance and accepted throughout the pubs industry as a term of art) is earning less than £10,000 per year (after accommodation and associated costs). Thus we have difficulty reconciling the position CAMRA is representing in the press.
- 1.23 We wrote to CAMRA on 5 June 2013 to clarify the findings of that survey, which has not yet been released by CAMRA for scrutiny. CAMRA’s response of 12 June 2013 told us that in fact only 310 interviews out of the total sample of 866 pubs of different types of tenure and representative geographic spread were with licensees of pub companies that own more than 500 pubs. We understand that at the time CAMRA replied to us GCA had not yet produced a full report, although CAMRA intends to include more details in its submission to the Consultation. This raises many questions, not least in relation to the way CAMRA chose to present a selection of the GCA findings and the timing of the press release.
- 1.24 It transpires that surveyed licensees were asked in telephone interviews: “*Approximately what level of personal income/profit do you earn from your pub?*” There was no attempt to clarify what was meant by “profit” in this context.
- 1.25 The question asked of tenants is inherently flawed.
- 1.26 It is not clear whether the tenants who were surveyed declared that they earn less than £10,000 in ‘profit’ i.e. net cash profit after living expenses, travel expenses, car expenses, re-investment into the business etc. By contrast in the employed sector, if one were to ask an employee how much of their earnings they actually saved in one year from their salary, very few would respond to say they had ‘saved’ more than £10,000 per year after their expenses.
- 1.27 It appears that a similarly flawed question was asked of tenants in a previous CGA survey which was relied upon by the BIS select committee in 2009 as evidence to criticize the industry. CAMRA, in its response to Enterprise Inns on 12 June 2013 stated: “*In line with the CGA Strategy survey commissioned by the Business Select Committee in 2009, CAMRA has not adjusted licensee responses to take account of accommodation or other benefits.*” The evidence relied upon by the BIS select committee in 2009 should have been disregarded.
- 1.28 As noted by Rob Wilcock of in an article published by the Publican’s Morning Advertiser on 13 June 2013: “*As someone who has, in a former life, run a salary survey business, I know the limitations of simply asking people how much they earn. Among employees, it is estimated that they inflate their salaries by as much as 20% to exaggerate their status. Among the self-employed, there are good reasons why they might want to understate their earnings.*”⁵⁷
- 1.29 Whilst CAMRA claim that 57% of tenants make a profit of less than £10,000, with 80% of tenants earning less than £15,000, our own data absolutely refutes that claim. We have identified 96 pubs (less than 2% of our estate) which have earnings potential of less than

⁵⁷ <http://www.morningadvertiser.co.uk/content/view/print/783153>

£15,000. Nine of which are currently closed, 12 are being traded under our Beacon format (with the publican receiving specialist help and support), 14 have received over £2,000 of discretionary support, three of which have also received investment of over £20,000 and six have received investment of over £10,000 over the last 18 months.

- 1.30 Average earnings across our entire estate are likely to exceed £30,000, before allowing for the benefit of associated living accommodation and related costs. Our estimates are supported by an analysis of over 2000 actual rent reviews negotiated with our tenants over the past three and a half years. We have offered to submit our data to independent examination and would invite CAMRA to do the same.

Enterprise Inns tenant: *"One major point that must be addressed is the sheer 'Math' of the situation. Had I continued to work on in the city on circa 80k per annum I would, after deduction take home around £4,500 per month. I need four bedrooms for my family, so out of that money I would have to spend probably the best part of that 3k on private residential rent, my wife may work but that would be cancelled out by huge childcare costs. So in other words for the rent I would have to pay anyway, I get a stunning 5 bed property with a business downstairs for the same price of a private rent. I mean, what is everyone complaining about? So if I was not tied, paying probably 3 times more rent, I would be better off? Having no real support? Yes the beer would be cheaper but not everyone drinks beer, I know I won't make the best GP on beer so I promote wine, spirits and serve great food."*

- 1.31 If any publicans in the Enterprise Inns estate are genuinely earning less than £10,000 per year after accommodation and associated costs we urge them to contact their regional manager so that we can review their circumstances and if appropriate offer targeted discretionary support.
- 1.32 If any tenants are earning less than £10,000 per year after accommodation and associated costs it may be an indication that the business is no longer viable as a pub (for economic, social or demographic reasons) and in such cases we can help that publican exit so that he/she can seek employment and accommodation elsewhere which may provide a more stable income stream.

This is not a consumer issue

- 1.33 We fail to see how CAMRA is representative of tied tenants. CAMRA is a consumer group which launched a very thorough and expensive OFT investigation into the industry in 2009. It was entirely appropriate for a consumer group to ask the OFT to consider if there was any consumer detriment in the pub industry. It is not appropriate for a consumer group to interfere with the commercially negotiation agreements between pub companies and their tenants.
- 1.34 In relation to the CAMRA super complaint, in October 2009, the OFT found that there was no consumer detriment in the pub industry. CAMRA challenged the OFT's finding. The OFT then considered the matter further, and published its final decision in October 2010 which once again confirmed that there was no consumer detriment in the current model.
- 1.35 The OFT clearly refuted CAMRA's claim that higher beer prices were driven by excessive prices and rents charged by the large pub companies, finding that higher average retail prices of beer in tied pubs are not likely to be attributable to a lack of effective competition, or to the tied model specifically.

- 1.36 At the CAMRA-sponsored rally at the House of Commons on 5 June 2013, Toby Perkins MP called this a “*people’s campaign*”, saying that “*we need to make this, what is a fairly technical issue, a consumer issue that every single person can get behind and support*”. The OFT has specifically looked at the industry and has determined that there is no consumer detriment in the current model. Simply put, it is not a consumer issue.
- 1.37 Lobbyists and certain politicians continue misleadingly to promote their campaign as being for the benefit of consumers. These proposals are absolutely not in the interest of consumers and are instead likely to be detrimental to their interests. Several Competition Commission and OFT investigations have determined that both the tied model and specifically the pub company model works well for consumers. The market is competitive. The variety of pubs existing under different models drives competition which is benefiting the consumer. The access that microbreweries have to the market through the buying power and economies of scale of the pub companies is unprecedented. This is not a consumer issue and should not be promoted as one.

Unintended consequences

- 1.38 The unintended consequences of statutory intervention are extensive - pub closures, loss of employment, less consumer choice, closure of microbrewers, loss of revenue for the Treasury, pub companies restructuring— to name but a few. All of which would be a huge shame for the vast majority of tied publicans who want to continue their business under the tied model with the support of their pub company but who may not have that choice if pub companies are driven to restructure their business.

Enterprise Inns tenant: “*I would whole heartedly say that I have had an exceptionally positive experience of dealing with large Pubco's*”

- 1.39 The Government has claimed this is not a competition issue. However, the Government is very naïve if it does not realise that its proposals could severely distort competition in the pub industry. The proposed Statutory Code will create a disadvantaged asset class (pubs). Pub companies may either:
- 1.39.1 close down pubs and allocate the real estate to non-pub uses; or
 - 1.39.2 sell pubs to small pub companies or dispose of pubs in packages to reduce its core business to 499 pubs. This bypasses the regulation but will remove certain economies of scale and transfer wet rents from pub companies to brewers (i.e. not to tenants); or
 - 1.39.3 decline to offer tied arrangements and instead vertically integrate into the management of the pub; or
 - 1.39.4 restructure and operate as simple commercial landlords charging a dry rent (perhaps as a REIT), whilst possibly also owning a pub services business acting as a beer wholesaler. In this case it is likely that economies of scale will be lost, and the profits of brewers will rise and pub companies’ profits will fall, with little positive impact on the pub tenant.
- 1.40 The main distributional consequence will primarily be between pub companies and brewers except in the case of lost economies of scale which harm all of pub companies, brewers, publicans and customers in unclear proportions.

Property Law Concerns

- 1.41 Government has failed to consider the impact of the proposed Statutory Code in relation to current landlord and tenant related legislation and current commercial property market practice. This could potentially put pub companies in a worse position than other commercial landlords and benefit certain pub tenants in a way that other tenants are not protected as well as leading to distortion in the market place which may have a significant adverse impact on pub companies, their shareholders and their lenders. A number of these measures also have the potential to add significantly to cost and cause delay. See in particular Enterprise Inns' response to Consultation question 8(i) below.

ECHR Article 1 Protocol 1 challenge

- 1.42 If implemented as drafted, the Government's proposals would be open to challenge under Article 1, Protocol 1 ("A1P1") of the European Convention of Human Rights (the "ECHR"). Interference with property is protected by human rights law in the UK. Depriving pub companies of future income would constitute an exercise of "control" by the State over Enterprise Inns' property and therefore A1P1 is engaged.
- 1.43 The Government has failed to demonstrate any mischief to justify statutory intervention in the pub industry. The Government itself in 2011 concluded that a strengthened system of self-regulation, including making the IFC binding and setting up an independent arbitration service, would deliver the objectives of the Select Committee. That strengthened system has been delivered by the industry. The additional information which has been collated by BIS since November 2011 is very thin and unconvincing. An example of its quality is the "hundreds of complaints" to the BII helpline attributed to pub companies which turned out to be merely enquiries for advice.
- 1.44 There has been no attempt by the Government to determine if any actual individual complaints against large pub companies are well founded or to check if complainants used the self-regulatory system for redress and if not, why not.
- 1.45 There has been no specific identification of weaknesses or defects in the self-regulatory system. In fact, the provisions of the Statutory Code more or less mirror the provisions of the IFC (save for the misconceived and simplistic principle that a tied tenant should be no worse off than a free-of-tie tenant).
- 1.46 There has been no assessment of whether self-regulation has improved the position for tenants, is inadequate or is simply not being used. If the latter is found to be the case, the answer may lie in an awareness campaign rather than statutory intervention with the risk of drastic unintended consequences.
- 1.47 The stark lack of independent evidence (especially in relation to the assessment of the self-regulatory system) in the Consultation paper is telling. Without proper justification the proposed Statutory Code is manifestly without reasonable foundation and would likely result in a set of unintended consequences which would have very serious adverse consequences for both pub companies, tenants and the wider industry including brewers, services and supply companies and consumers.

IFC Awareness Campaign

- 1.48 If Government is still concerned that many tenants fail to appreciate or understand their rights under the IFC and how they can benefit from the PIRRS and PICAS systems then a more proportionate response would be for BIS to initiate a raising awareness campaign. Enterprise Inns would fully support such a campaign.

- 1.49 In 2009/10 BIS led the “*Know your rights campaign*” targeted at increasing consumer awareness of their legal rights and directing them to Consumer Direct for information needed to take action when required.⁵⁸
- 1.50 An example of a campaign undertaken by the OFT was its “*Championing Competition*” campaign in 2005, which was aimed at SMEs. As part of the campaign, the OFT released guides, including “*How your business can achieve compliance*”⁵⁹, and embarked on road shows which targeted small local businesses and engaged with them on their understanding of competition law. The OFT highlighted the positive aspects of competition for businesses and informed businesses on how to avoid anti-competitive practices, linking its campaign with business organisations such as CBI and the Federation of Small Businesses. The campaigns resulted in increased awareness of competition legislation, with those claiming to have “*a fair amount*” or “*a lot*” of knowledge rising from 12% in 2006 to 25% in 2010, and the amount of people who claim to know nothing about competition legislation has decreased from 38% in 2005 to 27% in 2010.

What the industry and Government can do together

- 1.51 Fundamentally the issue identified by the Government in the Consultation paper is a communication issue. A similar approach to that outlined in the paragraphs above could be adopted in the pub industry to raise tenants’ awareness of their rights under the Industry Framework Code as well as the availability of the low cost PIRRS and PICAS services to help resolve any disputes. It would be completely disproportionate and manifestly without reasonable foundation to legislate when the non-statutory regime is working perfectly well save for the lack of awareness of its existence. The solution is for Government and the industry to pull together and raise awareness to benefit tenants.
- 1.52 One method could be through the Publican’s Morning Advertiser which has 110,000 unique website hits on average each month, circulates 30,000 print copies to publicans and estimates that it has over 85% coverage in the leased or tied sector.
- 1.53 Tenants could also benefit from an enhanced advice line. The Competition Pro Bono Scheme was introduced in 2006 to provide a no-or-low cost avenue through which individuals and small businesses can obtain competition law advice. The Scheme, backed by a 49 law firms and 2 sets of chambers, offers free access to legal advice for those who feel they are victims of competition law infringements. The Scheme has been in significant and constant demand, with over 500 queries being put forward by 2010. A similar advice line could be introduced in the pub industry, akin to the one currently operated by the BII, but backed by a pool of industry experts such as rent surveyors, to assist publicans understand the IFC and how it affects them. The cost of such a scheme would be much less than a statutory adjudicator with no risk of unintended consequences.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- BIS should launch a campaign to increase tenants’ awareness of the IFC, the PIRRS and PICAS systems

⁵⁸ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/31601/10-1280-government-industry-initiative-consumer-rights-awareness.pdf

⁵⁹ <http://www.corporateaccountability2009.com/CAC09%20Amsterdam/Pancl%20III/Hoehn%20-%20OFC%20-%20How%20Achieve%20Compliance.pdf>

Q2. Do you agree that the Code should be binding on all companies that own more than 500 pubs? If you think this is not the correct threshold, please suggest an alternative, with any supporting evidence.

- 2.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section 1. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 2.2 This question automatically assumes that a Statutory Code is going to be introduced which is biased and misleading. A Statutory Code is not needed to regulate the relationship between pub companies and their tenants. However, if a Statutory Code were, contrary to all evidence, to be introduced it should apply to all tied tenants irrespective of the size of the landlord.
- 2.3 The suggested 500-pub threshold proposed by Government is expressed as a "market power" threshold (Consultation, paragraph 4.15). Despite Government's claim that its Consultation is about a nebulous idea of "fairness", this is clearly a competition law concept. As indicated, there is no evidence that 500, or any other number, is an appropriate threshold for the application of any rule or Code. From a competition law perspective:
 - 2.3.1 It is incongruous to refer to a concept (market power) which is normally a competition law tool in a document which purports not to be based on competition law grounds.
 - 2.3.2 This is all the more confusing as a 1% threshold (which is how paragraph 4.15 describes it) is far below any threshold found in any competition law case or guidance to define market power. That would start, as a rule of thumb, at around 40%. 1% is indeed below the de minimis levels (of 10% or 15% depending on the context⁶⁰) which determine when non-hard-core infringements may have an appreciable effect on competition. In other words, a 1% threshold would, in competition law terms, be the opposite of market power.
 - 2.3.3 The imposition of such a threshold would therefore involve a stricter form of market-share regulation than is allowed for under competition law, which is excluded from the scope of the Consultation. This would be a perverse outcome when the UK's competition regulator has recently found there to be no relevant market defects in the pub industry.⁶¹
- 2.4 Furthermore, the application of a threshold is not justified in any terms, except by vague reference to calls to a hotline (see paragraph 3.3 above) and to the fact that certain self-interested "stakeholders" have asserted the advisability of a threshold (see paragraphs 158-164 above). It should be noted here that there is no other inherent link between any particular size of company and the detriment loosely alleged throughout the Consultation in terms of hardship for struggling tenants. A company with five pubs in a local region will be just as much in a position to exert potential commercial pressure on a single tenant as will a company with 500+ pubs nationally. Quite apart from the general unreasonableness of the proposed regulation, the threshold in question is unreasonable on this basis.
- 2.5 The 500 pubs threshold will also result in a two tier system, with tenants of pub companies with less than 500 pubs not being covered.
- 2.6 Competition concerns arise around the proposals to restrict tenants of pub companies with more than 500 pubs from tying products other than drinks. There is no such restriction for pub companies with less than 500 pubs. This would create an unfair disadvantage for those

⁶⁰ See <http://ec.europa.eu/competition/antitrust/legislation/deminimis.html>

⁶¹ Again, see 3.10 of the Consultation on the October 2010 OFT final decision on CAMRA.

companies and their tenants. The groups who operate beneath that number are competitors on the same high streets, suburbs and villages.

- 2.7 From a gaming and flow monitoring perspective the number of pubs owned by a company is irrelevant.
- 2.8 The proposal to allow tenants of pub companies with more than 500 pubs to have a “guest beer” from any source, which is not properly restricted, will distort competition.
- 2.9 Enterprise Inns provides a huge choice of beers and ales to its publicans and already offers a local cask conditioned ale option (as one of several flexible letting terms offered) in many of its new agreements. Over 400 different microbrewers have access to our tied estate even where the publican is fully tied for all beers. The Enterprise Inns Code of Practice sets out at paragraph 12 that *“the supply of guest beers from a small brewer will be negotiated during the letting process.”*
- 2.10 The Enterprise Inns cask conditioned ale option is controlled (unlike the Government proposals) so that it is local small independent brewers who are selected for the provision of a cask conditioned ale and not the large international breweries which produce top selling lagers.
- 2.11 Government proposes that publicans should be permitted to sell a *“guest beer from any source”*. Such a proposal is dangerous as it will undermine the diversity of the beer and ale market currently enjoyed by consumers in the UK which was praised in the OFT final decision in the CAMRA super complaint in October 2010.
- 2.12 Publicans would be much more likely to source a best selling lager from a large international brewer (who can afford to offer extremely competitive prices) than a local British ale from a small independent brewer. This will result in (i) the closure of microbreweries across the country with associated job losses and loss of tax revenue (ii) the loss of a unique and diverse beer and ale market with negative consequences for the consumer and (iii) a distortion of competition as the large international breweries take the place of the microbrewers and become dominant in the market.
- 2.13 The Consultation seeks to exclude family brewers from the Statutory Code, citing their ‘better’ behaviour. BIS have provided no evidence to support this statement. We question the availability and the percentage of sales of non-own-brewed products in the family brewers’ estates, both managed and tenanted. We believe that certain family brewers represent the one area of the market where consumer choice has not been enhanced since the introduction of the Beer Orders.
- 2.14 The costs of the voluntary system are substantial. It has been funded at a cost of £4 million since 2010 and an ongoing cost of £1 million per annum which is paid for by an industry levy. Who will fund the voluntary system if the bigger companies are removed?
- 2.15 Overall it is clear that, far from correcting any perceived imperfection with the current model, the proposed Statutory Code would introduce them.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- If a Statutory Code were, contrary to all evidence, to be introduced, it should apply to all tied tenants and not those who are tenants of pub companies with more than 500 pubs

Q3. Do you agree that, for companies on which the Code is binding, all of that company's non-managed pubs should be covered by the Code?

- 3.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section 1. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 3.2 This question automatically assumes that a Statutory Code is going to be introduced. That assumption is biased and misleading. A Statutory Code is not needed to regulate the relationship between large pub companies and their tenants. However, if a Statutory Code were, contrary to all evidence, to be introduced it should apply to all tied tenants irrespective of the size of the landlord. Only leased / tenanted tied pubs should be covered.
- 3.3 Commercial property companies and free of tie landlords operate at arm's length from their tenants. To include them within the remit of the proposed Statutory Code would result in more pub closures. The Statutory Code would unjustifiably create a disadvantaged asset class (pubs). Landlords who do not operate a tied estate would likely seek to change the use of pubs within their portfolio or sell them to avoid burdensome statutory intervention.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- If a Statutory Code were, contrary to all evidence, to be introduced, it should only apply to tied tenants

Q4. How do you consider that franchises should be treated under the Code?

- 4.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section 1. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 4.2 There should be no Statutory Code.
- 4.3 If a Statutory Code were, contrary to all evidence, to be introduced, it should not apply to franchises which are already regulated under a separate regulatory regime.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- If a Statutory Code were, contrary to all evidence, to be introduced, it should not apply to franchises

Q5. What is your assessment of the likely costs and benefits of these proposals on pubs and the pubs sector? Please include supporting evidence.

- 5.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section 1. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 5.2 Statutory intervention will lead to very little or no benefit to individual pubs or on the pubs sector as a whole. The alleged benefit of a transfer in value of £102 million per year from pub companies to tenants is superficial and misleading (as discussed above at paragraphs 154 and 155 above). The only group of tied tenants likely to benefit from the proposals are already successful, multiple operators as well as the large international breweries. That cannot be Government's intention.
- 5.3 The Government has supplied no evidence to support the projected costs set out in the Impact Assessment. Instead, the projected costs appear to be based heavily on the costs anticipated for the implementation of the Groceries Supply Code of Practice ("GSCOP") and the Groceries Code Adjudicator ("GCA").
- 5.4 There is a serious risk that the costs of implementing the proposals would outweigh any benefits.

Less and less costly regulation, not more

- 5.5 It is surprising that the Government and BIS in particular have failed to consider that the introduction of a Statutory Code and Adjudicator will serve to increase the already excessive regulatory burden faced by publicans. Association for Licensed Multiple Retailers' strategic affairs director Kate Nicholls has indicated that *"what we need is not only measures to make it more expensive to drink at home, but also action to remove the horrendous regulatory and tax burdens which are crippling the pub and literally pricing many out of the market"*.⁶²
- 5.6 In the Queen's Speech 2013, it was said that *"a Bill will be introduced to reduce the burden of excessive regulation on business"*. It is unclear whether BIS was aware of this Bill when the Consultation paper was drafted or if they were, how they hope to reconcile their proposals with this Bill.
- 5.7 BIS should be aware of the campaign to reduce red tape, especially for small businesses. According to the Red Tape Challenge: *"over the years, regulations – and the inspections and bureaucracy that go with them – have piled up and up. This has hurt business, doing real damage to our economy. And it's done harm to our society too... So this government has set a clear aim: to leave office having reduced the overall burden of regulation. With more than 21,000 regulations active in the UK today, this won't be an easy task – but we're determined to cut red tape."*⁶³
- 5.8 In addition, from January 2012 every new regulation that imposes a new financial burden on firms must be offset by reductions in red tape that will save double those costs (the *"One-in, Two-out"* rule). The new One-in, Two-out rule has replaced the previous *"One-in, One-out"* rule, which required the costs of every new regulation to be matched by savings of an equivalent amount. Government claims that this policy has already reduced net costs on business by almost £1 billion since January 2011.⁶⁴ It is unclear how the proposed Statutory Code complies with

⁶² <http://www.almr.org.uk/presspdfs/195.pdf>

⁶³ <https://www.redtapechallenge.cabinetoffice.gov.uk/about/>

⁶⁴ <http://news.bis.gov.uk/Press-Releases/-One-in-two-out-Government-to-go-further-and-faster-to-reduce-burdens-on-business-and-help-Britain-compete-in-the-global-race-6838c.aspx>

this rule. The proposed Statutory Code imposes new costs on pub companies. How does the introduction of the proposed Statutory Code and adjudicator save double those costs?

Government should emphasise funding for tenants and other SMEs

- 5.9 The Government's view that by increasing profits per pub of £4,000 gross per year, to be reinvested into the pub by the publican, as a "solution" for struggling tenants is misconceived. Enterprise Inns already invests c. £60 million into its pub estate every year. The Government is well aware of the lack of funding available for small businesses in UK.

Enterprise Inns tenant: *"People are very quick to judge and knock the big companies but reality is landlords like me are not in a position to purchase free houses where the banks are demanding 50 percent deposits so we therefore look towards the renting option."*

- 5.10 At the start of 2012 there were around 4.8 million SMEs in the UK which employed 23.9 million people forming 99.9% of all businesses by number.⁶⁵ Around half of SMEs do not use formal sources of external finance, instead relying on trade credit from their suppliers or retained earnings. In 2010, 21% of SMEs that sought finance in the UK were unable to obtain any from any source, a significant increase from the 8% of business in this same situation in 2007.⁶⁶
- 5.11 Struggling tenants need access to finance. Despite the availability of various schemes and some encouragement from Government, the banks in general have not sufficiently raised their levels of accessible and affordable SME funding. BIS needs to do more to press the banks to facilitate small business development.
- 5.12 As part of an awareness raising campaign, BIS could usefully give much greater publicity to the various finance schemes available. In April 2013 BIS circulated a paper entitled "*SME Access to Finance Scheme*" to those "*who work in and with Government*". The paper's messages need to be delivered directly to SMEs.
- 5.13 Pub tenants need to know more about these and other options to fund the growth of their businesses.
- 5.14 The Funding for Lending scheme, which was due to end in January 2014, has been extended by a year to 2015. However, among participating banks, lending was actually lower in the first sixth months of the scheme than it was in the six month period before the scheme was introduced in August 2012.⁶⁷ Figures recently released show that bank lending to businesses and households has continued to decline in the three months to March 2013.⁶⁸ Bank lending fell by £300 million in the first quarter of 2013 and "*since last June the outstanding stock of loans granted by participating banks, which together make up 80 per cent of lending to businesses and households, has fallen by £1.7 billion.*"⁶⁹
- 5.15 The arrival of a new Governor of the Bank of England gives BIS an opportunity to rethink and reinvigorate the direction the recently updated Funding for Lending scheme, so that the focus is

⁶⁵ <http://www.fsb.org.uk/stats>

⁶⁶ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32263/12-539-sme-access-external-finance.pdf

⁶⁷ <http://www.bbc.co.uk/news/business-22275344>

⁶⁸ <http://www.ft.com/cms/s/0/633b9ac8-cc34-11e2-9cf7-00144feab7de.html>

⁶⁹ <http://www.ft.com/cms/s/0/633b9ac8-cc34-11e2-9cf7-00144feab7de.html>

shifted to providing greater access to finance for SMEs such as pubs, rather than further increasing loans for mortgages.

- 5.16 Overall research is indicative of a shortage of finance for SMEs, reflecting banks' attitudes to risk and their own pressures to deliver. Although demand fluctuates, there is a high level of discouragement from application for lending as well as high rejection rates and margins on credit after controlling for risk. If the situation is not resolved, output, investment and employment will be lower than would otherwise be the case, with adverse effects on economic performance in the short and longer term.⁷⁰ The answer is for Government to put some real vigour into requiring banks to make the money available and to ensure through awareness campaigns that pub tenants know about the scheme. The British Banking Association, financial services authorities and relevant consumer groups should work together to draw up industry wide criteria for publican funding.
- 5.17 Enterprise Inns welcomes the new "community assets fund" of £250m for local communities to buy pubs and shops which are no longer commercially viable.⁷¹ We note the underlying message – ignored in the Consultation – that some pubs cannot be commercially viable but may be used as a community resource staffed by volunteers.

Taking the Groceries Supply Code and Groceries Code Adjudicator as a comparator is a misleading choice

- 5.18 It is difficult to see how such comparison is appropriate given that the GSCOP monitors anticompetitive behaviour of large supermarkets. The GSCOP does not seek to impose commercial terms in so far as they are not anti-competitive. It does not seek to set the prices supermarkets pay their suppliers – a very important distinction from the proposed Statutory Code which seeks to set a regulated rent for pubs even though there are no anti-competitive practices in the pubs industry.
- 5.19 The GCA has not yet started her functions and it is possible that the projected costs may have been underestimated by Government (for example it was estimated that she would only work one day a week increasing to three days a week when the Bill comes into force⁷²).
- 5.20 Under the proposals, the Pubs Adjudicator has a wider remit than that envisaged for the GCA, having two specialised areas to police (rent reviews and breaches of the proposed Statutory Code). It is likely that the costs of the proposed Pubs Adjudicator have been grossly underestimated. This may result in a disproportionate cost to large pub companies, especially once managed pub companies and commercial property companies are removed from the list of contributors.
- 5.21 The first point is therefore that there is no like for like comparison. The second is that the second limb of the Pubs Adjudicator's role – rent review adjudication – is a highly specialised area. It is highly unlikely that Government will find a single individual with the requisite skills in rent review and more generally in Code issues. The rent review role will require intensive support. Tenant and pub companies appearing before the Adjudicator on rent reviews will likely each produce their own experts, pushing the costs to be imposed on pub companies even higher. Contrast this with the respected, informal and cost effective system under PIRRS.
- 5.22 Will there be different Adjudicators allocated to different regions given the possible number of rent reviews and the disparity of rents and related factors across the UK?

⁷⁰ Lucy Hatton (September 2012) *'It's the SMEs, Stupid: Lessons from America'* p.3. Available at: http://www.civitas.org.uk/economy/Hatton_USUKSMEs.pdf

⁷¹ <http://www.telegraph.co.uk/news/politics/conservative/10102846/David-Cameron-pledges-250m-for-local-communities-to-buy-pubs-and-shops.html>

⁷² <http://news.bis.gov.uk/Press-Releases/Christine-Tacon-appointed-as-Groceries-Code-Adjudicator-68658.aspx>

- 5.23 The Government estimates that the Adjudicator is expected to hear only a couple of cases a year. Enterprise Inns questions whether this is realistic. If it is anticipated to only hear a couple of cases a year then arguably the cost outweighs the benefit. On the other hand, if the Adjudicator is to hear all large pub company cases which currently go to PIRRS – and if the system is to give equal treatment to all tenants he/she must do that – the number of cases will be far higher and the costs higher too. Government has simply not thought this through.

Who will fund the self-regulatory system?

- 5.24 There is also the added burden for small companies to continue to fund the self-regulatory system after the removal of the larger companies. The Government is at risk of doubling the costs to the industry by running a two tier system. It may be that PICAS and PIRRS cannot survive without subsidies from the larger pub companies. There would be no incentive for the larger pub companies to provide those subsidies, so the vast numbers of tenants of smaller companies would have no support and only the court system for redress. To fight battles through the UK court system would put many out of business.
- 5.25 Will PICAS and PIRRS' treatment of tenants of pub companies with fewer than 500 pubs mirror treatment by the Adjudicator to ensure equal treatment and vice versa? If so, will the Adjudicator base its practice on PICAS and PIRRS? Is it likely that the two regimes will share experts e.g. surveyors? If the answer to the latter two questions is yes, what is the point of having the statutory regime when its function is already covered by PICAS and PIRRS at a lower cost to the industry? If the answer is no, how does Government justify a two tier system?

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- BIS should launch a campaign to increase funding for SMEs

Q6. What are your views on the future of self-regulation within the industry?

- 6.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section 1. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 6.2 In the autumn of 2009, bodies representing both landlords and tenants, under encouragement by BIS, agreed a standard Industry Framework Code of Practice (IFC). This Industry Code was a far stricter system of accreditation and accountability than had ever existed before. Pub companies had to satisfy the British Institute of Innkeepers (BII) that their individual Codes of Practice complied with the Framework Code and the BII had the job of monitoring whether pub companies complied with it.
- 6.3 The BIS Select Committee's Report of 6 September 2011 concluded that the industry's efforts at self regulation were not effective. The Select Committee recommended statutory regulation of the industry. The industry continued to make improvement to the IFC and to publicise its benefits to affected tenants. In November 2011, the Government, after considering the evidence, rejected the Select Committee's recommendation for statutory regulation and announced that self regulation was improving and the industry should strengthen and build upon self regulation by making the Industry Framework Code legally binding and by setting up an industry funded arbitration service.
- 6.4 The industry responded by publishing a more robust version 6 of IFC and all the major pub companies declared it to be legally binding on them. The industry set up the low cost PIRRS and PICAS services to hear disputes on rent and breaches of the IFC respectively. Clear progress has been made with regards to self-regulation.
- 6.5 In the 2012 survey commissioned by CGA Strategy, the "State of the Nation", found that 7 out of 10 publicans surveyed indicated that they would sign up with their pub company again. The reasons that the small minority would not enter into the same agreement again could be multiple e.g. retirement; change in family circumstances; moving house for various reasons; pursuing a different career path; spouse or partner changing jobs etc. Despite this, a select group of lobbyists have sought to undermine the IFC and the large pub company codes at every turn.
- Enterprise Inns tenant:** *"Not all publicans – tied or otherwise – are supportive of the thinly disguised attacks directed towards the pub owning companies"*
- 6.6 In October 2012, Jo Swinson's office reaffirmed the Government's position from November 2011 that statutory intervention into the pub industry was not needed. It is unclear how and why the Government's position has changed since then. No new evidence has become apparent. In the absence of robust evidence statutory intervention in the pub sector remains unjustified, disproportionate and manifestly without reasonable foundation.
- 6.7 Any continued lack of progress with the self-regulatory system is largely a communication issue as discussed above at paragraphs 1.51 to 1.53 above.
- 6.8 Enterprise Inns recommends that the IFC be submitted triennially to an independent review to ensure it continues to be fit for purpose or continues to evolve to become fit for purpose. In a market that is constantly evolving as social norms change, the IFC is flexible as the Government noted in its response to the BIS Select Committee 2011 report, "[the IFC] can be fast, effective and responsive to the needs of the industry".

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- The IFC should be triennially reviewed by an independent party to ensure it remains fit for purpose

Q7. Do you agree that the Code should be based on the following two core and overarching principles?

i. Principle of Fair and Lawful Dealing

- 7.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section I. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 7.2 There is no need for a Statutory Code.
- 7.3 It is hard to discredit the above principles as general principles of behaviour. But that is not what Government means. Government takes a moral premise and develops out of this specific and unwarranted intervention in commercial arrangements.
- 7.4 Enterprise Inns is committed to treating its publicans fairly and lawfully. The Enterprise Inns Code of Practice states "*The core values upon which we have built over twenty years of success lead with fairness, integrity, honesty, transparency and mutual respect and these are the key themes that run through this Code of Practice*".
- 7.5 It appears that the Government has transposed the terminology of "fair and lawful dealing" from the Groceries Supply Code of Practice ("GSCOP") without much thought to the reasons why the GSCOP enshrined such principles. Article 2 of the GSCOP states that: "*A Retailer must at all times deal with its Suppliers fairly and lawfully. Fair and lawful dealing will be understood as requiring the Retailer to conduct its trading relationships with Suppliers in good faith, without distinction between formal or informal arrangements, without duress and in recognition of the Suppliers' need for certainty as regards the risks and costs of trading, particularly in relation to production, delivery and payment issues.*" In the GSCOP the principles are explained in terms of specific actions, related to specific harm which those actions should correct.
- 7.6 The principle of fair and lawful dealing in the GSCOP was born out of an unfavourable finding by the Competition Commission ("CC").⁷³ The Government explicitly states in paragraph 3.9 of the Consultation paper that there is no competition issue in the pub industry.
- 7.7 In its investigation into the groceries industry the CC explained that the overarching principle of "fair dealing" should be incorporated into the GSCOP on the basis that it would add to the effectiveness of the dispute resolution function by giving the Groceries Code Adjudicator a general standard by which to judge retailers' conduct and also because it would add a useful overarching context in which other provisions of the GSCOP could be interpreted.⁷⁴
- 7.8 The incorporation of the principle was also to safeguard against the transfer of excessive risk and unexpected cost from grocery retailers to their suppliers. Such excessive transfer of risk and unexpected cost does not exist in the pub industry as the viability of pub tenants is closely aligned with the interests of pub companies – pub companies profits are intrinsically linked to the success of their publicans. This link stops pub companies from forcing up prices beyond a competitive level as recognised by the OFT in its final decision to the CAMRA super complaint published in October 2010.
- 7.9 Enshrining the same principles that are suitable for the groceries industry to repair damage caused by anti-competitive practices into a Statutory Code for pub companies is manifestly without reasonable foundation.

⁷³ See http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538

⁷⁴ See paragraph 11.314 of the Competition Commission's report on The Supply of Groceries in the UK market investigation - http://www.competition-commission.org.uk/assets/competitioncommission/docs/pdf/non-inquiry/rep_pub/reports/2008/fulltext/538

- 7.10 The proposed Statutory Code and Consultation paper do not adequately define what the terms “fair” and “lawful dealing” mean in the context of the pub industry. Nor do they provide guidance or examples on what “fairness” and “lawful dealing” requires from pub companies. The principle of “fairness” is opaque; it is not defined in statute nor is it applied in a universal manner by the courts or regulatory bodies. Instead, many decisions and reports which have considered the application of “fair” requirements are very fact specific and look to the particular circumstances of the case at hand. That is how the principles were used in the GSCOP. This could not be a more stark contrast with BIS’ approach to the pub industry. The proposed Statutory Code seeks not to correct faults identified by a competition investigation and proportionally addressed through competition remedies, but quite simply to impose specific commercial terms on an ill defined group of businesses contrary to all principles of fairness and freedom to contract, subject to applicable property law.
- 7.11 Enshrining such equitable principles into law, without fully defining their scope and meaning could result in adverse consequences for the industry and could distort competition.
- 7.12 Enterprise Inns is already committed to treating its publicans fairly and lawfully as can be seen from the Enterprise Inns’ Code of Practice and the IFC. Any breach of the IFC could result in a referral to PICAS and a possible fine or censure. Statutory intervention is unnecessary, disproportionate and manifestly without reasonable foundation.

ii. Principle that the Tied Tenant Should be No Worse Off than the Free-of-tie Tenant

- 7.13 Pub rents are valued by reference to a profit and loss account based on the fair maintainable trade one would expect of the hypothetical reasonably efficient operator. In 2010, RICS published revised guidance⁷⁵ on the valuation of pub rents which was influenced by the findings of the court in the Brooker decision.⁷⁶
- 7.14 In the Brooker case, the tenant’s expert attempted to challenge the then RICS valuation guidance, by arguing that “*tied tenants should not be financially worse off than if they were free of tie*” (wording which has since been adopted by the lobbyists and now the Government).
- 7.15 The Judge rejected the tenant’s expert’s arguments, approving the RICS guidance and decided that the tenant’s expert’s method was not appropriate for setting the rent on a tied lease renewal. The concept of the “equivalence” principle was found by Judge Iain Hughes QC to be inappropriate:
- “I regret that I did not find the evidence of [the tenant’s expert] to be particularly helpful and I am not prepared to adopt his methodology in resolving the issue before me. I found that his evidence lacked the qualities of objectivity and independence essential in an expert. It was also plain that [the tenant’s expert] was representing how he (no doubt sincerely) believed such rent reviews should be carried out, rather than how they are in fact carried out.”*
- 7.16 The OFT final CAMRA decision published in 2010 found that “*Overall, the OFT considers that the costs and risks faced by tied and free-of-tie lessees are broadly similar. Our analysis suggests that, as per prior analyses in this sector, the higher beer prices charged by tied lessees are offset by lower dry rent and business benefits.*”
- 7.17 The “*no worse off than*” principle is biased and distorts competition. The Government proposes to impose a requirement on pub companies owning more than 500 pubs (representing around 1% of the total stock of pubs) that obliges them to give tied tenants a deal that leaves them “*no*

⁷⁵ The review of the RICS guidance and publication of new guidance was carried out by a group of industry experts.

⁷⁶ *Brooker v Unique Pub Properties Limited* [2009] 49 EG 72.

worse off” than a free of tie tenant. However assuming one wants to create a level playing field between tied and untied models, the relevant test should in fact more accurately be “*no worse off and no better off*.”

- 7.18 There is no evidence that tied tenants are “*worse off*” than free of tied tenants. Tied tenants operate under a very different risk/reward profile to free-of-tied tenants. It may well be that free of tie tenants have the potential to make slightly increased profits, but their risks are much greater than tied tenants. The tied model offers a low cost entry to running your own business and a risk sharing mechanism with the pub company with various SCORFA benefits. This does not seem to be appreciated in the Consultation paper.

Enterprise Inns tenant: *“The capital requirement to launch our business was the lowest model available because there was no premium paid and the ingoing costs were minimal so any operating profit generated, regardless of the gross profit margin, was a return on our capital invested”*

- 7.19 The principle proposed by Government is far too simplistic. What can “*worse off than*” mean? There is no “one size fits all” formula to fit all tenanted pubs. SCORFA benefits far outweigh the difference in rent but can be very difficult to quantify.⁷⁷ Each tied tenancies is unique. The SCORFA benefits will often vary from one tenant to another, with sole traders deriving more of a benefit than multiple operators (i.e. it is of more benefit to struggling tenants to operate under a tied model).

Enterprise Inns tenant: *“Given the wide variety of pub sizes, styles and locations there is no formula that can be applied to all pubs to determine Rent and Beer Price. The best solutions in our case have been achieved through human interaction where elements of a business contract are discussed and agreed with principles and fairness. The inclusion of the price of beer in these contracts allow for a more variable discussion on contracts which gives a better chance of everyone being happy”*

- 7.20 SCORFA benefits can include (but are not limited to):
- 7.20.1 the availability of upwards and downwards rent reviews;
 - 7.20.2 training and support on the management and marketing of the business;
 - 7.20.3 discounted pricing across a range of goods and services; and
 - 7.20.4 financial support at the commencement of the lease and during times of difficulty.
- 7.21 The tied tenant and the pub company also share the risk of a downturn in business, without the tenant having to pay a higher ground rent.

Enterprise Inns tenant: *“yes a tied pub achieves lower GPs to those that are free of tie but this will be taken into account at rent review so the bottom line will give the same end result whether tied or not tied. it makes much more sense to argue a lower rent which*

⁷⁷ See the latest analysis by E&Y/CU/BBPA

is fixed and leave the variable costs such as the GP to the tenant to control"

- 7.22 The shared risk and reward relationship between pub companies and tenants can protect vulnerable and struggling tenants. It can allow certain tenants to walk away from their lease in certain circumstances. In a free-of-tie relationship this will not be available and could be very damaging to individuals where they have leases subject to personal guarantees. It is simply not possible to work out an equivalence or a comparison based on the different scenarios.
- 7.23 The essential situation is that a tied tenant typically pays a lower dry rent than a free tenant but pays a mark-up on beer supplies (wet rent). It follows (assuming for this purpose that SCORFA are neutral) that the relative attractiveness of the two tenancies depends on the quantity of beer sold at those premises by that tenant. There exists a critical beer volume V^* at which the two situations yield the same payoff. For $V > V^*$, the free house does better (as on high beer volumes the low beer price dominates) but for $V < V^*$ the tied house does better (as on low beer volumes the cheaper rent dominates).
- 7.24 The equal treatment principle cannot easily be implemented because beer sale volumes are uncertain.
- 7.25 In theory it would be possible to set a mid-point volume so that the average tied house, which sells the average volume V^* , is equal to the (average) free house. However this would leave below-average performing tied houses worse off than the average free house (but, critically, better off than a free house selling the same low volume of beer).
- 7.26 How could this possibly work in practice? The comparison requires calculating what each individual pub "should" be able to sell assuming equal management skills in a world where almost each pub has different prospects. But this is possible only in theory - for example, to the extent that certain tenants have occupied a pub for a period of time, management quality and pub quality may be largely inseparable.
- 7.27 Even if equivalence could be achieved in terms of expected value (for "mid-point" beer sale volumes), the two contracts are not economically equivalent because the free of tie proposal has higher variance of pub profits and hence higher risk.
- 7.28 Conversely, given that risk must carry some premium, financial equivalence in expected value terms is economically biased against free of tie providers. This is because the free house tenant, who has a higher fixed cost but a lower variable cost, faces high variance of profits. Since the publican cannot diversify this risk, the average return of the free house must exceed the average return of the tied house by an amount equal to the compensating risk premium.
- 7.29 This would not be easy to calculate, but given that individual publicans have poor access to capital and are risk averse, this risk premium is likely to be significant.
- 7.30 In terms of implementation, a tied tenant pays a lower dry rent than a free house but also pays his wet rent. Accordingly, any tied tenant who sells less than the "midpoint" volume of beer is getting a better overall deal than a free tenant selling that volume of beer would be receiving from the market. Moreover, the tenants suffering hardship (whom the proposals should really be designed to assist) will disproportionately be those selling less beer than the "midpoint", and hence are already getting a better deal than the free of tie pub selling the same volumes.
- 7.31 Enterprise Inns will consider offering any tied publican who is unhappy with its commercial arrangement with Enterprise Inns 6 months notice to quit subject to all obligations (e.g. repair obligations) under their agreement being fulfilled.

Enterprise Inns tenant: *“I understand that most concerns relate to the ‘tie’, I take a sensible view on this – I know that I could buy the same products cheaper elsewhere, but I accept that it’s about the overall deal. At the very start, it was made clear to me what my obligations were in each pub, and I except that the overall deal means that the rent and related costs are lower than they otherwise would be and in reality my risk in each site is the that I have to pay the bills for my time in the pub, I’m not having to spend hundreds of thousands of pounds buying and maintaining the site, which is a much greater risk.”*

- 7.32 To impose this principle into existing leases / tenancy agreements would be contrary to the principle of freedom of contract. It is inappropriate for Government to interfere in commercially negotiated agreements. No one is forced to take on a tied pub lease and some pay a premium on assignment. An individual can decide to take on a tied lease after assessing the benefits and risks. Tenants are happy to enter the industry under the tie due to the low entry costs and shared risk when beer sales are slow.
- 7.33 It appears that certain campaigners have built up a successful business with the assistance and expertise of a large commercial organisation and now want to change their commercial agreement to go “free of tie”. They want to change the deal. Those publicans are lobbying the Government that a tied tenant should be no worse off than a free of tied tenant without explaining what this means and without providing any evidence that such a comparison is even possible. They have managed to lobby the Government to put forward a radical and confusing position on the tied model which has served the British pub industry so well for decades.
- 7.34 During a difficult economic climate the tied model protects vulnerable publicans. Enshrining the ill defined principle that the tied tenant should be no worse off than the free-of-tie tenant will not benefit struggling tenants but instead the blue chip tenants who agreed to enter into their tied lease or agreed to pay a large premium to take over a tied lease and who have the buying power and business acumen to take the risk and go free of tie at the expense of the pub company.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- The principles are too simplistic, not backed up by empirical evidence, not properly explained or defined and will not work in practice

Q8. Do you agree that the Government should include the following provisions in the Statutory Code?

- i. Provide the tenant the right to request an open market rent review if they have not had one in five years, if the pub company significantly increases drink prices or if an event occurs outside the tenant's control.*

- 8.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section 1. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 8.2 There is no need for a Statutory Code.
- 8.3 This question bypasses a key point. The OFT has decided that there is no market power in pub companies. If there is no market power in pub companies, why does competition between pub companies not ensure fair deals? The Consultation paper makes unproved allegations that pub companies inflate projected turnovers to justify rent rises.
- 8.4 Government has offered no coherent reason as to why a pub company should raise rents disproportionately, never mind providing any evidence of such practice.
- 8.5 Paragraph 4.24 of the Consultation paper says "*if the code only covered tied pubs there would be nothing to stop a pub company from removing the tie and immediately increasing the rent to well beyond market rent values.*" This paragraph lacks commercial sense and ignores the basic law of contract. Landlord of pubs or any other properties cannot independently increase rents. They have to follow the agreed contractual arrangement. This includes the situation where, under the contractual arrangements the pub company is allowed to free all or part of the tie – even then the rent can only be increased by negotiation or by an RICS managed expert adjudication/arbitration. Where the independent resolution mechanism is followed this leads to an open market rent on the amended tie terms not to rent "well beyond market values". Is this policy actually about seeking to impose sub market rent regulation for pubs?

The fallacy that pub companies only operate upward only rent reviews

- 8.6 Commercially negotiated leases across a range of sectors (e.g. office, retail and industrial) already usually provide for cyclical upward only rent reviews ("UORR"). Since 2006 the majority of new substantive tied leases granted by Enterprise Inns provide for an open market rent review (ie could go up or down) and for those tied leases granted before 2006, notwithstanding the fact that they have UORR clauses, these are not enforced. Enterprise Inns itself is subject to UORR where it is the leaseholder (for example where the freehold is owned by a local authority, commercial property company or a pension fund) and there is no statutory framework in existence or proposed to protect commercial landlords who have long leases with UORR to either exit those agreements early or vary the contractual rent review terms where the commercial agreement has become toxic. The IFC and our voluntary code clearly already provide for protection for struggling publicans on rent reviews or otherwise.

Enterprise Inns tenant: "*Aware of difficulties in trade I have had my rent reduced on two occasions by Enterprise and a new lease completed to my personal liking*"

- 8.7 Enterprise Inns has in fact been leading the way and through its own Code of Practice has adopted an approach where since 2006 upwards only provisions are not enforced (even where they are provided for contractually) whether in open market reviews or index linked rent reviews. Enterprise Inns recognises the potentially damaging impact of upwards only reviews

on their pub tenants. In contrast the vast majority of other commercial landlord's across a range of sectors still insist on and enforce upwards only reviews even when the lease is plainly toxic.

Enterprise Inns tenant: *"Previously the rent could only increase but the Pub Co have changed so there is flexibility which we appreciate – and as a result of that our rent has decreased in the recent review. Furthermore, during the period of harsh economic situation, Enterprise Inns did help our business on a couple of occasions by temporarily lowering our rent and increasing discount on the beer purchase"*

- 8.8 From 2006 to 2012 Enterprise has reduced over 1,000 rents at review and this is a key point of differentiation between Enterprise and landlords in other commercial sectors. Take, for example, the recently reported instances of the attempt by the new owner of a high street fashion chain bought out of administration who attempted to reduce the rent on over 100 stores. Because of landlord's refusal there is now a threat to close a substantial number of stores.

Enterprise Inns tenant: *"I had to close an Enterprise Inn 12 months ago... despite Enterprise offering me rent free and free of tied beer as the local community did not support their village pub"*

Rent review

- 8.9 As is standard practice in most leases of commercial premises there is provision in Enterprise Inn's leases for the tenant (or the landlord) to refer the amount of rent payable at a rent review to an independent surveyor for arbitration/expert determination if the parties are unable to agree the rent. In most leases in Enterprise Inns estate of more than 5 years there is a provision for a cyclical review on a 3 or 5 year basis. The proposed Statutory Code adds a further layer with the tenant having the ability to request an open market review if they have not had one in the previous five years, if the pub company significantly increases drink prices or if an event occurs outside the tenant's control. This raises a series of issues as set out below.
- 8.10 Firstly, there is no guidance given as to how the Code will overlap or function in tandem with the normal contractual cyclical rent review provisions. Does this mean that the landlord may have triggered a third party referral under the contractual arrangements and the tenant may (for example where the rent has not changed for the previous five years) make an application to an Adjudicator at the same time? This leads to two different third parties determining the same dispute which is a waste of time and money. Also what exactly are the proposed powers of the Adjudicator? The explanatory notes to the Code (at paragraph 6.2) refer to the Adjudicator acting in an "arbitration function". Would such an arbitration be intended to be subject to the Arbitration Act 1996? If not, then it is more of a third party expert determination. On what grounds can the Adjudicator's decision be challenged? Even worse, if a tenant is unhappy with the decision reached where the contractual dispute resolution procedure has already been followed, will the tenant still be able to refer the matter to an Adjudicator? If so, and the original dispute was determined by an arbitrator this cuts across completely the current rules relating to arbitrations under the 1996 Act (where there is only limited scope to appeal). Would an Adjudicator acting as arbitrator also automatically be bound by the decision of a contractually appointed arbitrator? If the contractual rent review arrangement is to be overridden, it is difficult to see how the system could operate without giving the tenant a second bite of the cherry which would have significant implications in terms of uncertainty, cost and fairness.

- 8.11 What training/skills will an Adjudicator need? Presumably they would need to be or engage an RICS qualified valuer, so what would the Adjudicator add (apart from cost)? Also it is important to emphasise that under contractual arrangements where there is a reference to an Arbitrator or Expert, this is always an independent qualified surveyor. It is not the role of that surveyor to set the market and dictate rents. The person's function is to be a market score keeper. The independent surveyor's who perform the roles of arbitrators and experts are highly trained and qualified experts who understand the pub market.
- 8.12 In terms of detail, at what date will the Adjudicator be assessing the open market rent? Will it be at the date of referral to the Adjudicator? Would it be the date of his/her decision? The normal commercial lease with a cyclical rent review pattern makes provision for a valuation date and for the old rent to continue to be paid until the new rent is agreed or determined. How will this work in the context of an Adjudicator? If the valuation date the Adjudicator is looking at is, say, three months prior to the date the decision is made, will the Adjudicator have any power to require the landlord to repay any overpayment to the tenant or for the tenant to pay any shortfall where the rent is being increased (all of these arrangements are normally set out in a lease of commercial premises).
- 8.13 In addition, the contractual provisions in a lease for determining the new rent set out specific regards and disregards. These may differ from the RICS Guidance and the proposed Statutory Code in a way which may be better or worse for the tenants. This means that the Adjudicator will be making a decision on a different basis to a third party determining a review under the lease.
- 8.14 The Code also refers to a tenant's ability to refer the amount of the rent to an Adjudicator where there is a significant alteration in the rent. What will constitute a "significant alteration"? Clearly prices will fluctuate from time to time. Will the question of "significance" be determined by the margin of increase in any specific case? If the "significance" will be looked at from the point of view of the tenant then an increase by a particular margin may be "significant" for Tenant A but not for Tenant B. This may be through no fault of the landlord but may be partly as a result of the way Tenant A is operating the particular pub. This would mean that a pub tenant who is not a reasonably efficient operator would have more protection because a 1% increase may erode a small profit margin in comparison to the reasonably efficient operator.
- 8.15 The final criterion to call for a rent assessment is where there has been an event outside the tenant's control and unpredicted at the time of the previous rent assessment which impacts significantly on the tenant's ability to trade. This is extremely wide. For example, it could be read as including the impact of market forces which have a sudden and significant impact on trade. For example, the general economic consequence of the collapse of Lehman Brothers was clearly outside the control of a pub tenant but it could have impacted significantly on its trade as part of the broader economic climate. Surely these sorts of market events should not trigger a rent assessment? Again, the question of the extent to which the pub company has any control is ignored. There may be any number of events which have an impact on the ability to trade which are outside the landlord's control. For example, a competitor pub company may set up competing premises in the vicinity, a premises licence may be obtained for a neighbouring property not previously able to retail alcohol or a supermarket operator may open selling cut price alcohol all of which could have an impact on trade. In those circumstances the interest of the pub company and the Tenant should be aligned to make the existing pub as viable as possible rather than the pub company alone being penalised.
- 8.16 There is some similarity between the aim of the proposed Statutory Code to provide for "fair" rents for pub tenants, and the "Fair Rent" procedure in relation to protected residential tenants (Rent Act Tenants and Assured Tenants) who are entitled to refer their rents to a Rent Officer and/or Rent Assessment Committee once every one or two years. However the rationale behind

the residential Fair Rents legislation and the proposed Statutory Code are very different. Strikingly one relates to residential accommodation - someone's home- and the other to a commercial venture, just as any tenant taking on retail or office accommodation will have no similar protection. We appreciate the fact that some pub tenants will live in adjoining accommodation and consider this below in paragraph 8.22. Further the Fair Rents legislation in practice no longer protects new residential tenancies and was a creature of its time.

- 8.17 What the Fair Rent legislation illustrates is that introducing rent protection distorts a market. Rent Act tenants whose rent is assessed pay far less than market rent as do assured tenants, on the basis of the discounts which come into play reducing the rent payable for that would otherwise be considered market rent.

Rent assessment

- 8.18 Part 3 of the proposed Statutory Code refers to "initial rent assessments". This is presumably intended to mean when a lease is first granted i.e. the rent to be agreed in the heads of terms. Ordinarily this would be an arms length negotiation between the parties. It is not clear from the Statutory Code, as drafted, whether the rent at this stage can be assessed by an Adjudicator. If it can then does each potential tenant for each property have the ability to refer it to an Adjudicator or can one tenant choose not to do so, in which case are pub companies going to lease to tenants willing to forgo this initial assessment by the Adjudicator? What if a pub is in a particularly sought after location and several prospective tenants are bidding for the lease – if one offers more than market rent to secure the pub will that tenant then be able to immediately refer the rent to the Adjudicator to get it reduced? Government should not interfere with freedom of contract.
- 8.19 Paragraph 17 of part 3 of the Code refers to a pub company having to complete a rent assessment within six months. This will of course depend in part on the co-operation of the tenant. What is the Rent Assessment date in paragraph 18 of part 3? If it is the tenant calling for the rent assessment, which must be concluded in 6 months, how can the pub company provide information as set out a minimum of 6 months before?
- 8.20 The rent assessment provisions in the proposed Statutory Code are ripe for abuse by vexatious/serial litigants and unmeritorious applicants.

1954 Act protected leases

- 8.21 Part 3 does not address the situation where the lease is renewed under the Landlord and Tenant Act 1954 where the rent would then be determined by a court or via Professional Arbitration on Court Terms at open market rent unless agreed otherwise between the parties. The rent is therefore already being assessed by an independent third party (the court) if not agreed. Can the tenant also refer it to the Adjudicator at this stage, or if they did not like the court determination adding yet a further layer, costs, uncertainty and delay?
- 8.22 The Landlord and Tenant Act 1954 contains detailed provisions dealing with the assessment of an "interim rent". On the face of the Consultation a tenant who was dissatisfied with an interim rent fixed by the Court could potentially apply for a "rent assessment". This again gives the tenant a second bite of the cherry.

Residential accommodation

- 8.23 The Consultation paper refers to the fact *"the fair working of the beer tie is particularly important because of the hardship many publicans face including the possibility of losing their home (which is the pub)."* (Para 3.6 of the Consultation paper). However, all residential tenants are afforded significant protection from a landlord taking back possession of their home under

existing legislation. For example, a landlord is not entitled to peaceably re-enter residential accommodation but must obtain a possession order from the court and the tenant is automatically entitled to relief from that order in certain circumstances. If the breach of the lease is failure to adhere to the beer tie for example, the landlord would need to first serve notice on the tenant giving it the opportunity to remedy that breach before taking action to repossess the property. Further the court will invariably grant a tenant relief from possession on the condition that the tenant remedies the breaches of it lease.

Dilapidations and wants of repair

- 8.24 Para 9(c)(v) of the proposed Statutory Code requires the pub company to provide a prospective tenant with a schedule of condition of the premises and clarification of what remedial work is required and expected during the lease.

- 8.25 The proposal is unclear as to what exactly this “schedule” is. It is normal market practice in relation to commercial premises for a “schedule of condition” to be attached to a lease where there are wants of repair which the parties intend to fall outside of the otherwise expressed repairing obligations. The purpose of the schedule is to make it clear that the tenant has no obligation to give back premises in any better state of repair than the schedule sets out.

- 8.26 Is the intention of the Code that a schedule can be attached showing that a premises is in good repair or is the schedule intended to be what is normally regarded as a schedule of condition within the real estate market?

- 8.27 Enterprise Inns always recommend to potential tenants whether on new lettings or assignments that they should take independent professional advice from a qualified surveyor to inspect the premises (in the same way as any house buyer would). The draft Code potentially changes the allocation of risk and would lead to additional cost

- 8.28 In normal practice, every tenant taking on commercial premises has to take a view/take advice on the extent of its repair obligations under the proposed lease. A lease would either be subject to a schedule of condition (whereby the tenant is only required to keep and return the premises in the condition set out in the schedule), or not. Where there is no schedule of condition, the tenant is usually required to comply with express repairing obligations which may be fully repairing or internal non structural and maintain the premises and, if necessary, put in repair and something that is currently in disrepair. There is a body of case law and practise which has built up around these issues.

- 8.29 Where the proposed Statutory Code will apply, a schedule will be provided but this will not alter the terms of the lease (and the Statutory Code does not say that it should) which will potentially mean a situation where the tenant is presented with a schedule of condition which has no or limited bearing on the extent of its obligations to repair under the lease.

- 8.30 We then draw a blank as to what paragraph 9(h) is intended to achieve. The relatively new CPR Dilapidations Protocol was extensively debated by an eminent panel of real estate practitioners, lawyers and the judiciary to provide a timetable for dealing with dilapidation claims. The proposed Statutory Code appears to ignore this and requires the pub company to provide the tenant with a protocol which goes beyond this.

- 8.31 Paragraph 9(i) suggests that the schedule of condition referred to above is to be the benchmark for repair in this timetable. The timetable in paragraph 9(h) also envisages the pub company commencing the dilapidations procedure not less than 12 months before the end of the term. There are tactics used in relation to dilapidations cases which will be open to other landlords who are not required to commence the process at this early stage which will be lost to pub

companies. Further in the case of a 1954 Act protected lease, where the tenant is renewing, the timetable would be inappropriate/pointless.

- 8.32 Paragraph 38 of the proposed Statutory Code provides a fall back that unless the lease provides otherwise, the tenant will be required to keep or maintain the building in the condition set out in the schedule of condition. Most leases over 5 years do not have a schedule of condition. Despite this, paragraph 38 provides that the schedule of condition will form the basis of agreement on the repair liabilities of the lease or tenancy agreement offered – therefore is a lease once assigned varied to incorporate a schedule of condition? And is the outgoing tenant, whose liability was greater if no schedule of condition was attached to the lease at the outset, potentially liable for any difference?

Assignment of Leases

- 8.33 Paragraph 34 states that the pub company must respond timely to requests for assignment. Is this only in the case where assignment is permitted under the lease? In which case there is already provision under the Landlord and Tenant Act 1988 requiring a landlord to respond within a reasonable time. If this new obligation is not actually adding anything to the existing law, why include it? If it is intended to change the existing primarily legislation then what is the proposed substantive change? The tests appear very similar.

No cooperation obligations on the tenant

- 8.34 As a general note there is no requirement on the tenant under the Statutory Code to co-operate/not frustrate the pub company's obligations.

Turnover

- 8.35 The Adjudicator's power to require information from pub companies as described in paragraph 6.8 of the Consultation document refers as an example of where pub companies may be grossly inflating projected turnovers. This is not an issue which can be determined without looking at actual turnovers. This could require disclosure of an individual tenant's trading accounts to the Adjudicator which potentially puts the pub company in breach of its data protection obligations under the Data Protection Act 1988 (irrespective of any contractual confidentiality arrangements). How would this duty to disclose to the Adjudicator fit with the existing data protection primary legislation? Which would take precedence?
- 8.36 In addition both the RICS Guidance and normal contractual lease terms require that there is a disregard of any personal "goodwill" when assessing a rent on review. Is the current operator's actual accounts are not generally to be taken into account. If these accounts are not in the public domain (they often will not be) arbitrators or experts are unlikely to order disclosure and, even if they are disclosed, they may be ruled as inadmissible as evidence of rental value.
- 8.37 The overall result of the proposed information arrangements is that an Adjudicator who asks the pub company to show their FMT projections are not inflated will often put the pub company in an impossible position because there may be no actual accounts disclosed by lessees or because of the fact that the Data Protection Act applies and the pub company will not be able to disclose without the lessee's consent.

Significant increases in drink prices

- 8.38 The term "significantly" is very vague. What does the Government consider to be "significant" in this context?

- 8.39 The Enterprise Inns' Code of Practice provides that prices generally increase annually and by duty. There is no evidence that Enterprise Inns has increased prices significantly, in the context of RPI or other index over a number of years. Increasing prices can only be done annually, or if the wholesale price of produce is increased significantly by the brewer. It is simply not in the interest of pub companies to increase pricing so as to make the pub uncompetitive. See the Forest Hill Tavern decision in this regard.⁷⁸
- 8.40 In addition to the Court, the OFT was satisfied that pub companies were not in a position to sustainably inflate prices above a competitive level. In light of the extent of competition and choice that exists between pubs, any strategy by a pub company which compromises the competitive position of its publicans would be expected to result in losses for the publican and, in turn, for the pub company. If a landlord unduly maximises the wet rent he will not only jeopardise his prospect of recovering the dry rent but will run the risk that the open market dry rent to be ascertained at the next rent review will be correspondingly affected.
- 8.41 It is misleading to promote that tied publicans will secure discounts on the open market at the levels heralded by the lobbyists. Free trade prices available may not be what the campaigners are leading others to believe. ALMR members and multiple operators may be able to secure certain discounts from breweries due to their buying power but individual and rural publicans will struggle. Individual publicans will struggle due to their small purchasing volume and rural pubs will struggle due to the delivery costs. Individual tenants may also struggle to get decent credit terms from brewers.

Unintended consequences

- 8.42 A tied lease generally anticipates that the landlord could be the supplier of the tied drinks OR that there could be a nominated supplier. If the Government's proposals are implemented a pub company who is currently also the supplier could change its structure and nominate a 3rd party to be the supplier. That nominated supplier (who is not a pub company) would not be bound by the proposed Statutory Code.
- 8.43 There are other means by which the tie could simply be shifted to a third party. A free of tie publican may (if he has the buying power) tie himself to a brewer or wholesaler in exchange for advance of discounts loans or to secure the biggest discounts gained by an exclusive purchasing agreement. Only multiple operators or publicans with large buying power are likely to have the bargaining strength to achieve substantial discounts on the open market. Not struggling tenants. The tie will simply shift elsewhere to those who can meet the minimum order quantities that may be imposed by breweries – again the large and successful operators will benefit and the struggling tenant will not.

ii. Increase transparency, in particular by requiring the pub company to produce parallel 'tied' and 'free-of-tie' rent assessments so that a tenant can ensure that they are no worse off.

- 8.44 First it should be noted that:
- 8.44.1 all ties are not the same, there is variety;
- 8.44.2 a number of our tied pubs have a cask conditioned ale entitlement already, mostly pursuant to the Beer Orders which required the release of one cask conditioned product and non beer drinks. That is specifically a provision of "one cask condition

⁷⁸ *Enterprise Inns plc v (1) The Forest Hill Tavern Public House Limited (2) Kevin Albrect and (3) Anne Albrect* AND *(1) Unique Pub Properties Ltd (2) Enterprise Inns plc v (1) Kevin Albrect and (3) Anne Albrect* [2010] EWCH 2368 & 2639 (Ch)

beer” not any beer or lager as seems currently envisaged under the proposed Statutory Code;

- 8.44.3 we already offer flexible letting terms from completely free of tie at one end to tied for BCFWSM (beer, cider, flavoured alcoholic beverages, wines, spirits and minerals) and any combination in between; and
- 8.44.4 leases which are protected business tenancies assign with the same tie and renew with the same tie.
- 8.45 There is a ladder of options to choose from when a tenant enters into a tied lease with Enterprise Inns. Every tied lease / tenancy agreement is unique and is subject to commercial negotiation. It will depend on the particular pub, its location, the terms of the agreement and the SCORFA benefits.
- 8.46 It would be next to impossible to compare a tied lease with a free of tie lease because one is not comparing like with like. There is no straight forward formula.

iii. *Abolish the gaming machine tie and mandate that no products other than drinks may be tied.*

- 8.47 The Government’s proposals in relation to machines are likely to:
 - 8.47.1 restrict the ability of the tenant of large pub companies to drive footfall into his/her pub;
 - 8.47.2 increase the risk of criminal activity associated with machines;⁷⁹ and
 - 8.47.3 reduce income for the Treasury.
- 8.48 It is a common misconception to refer to a machine tie. In reality there is a prohibition in most leases against having gambling machines installed. If the tenant would like to install a gaming machine, it must enter into a side letter with Enterprise Inns which provides consent to have amusement with prize (AWP) machines installed in the pub on agreed commercial terms. Tenants can mix and match the various ties in their leases. If, for example, a tenant would benefit from an expensive coffee machine, Enterprise Inns can offer to buy that piece of equipment for the tenant if they agree to be tied for coffee beans. It is a commercial negotiation.
- 8.49 Enterprise Inns has willingly made significant changes to its gaming operations through the provision and clarity of information and commercial terms and not least through the removal of royalties from its AWP machine rents. The AWP tie remains contentious because some pub companies have not removed royalties from their rent cards. Those companies who do not charge royalties should not be subject to a statutory removal of the AWP tie.
- 8.50 The rents charged by Enterprise Inns for AWP machines were significantly reduced in 2011 and are commensurate with those in free-of-tie pubs. In 2011, Enterprise Inns reviewed the AWP

⁷⁹ In May 2013, Spelthorne Council secured convictions against two individuals for unlicensed gaming machines (this was not an Enterprise Inns pub). Councillor Penny Forbes-Forsyth, Cabinet member for Community Safety, Young People and Leisure, said: “*Illegal and unlicensed gaming machines have a harmful effect on local community safety... I trust that this will act as a deterrent to those establishments which make gaming machines available for public use.*” Clive Noblett, Senior Compliance Manager for the Gambling Commission, said: “*Providing support, advice and expertise to local enforcement partners is key to the Gambling Commission’s role in keeping gambling fair and safe and we welcome the outcome in this case.*” <http://www.spelthorne.gov.uk/article/4156/Illegal-gaming-machine-prosecution> Pub companies can help provide that support, advice and expertise.

rent card and benchmarked this against the indicative Free Trade Rent Guide produced by John Painter and Associates (amusement and gaming machine operators). At that time the Enterprise Rent Card was comparable to free trade rents. Enterprise Inns AWP rents may appear to be higher because the quality of the AWP estate is much better than in the free trade because new machine injection is much higher. AWP rents have been actively managed by Enterprise Inns for the mutual benefit of itself and its tenants and, through negotiation with suppliers, have not increased during the last three years.

- 8.51 It is proposed that the restriction on having an AWP tie would only apply only to those companies with more than 500 pubs. This would create an unfair disadvantage for those companies and their tenants. The groups who operate beneath that number are competitors on the same high streets, suburbs and villages. From a gaming perspective the number of pubs owned by a company is therefore irrelevant.
- 8.52 There are many benefits of the “machine tie” that are completely overlooked by Government in the Consultation paper:
- 8.52.1 Where the pub company shares the machine income, the tenant’s share is not included in the divisible balance when assessing rent. Where machines are free of tie the tenant’s machine income is included in the divisible balance for rent calculations. Therefore if machine income declines slightly on a free of tie machine the tenant may be worse off even if they receive all the machine income.
- 8.52.2 If the tenant decided to change the profile of the business e.g. to a gastro pub and machines were no longer suitable for the new trading style, the loss of this income stream is currently shared between the publican and pub company. However, again if the pub company no longer shares this income stream and the rent is increased as a result, the loss of machine income would only impact the tenant because the higher rent which included lifting the prohibition on machines would still need to be paid by the tenant.
- 8.52.3 In the commercial arrangements for AWP machines between the tenant and the Company, the AWP rent is paid out of the pub companies share. Enterprise Inns’ machine agreements⁸⁰ guarantee that the tenant will not suffer any losses if the income is insufficient to cover the cost of the rental of the AWP. Enterprise Inns has negotiated share terms for other products, including jukeboxes, which are not normally available on a “no loss” deal for free of machine tie tenants.
- 8.52.4 Gamestec Leisure Limited, a national machines operator, conducted a survey in 2008 which showed that the AWP machine income in free trade houses is, on average, at least 26% worse than a tied house.
- 8.52.5 Pub companies can use their bargaining strength against machine companies to source good quality new machines which are more attractive to customers. The average age of an AWP machine in free trade houses is 2.5 years whilst in the tied estate is nearer 1 year. The average tied estate receives 36% new machines a year whilst in general free trade houses only receive machines that have previously been used in tied estates. There is a correlation between quality and age of machine and income.
- 8.52.6 Enterprise Inns as a large listed company can hold suppliers to account and ensure the correct licences are in place. Suppliers can be denominated or penalised through loss of business for poor standards or performance.

⁸⁰ With the exception of pool.

- 8.52.7 Enterprise Inns, through its active management of AWP machines, has from time to time discovered machines from non-approved suppliers in the pub estate and occasionally also found unlawful machines. We have a process in place with our operations teams to get these removed and, if appropriate, replaced with legitimate machines. Enterprise Inns contributes towards an industry wide initiative to employ a specialist agency to work with the police in identifying and convicting persistent machine fraudsters.
- 8.52.8 Tied tenants have fewer restrictions than free houses with regards to machines. Tied tenants do not have to enter into supply agreement with a Supplier for a given term. Some free trade machine supply contracts are onerous either due to the length of term or the fixed rental cost and some suppliers take advantage of the lack of specialist knowledge of tenants.
- 8.52.9 Enterprise Inns provides its tenants with a list of approved suppliers. All our suppliers are registered with the Gambling Commission. Our approved suppliers will ensure that machines are not installed without the correct licenses and permits - illegal machines cannot be supplied by our approved suppliers and we advise tenants on the legality of machines. Our approved suppliers will apply for the necessary permits on behalf of tenants if requested.
- 8.52.10 If the Government removes the tie on AWP machines, the process for collection of Machine Gaming Duty (MGD) risks failure; there will be no written, or systems record of the collection values and revenues to HMRC from MGD will decline. In free trade the majority of machines are supplied on a rental only. Rent is typically collected by direct debit. There is no visibility of income which provides a serious risk to HMRC for understating revenues, assuming that the pub has registered. Enterprise Inns ensure that all AWP machines are collected on either a 7 or 14 day cycle by an independent collector who completes a collection docket which is then entered onto our systems. This removes an administrative accounting burden from tenants and ensures that income is calculated and declared accurately for tax purposes.
- 8.52.11 Pub companies drive innovation and change. They work directly with UK and foreign manufacturers, software developers and entrepreneurs to stimulate new product initiatives. Pub companies constantly investigate the new product markets to ensure continuity of product and gaming content e.g. the digital and video equipment markets.
- 8.52.12 The UK's only remaining volume AWP manufacturer was purchased by an Austrian gaming giant Novomatic who then tried to increase the price of machines by 60%. This would have been a substantial additional cost to tenants but was resisted due to the bargaining strength and buying power of the pub companies. The pub companies then supported new entrants to the market - smaller companies in the UK manufacturing sector thus ensuring a competitive market and suppressing price increases for tenants.
- 8.53 Enterprise Inns has clearly demonstrated a cultural change in its approach to the AWP tie. It has simplified and made a concerted effort to review its commercial terms and processes and provides full transparency on gaming income. Enterprise Inns has removed all AWP royalties and only charges a small administration fee, but not on all machines. Enterprise Inns has seriously reviewed its gaming terms and has made strenuous efforts to deliver a gaming regime within the Enterprise Inns Code of Practice which is a fair deal for tenants.
- 8.54 Enterprise Inns has asked BIS to confirm if any of the calls received by the BII hotline regarding Enterprise Inns were in relation to AWP machines and if yes, how many were

complaints related to the AWP machines. Enterprise Inns is awaiting a response from BIS on this point.

iv. *Provide a 'guest beer' option in all tied pubs.*

- 8.55 In recent years British microbrewers have been afforded unprecedented routes to market through the purchasing power of large pub companies and the associated economies of scale. Enterprise Inns helped SIBA create the direct delivery service (DDS) to enable independent brewers access our estate.

Keith Bott Chairman of SIBA Council: *"Enterprise Inns were the first pubco to offer tenants the SIBA Direct Delivery Scheme (DDS) that enables tied licensees to source locally produced cask ales directly from the 650 brewing members. Designed to allow macro companies to deal with many micro companies with a single point of contact, the scheme has allowed those licensees approved by Enterprise to access locally produced beer that SIBA believes can drive footfall and generate sales. Enterprise Inns continued support for the scheme allowed in excess of 84,000 firkins of locally brewed beer to reach the consumer last year. The scheme also allows Enterprise to identify those brands with particularly strong sales for inclusion in their own delivery network"*

- 8.56 This has in turn increased the range of British beers and ales available to tied pubs and therefore the consumer. The beer and ale market in the UK is unique and something to be immensely proud of.

"Enterprise is a family business at the forefront of the development of cask ale at a regional level. In the early stages of our brand development we were challenged to build a brand that could warrant sufficient volume to make it logistically feasible to enter a national supply chain. Now, some years later, 40% of our total production is taken by pubco business in one form or another. Despite being tight on margin (our choice) this volume has delivered us profit and brand exposure in our regions, which we might have never otherwise had. In our opinion, the variety of cask ale sold by the major pubcos is a notable and positive example of market freedom in a tied estate environment"

- 8.57 Currently our Publicans have access to over 1,500 different brands, and we are supplied by c. 470 different brewers. The DDS is a major success story as can be seen from the following extract from the SIBA website:

Background

Since its inception in 2002, SIBA DDS has grown into a business which, in its latest financial year, achieved a turnover of more than £10 million.

SIBA DDS currently buys over 1500 draught and bottled beers from around 350 participating SIBA brewers and sells them on to 12 national pub companies and off-trade retailers – companies with which, until the establishment of DDS, brewers of local beers found it extremely difficult to trade.

A wholly-owned subsidiary of the Society, SIBA DDS operates without profit and ensures that

its customers – over 2000 pubs and stores around the country – receive the best possible choice of ales at the lowest possible prices, delivered in the freshest, most cost effective and environmentally friendly way.

How does it work?

The operation is, like most great ideas, essentially very simple – SIBA DDS receives orders (via EDI, e-mail or telephone) at its office in North Yorkshire, either from the company or direct from the outlet, and distributes them immediately to DDS member brewers all over the country.

Brewers access their orders via a secure intranet facility, delivering the required products directly to the outlet according to the SIBA Delivery Charter.

SIBA DDS reports centrally on all deliveries made and provides consolidated invoices to the company head office, which will then produce any appropriate documentation for the individual outlet.

Like to know more?

Whether you are -

A retailer who would like to obtain the beers offered by SIBA brewers in your area, or

A company seeking competitive advantage from the range of local beers and distinctive support, or

A brewing member of SIBA needing more information on the opportunities offered by DDS, or

A fan of quality, locally-brewed beer looking to find out more about the beers available near you, then please contact [us]

8.58 The CGA Strategy survey the “State of the Nation” published in June 2012 identified Cask Ale as the best performing category within the trade at the moment (almost half of the respondents identified this - 49%), and this is backed up by statistics from the CGA’s Brand Index service which has the category outperforming the declining beer market. There has been an increase in consumer demand for products with craft and a provenance image. Publicans found that an increasing prominence of smaller easier to manage cask ales within the trade was making it less of a risk for licensees to stock them and offered the opportunity to rotate brands more quickly.

8.59 We set out below some facts and figures demonstrating the growth of British microbreweries in recent years as a result of the tie:

8.59.1 According to CAMRA, in September 2010 there were more than 600 microbreweries across the UK, with no less than 70 new ones starting up in 2009.⁸¹

8.59.2 According to CAMRA's annual Good Beer Guide 2013, there are now 1,009 breweries in the United Kingdom with as many as 158 of those breweries opening in the last

⁸¹ <http://news.bbc.co.uk/1/hi/business/8513072.stm>

year alone. The recent rise in brewing establishments is the greatest rate of increase in the Guide's 40 year history.⁸²

- 8.59.3 The total figure is the highest number of breweries in the UK in 70 years and is more than double the number just a decade ago. The number reached an all time low in 1982 when there were just 200 breweries in the UK.⁸³
- 8.59.4 More than 1,000 brewers now operate across the country compared to just over 800 in late 2011, some working out of little more than a large garage but competing for drinkers with giants such as SABMiller and Greene King in a £16.5 billion industry.⁸⁴
- 8.59.5 Small breweries in London have doubled since 2006 to 14 in August 2011, with five more due to launch.⁸⁵
- 8.59.6 Statutory production figures confirm a 2008-2009 volume rise of 7.7% for SIBA micro, local and smaller regional brewers (up to 60,000hl per annum) – well ahead of the previous year's survey claim of 3.75%.⁸⁶
- 8.59.7 Many micro breweries have opened in recent years, but smaller ones have expanded despite a steady flow of pub closures.⁸⁷
- 8.60 Enterprise Inns provides a huge choice of beers and ales to its publicans and already offers a local cask conditioned ale option (as one of several flexible letting terms offered) in many of its leases. Over 400 different microbrewers have access to our tied estate even where the publican is fully tied for all beers. The Enterprise Inns Code of Practice sets out at paragraph 12 that *"the supply of guest beers from a small brewer will be negotiated during the letting process."*
- 8.61 The Enterprise Inns cask conditioned ale option is controlled (unlike the Government proposals) so that it is local small independent brewers which are selected for the provision of a cask conditioned ale and not the large international breweries which produce top selling lagers.
- 8.62 Government proposes that publicans should be permitted to sell a *"guest beer from any source"*. Such a proposal is dangerous as it will undermine the diversity of the beer and ale market currently enjoyed by consumers in the UK which was praised in the OFT final decision in the CAMRA super complaint in October 2010.
- 8.63 Publicans would be much more likely to source a best selling lager from a large international brewer (who can afford to offer extremely competitive prices) than a local British ale from a small independent brewer. This will result in (i) the closure of microbreweries across the country with associated job losses and loss of tax revenue (ii) the loss of a unique and diverse beer and ale market with negative consequences for the consumer and (iii) a distortion of competition as the large international breweries take the place of the microbrewers and become dominant in the market.
- 8.64 The world's four largest brewing companies are Belgium based Anheuser-Busch InBev (AB-InBev), London based SABMiller, the Dutch brewer Heineken, and Denmark's Carlsberg which together now account for over half the global market for beer. Only one of the top 5 international brewers has its head office in the UK.

⁸² <http://www.is4profit.com/small-business-news/20120913-brewery-numbers-highest-in-70-years.html>

⁸³ <http://www.is4profit.com/small-business-news/20120913-brewery-numbers-highest-in-70-years.html>

⁸⁴ <http://uk.reuters.com/article/2013/05/23/uk-britain-microbreweries-idUKBRE94M0MR20130523>

⁸⁵ <http://www.guardian.co.uk/lifeandstyle/2011/aug/02/real-ale-revival-small-breweries>

⁸⁶ http://siba.co.uk/wp-content/uploads/2011/02/industry_report_20111.pdf

⁸⁷ <http://www.guardian.co.uk/lifeandstyle/2012/sep/13/number-uk-breweries>

8.65 Top 5 breweries:

	Brewery	Location of global headquarters
1.	Anheuser-Busch InBev	Belgium
2.	SAB Miller	England
3.	Heineken	The Netherlands
4.	Carlsberg	Denmark
5.	Molson Coors Brewing Company (MCBC)	USA

8.66 If an unrestricted guest beer provision were to be introduced, then it would make sense for any publican to choose his biggest selling brand as his guest beer (provided he had the buying power and credit terms to source it), effectively achieving a substantial free of tie option by the back door.

8.67 An analysis of the largest selling brand across every pub in the Enterprise Inns estate confirms that lager products represent the largest brand in 86% of our pubs. Without doubt, the introduction of a guest beer option, far from helping local independent cask ale brewers in the UK, would be huge benefit to the international lager brewers.

8.68 The Government's proposals will result in serious unintended consequences for the treasury as UK based cask ale brewers lose sales to the international brewers (4 out of the 5 of the largest of which are located overseas) which will in turn mean a loss in tax revenues.

8.69 The introduction of a "guest beer" provision which is not adequately controlled will distort competition in the market and will not benefit the consumer.

v. *Provide that flow monitoring equipment may not be used to determine whether a tenant is complying with purchasing obligations, or as evidence in enforcing such obligations.*

8.70 The tie (also known as "purchasing obligations") has historically been an important source of revenue for brewers and pub companies. As long as there have been purchasing obligations, there has been a need to monitor compliance with those obligations, to identify tenants who are in breach of those obligations.

8.71 In the past the landlord of a tied pub generally relied on the following methods of identifying breaches of the tie:

8.71.1 Rights of entry and inspection of stock and cellars to identify the presence of tied products purchased from third parties. Such inspections relied on luck. Even if an inspection were carried out once a month, there was no guarantee that, on that particular day, buying outside of the tie would be discovered. Such inspections were disruptive to both the publican and the landlord. If a warning of a cellar inspection was given, then it was highly unlikely that buying outside of the tie would be discovered. Repeated surprise inspections caused disruption to the tenant's business and engendered bad feelings. Inspections also only provided a snapshot of the potential buying outside of tie. Even if third party supplies were discovered, the tenant could attempt to argue that the buying outside was a 'one off'.

- 8.71.2 Access to the tenant's books of account and VAT invoices and returns. This can be a very good way of checking if buying outside of the tie has occurred. The problem usually was and still is, that a tenant may resist financial disclosure, or be incomplete (which is also an issue for HMRC). Accounts are generally unaudited profit and loss accounts prepared for tax purposes. They often do not split the sale of tied products from untied products and food.
- 8.71.3 Comparing volumes of deliveries, to show a decline in deliveries caused by buying outside of the tie. However, deliveries may be declining for other reasons so it becomes very difficult to accurately estimate the proportion of decline attributable to buying outside of tie.
- 8.71.4 An admission from the tenant or manager.
- 8.72 Alternative methods of detecting breaches outside of the tie are old fashioned and less sophisticated. They were found to be very disruptive, time consuming and costly for both parties. The man hours needed to carry out cellar inspections, chasing financial records and surveillance would impose a substantial cost on the landlord and interrupt the business of the tenant. His Honour Judge Behrens in the *Onifas* decision⁸⁸ recognised that there are other ways of enforcing the tie but that such "*methods proved unreliable and unsatisfactory*". It would be difficult to decide which pubs to investigate and the landlord's choice was often based on suspicion or guesswork. The investigations were expensive in man hours and intrusive methods did not promote good relationships with tenants."⁸⁹
- 8.73 Owners of tied pubs therefore needed a management tool that could:
- 8.73.1 easily identify pubs which may be breaching their purchasing obligations, in order to investigate them;
- 8.73.2 reduce the man hours spent investigating pubs that are not buying outside of tie and focusing on the ones that are; and
- 8.73.3 provide better evidence of the quantity of buying outside of tie taking place.
- 8.74 Flow monitoring equipment provided that management tool. The equipment has also increased transparency in this area (something which the Government seeks to increase in the pub industry). It goes without saying that certain 'lobbyists' have a vested interest in dispensing with such equipment despite having no evidence to back up their position that the equipment is inaccurate.
- 8.75 It is hard to give any serious consideration to the Government's flippant comparison in the Consultation paper at paragraph 5.20 to the 18th century. Such a comparison is misconceived and simply not credible. It was a lot easier to monitor breaches in the tie before the Beer Orders when pubs and ale houses only sold one beer or limited products from one brewer. There are now a plethora of brands available through a multi-level supply chain.
- 8.76 Enterprise Inns Code of Practice allows the findings of flow monitoring equipment to be taken into account when policing tenants' purchasing obligations under the tie. However, it will not be the only evidence taken into account. Flow monitors are one of many means Enterprise Inns uses to identify breaches of purchasing obligations and ultimately, in the event of a dispute, it is for the court to decide whether a breach of the tie has occurred taking into account all of the facts of the case.

⁸⁸ (1) *Unique Pub Properties Limited* and (2) *Enterprise Inns PLC v Onifas Limited* [2011] EWHC 3071 (Ch)

⁸⁹ *Ibid* at paragraph 28.

- 8.77 The equipment can be used to identify a potential breach which will then be investigated further with additional facts and evidence being gathered. Enterprise Inns' usual response to an alert is to commission an investigation in conjunction with the Regional Manager. The system will be checked and calibrated again before further action is taken. If there is a fault on the system, the electricians or the telephone line, then it is easy to identify it.
- 8.78 Small variances over long periods of time will not start an investigation. The variances are typically large on a particular (usually keg) product over a short period. Thus the flow monitoring equipment report will show, for example, 180 gallons of Guinness (keg) delivered in a 12 week period, but will show 370 gallons dispensed, a variance of 190 gallons or 105% of the volume delivered.
- 8.79 Enterprise Inns arranges for the installation of the equipment free of charge. Although the primary function of the equipment is to manage compliance with the purchasing obligations, it has other uses - a publican can use it as a management tool: they can access the data from anywhere (e.g. if on holiday, at home or if they have more than one premises), use it for staff planning, identifying hotspots, checking if the lines are clean and for stock control, pilfering, wastage and staff serving out of hours. It can provide the tenant with valuable information about which of their products are selling the most and at what times, so that they know which brands to promote and how much to order. Managed house operators use the equipment for management purposes.
- 8.80 Enterprise Inns takes steps to explain to tenants how the system works. As the Enterprise Inns' Code of Practice confirms; within three months of taking one of our pubs, or having flow monitoring equipment installed, the tenant receives a visit from a qualified technician who will provide them with the necessary instruction on how the system operates and how to view and use the dispense data.
- 8.81 The system has been installed in thousands of pubs, for many years. The Government has produced no evidence to support the position that the equipment is inaccurate. By contract, Stockton Trading Standards carried out tests in May 2009 which showed that the equipment had an accuracy of over 99%. In January 2011, the National Measurement Office published a report which found that the equipment was accurate to an acceptable level: in relation to keg products the equipment was accurate 99% of the time. These reports demonstrate that flow monitoring equipment is fit for purpose.
- 8.82 During the Onifas case in 2011, Enterprise Inns was forced to seek a court injunction against Onifas Limited to stop it removing the flow monitoring equipment which was installed in the pub. The judge found in favour of Enterprise Inns. His Honour Judge Behrens stated, "*I agree with Mr Rodger QC (for Enterprise Inns) that there is no contravention of the Weights and Measures Act and no other evidence that flow monitoring equipment is unlawful.*"⁹⁰
- 8.83 It is for the court to determine the appropriate weight to give to evidence supplied during legal proceedings and the data from flow monitoring equipment should be disclosable under the Civil Procedure Rules.
- 8.84 Certain publicans have interpreted the use of flow monitoring equipment as some sort of penalty imposed by the pub company on tenants. It is not. It is simply the best available method of policing breaches of the lease. A breach of the purchasing obligations in the lease is a bona fide breach of contract. Enterprise Inns has a right to claim compensation for loss of profits arising from a breach of contract.

⁹⁰ *Ibid* at paragraph 76.5.

- 8.85 There have been various smear campaigns led by certain biased publicans and pressure groups against the use of flow monitoring equipment. In their submissions to the BIS select committee enquiry in 2009, the Fair Pint Campaign attacked the use of flow monitoring equipment. Their submissions were based on misrepresentations and erroneous evidence e.g. they presented an expert report which tested an old and no longer in use flow meter.
- 8.86 The Government appears, once again, to be basing its proposals on biased and inaccurate opinions from those 'lobbyists' who have vested interests in the proposals instead of robust factual evidence. We ask the Government to review the evidence and come to an independent finding on the usefulness of such equipment to legitimately help companies monitor compliance with purchasing obligations. There is nothing to fear from the technology unless there is a variance which cannot easily be explained.
- 8.87 The proposals envisage that pub companies with fewer than 500 pubs will be able to use flow monitoring equipment to police breaches of the tie whilst larger pub companies cannot. The 500 pub threshold in this context is illogical.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- The AWP gaming machine tie should not be removed for certain tenants
- Pub companies should take flow monitoring equipment into account when policing breaches of the tie but it should not be the only evidence taken into account

Q9. Are there any areas where you consider the draft Statutory Code (at Annex A) should be altered?

- 9.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section 1. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 9.2 This question is biased. A Statutory Code is unnecessary because the IFC is working. Government has acknowledged this by virtually transposing its provisions into the proposed Statutory Code. The key differences stem from the misconceived principle of equivalence between tied and free-of-tie which was rejected by the court in the Brooker case.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working

Q10. Do you agree that the Statutory Code should be periodically reviewed and, if appropriate amended, if there was evidence that showed that such amendments would deliver more effectively the two overarching principles?

- 10.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section I. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 10.2 There is no need for a Statutory Code.
- 10.3 The two overarching principles are too simplistic, not backed up by empirical evidence, not properly explained or defined and will not work in practice.
- 10.4 Enterprise Inns supports a triennial independent audit of the IFC by an independent party e.g. a judge.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working

Q11. Should the Government include a mandatory free-of-tie option in the Statutory Code?

- 11.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section I. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 11.2 No.
- 11.3 The Government has asked "*If the tied system is so good, why not agree to offer free of tie? If you're right no one will want it*". We do offer free of tie agreements in our estate along with different types of tied agreements. Enterprise Inns objects to the Government intervening in commercially negotiated agreements to impose a formula for the calculation of rents and overturning the fundamental principle of free market negotiation.

Enterprise Inns tenant: "*One of the biggest challenges for me personally and an issue that affects many in the industry is cash flow. Due to perishable stock we face challenges that retailers do not. Having a lower base rent that is lifted through the beer tie allows me to manage my cash flow more effectively. I pay for my beer weekly and buy the amount I will sell in a week. If the tie was to be removed and the rent fluctuated this would increase my fixed costs taking away my power to manage cash flow in the way I do presently*"

- 11.4 Around 55% of Britain's 50,000 pubs operate under a lease or tenancy, making it the most popular business model in the pub sector. There are around 28,000 tenanted pubs in the UK and the majority are "tied" to their landlord for the purchase of beer and other products. The basis for the tied system is supported throughout the UK and Europe by the Block Exemption which was recently extended by the European Commission until 2022.
- 11.5 In 2006, the Crehan decision⁹¹ found that tied agreements were not anti-competitive.
- 11.6 The advantages of the tied model are that the rent and cost of entry are lower than in free trade premises and the landlord and publican have a common interest in ensuring that the pub is successful and sells more tied product. In addition, in the case of long leaseholds there is the potential to develop a successful business and sell it at a premium on assignment.
- 11.7 The tie also works to the benefit of consumers, as it results in a diverse and competitive pub industry with lots of choice as recognised in the OFT final decision of October 2010.
- 11.8 The Secretary of State for BIS highlighted the benefits of the tied model in December 2011: "*the tie may actually play an important role in safeguarding the future of Britain's smaller breweries. Data produced by CGA Strategy clearly shows that between December 2008 and June 2011 more free-of-tie pubs closed than tied pubs, both in absolute figures and as a percentage of the total number of pubs in that category.*" Although the lobbyists will disagree there is empirical evidence that the tied model is keeping pubs open in the midst of the difficult economic climate.

⁹¹ *Crehan v Imntrepneur Pub Co (CPC)* [2006] UKHL 38.

Enterprise Inns tenant: *“there is absolutely no way that we would have been able to start a business of this type and in this location where it not for the tied mode. We simply would not be able to risk the huge commercial rents nor would we be able to save up the huge deposits required despite coming from a well paid job prior to starting up our own business”*

11.9 Publicans choose to enter into a tied agreement with a pub company. Enterprise Inns provides information, our Codes of Practice and training materials to explain to publicans how the relationship between us will work.

11.10 Is it intended that the proposed free-of-tie option will apply retrospectively to leases which have already been negotiated and agreed? It is not the Government’s place to interfere with freedom of contract. The unintended consequences would be severe.

Is there a difference between option 2 and option 3?

11.11 The relationship between the BIS Proposals Option 2 (“Equivalence”) and Option 3 (“Mandatory Free of Tie”) is not entirely clear.

11.12 Option 2 (BIS Equivalence Proposal) states that the income of an actual tied tenant should, via changes in the prices of three key variables, be equalised to the income he would receive if he were free of tie. The three key prices relate to the wet rent (the purchase of beer), the purchase of various benefits (SCORFA), and the payment of the dry rent. The actual tied tenant should:

11.12.1 pay a price for beer that is the hypothetical price that would occur if beer were sourced by the pub on the open market. It is assumed that this would be lower than the price the tied tenant currently pays;

11.12.2 pay for SCORFA (though it is uncertain whether these should be purchased at cost or value);

11.12.3 pay a “corresponding” increase in dry rent (though it is uncertain what is meant by “corresponding”, which, given the £100m transfer, would seem to be something different from the natural interpretation of “equal and offsetting”).

11.13 Option 3 BIS Mandatory Free of Tie Proposal intends that each tenant should have the option to elect actually to go free of tie (FOT) and actually to buy beer from a supplier other than the pub company landlord (though presumably it could choose to purchase from his landlord or from a landlord’s designated exclusive supplier from among all its options if that seemed to him most advantageous). The tenant would also presumably pay a “commercial” free of tie rent for the pub.

11.14 The publican would then:

11.14.1 buy beer and cider on the open market at a “no-tie actual market price”;

11.14.2 as in Option 2 pay for SCORFA (again, unclear whether at cost or value); and

11.14.3 pay higher dry rent (presumably increased by an equally “corresponding” amount (whatever that means).

11.15 It is instructive to consider the relationships between Option 2 and Option 3.

- 11.16 There are many challenges/uncertainties here, including (i) how to decide what would be the actual price paid by a publican in the same situation as regards size of establishment and volume and range of beer delivered so as to provide an understandable and implementable comparison; and (ii) how to deal with the fact that, if the market were reformed in this way, the free beer price might (indeed quite likely would) for various reasons change.
- 11.17 Provided that both free houses and tied houses continue to exist, one could potentially envisage that a certain fraction of the pub market would actually bargain rent and beer prices, whilst the remaining, complementary fraction would operate as tenants at rents and beer prices benchmarked to the freely bargained open-market rates.
- 11.18 At a practical level, this faces the difficulty that different brands of beer sell at different prices and that all pubs are different and hence have different free market rentals, and also that there is not going to be a unique free market price negotiated. But even assuming away such practical but significant problems, the free houses would negotiate with brewers or wholesalers, whereas the tied tenants would expect their landlord to supply beer on the same basis as the free house sector publicans acquire their beer.
- 11.19 But if there were true equivalence of the tied tenant to the free house, this would mean that beneficial aspects of the tie, including risk-sharing benefits are lost to the tenant, and “equivalence” would effectively collapse into the de facto abolition of the tie.
- 11.20 The number of complications, implications and scenarios is undoubtedly large. But, by way of illustration, one severe problem would arise if any independent wholesaler achieved greater scale or bargaining power with brewers than the smaller (or least effective bargainer) of the pubcos subject to the policy (which could be as small as 500 pubs). In this situation, under Option 2 the pubco would – as we understand the proposal – be obliged to supply on terms equal to a wholesaler whose cost of beer from the brewer the pubco would be unable to match. At that point, the only sustainable financial solution for the pubco would be to remove the obligation on the pubco to supply the tied tenant and allow the tenant to deal direct with the wholesaler – but again that effectively abolishes the tie for these pubcos.

Enterprise Inns tenant: *“We were able to build up a multi site business quicker than we would otherwise have done because of the cash flow benefits of the tenanted/leased model. Were it not for the low cost entry opportunity afforded to us by Enterprise Inns we would not have been able to achieve this as quickly or without introducing third party funding”*

- 11.21 A movement towards a higher rent/lower beer price model will increase, not decrease, the financial difficulties facing below-average performing publicans. This is because the free house model (whether replicated under Equivalence or implemented via Mandatory Free of Tie) increases fixed costs and reduces marginal cost and hence worsens below-average outcomes (and improves above average outcomes). If these proposals are motivated by improving the outcome of struggling tenants, the rebalancing from variable to fixed costs goes in the wrong direction, and worsens their outcome. And by affecting the supply of publicans will likely lead to more pubs ceasing to be viable.

Microbrewers out of business

- 11.22 Small microbrewers will be forced out of business as they lose their distribution channels, access to market and national technical services support. This will eventually distort competition and lead to less consumer choice as large international brewers become dominant.

Cessation of pub company investment and support

- 11.23 If a mandatory free of tie option is included in leases, there will be less incentive for pub companies to provide business support or capital investment into their pub estate, as their income is no longer linked to the publican's performance behind the bar. Enterprise Inns would also be forced to substantially reduce our workforce.

Enterprise Inns tenant: *"the support that I have been given by Enterprise Inns has been crucial"*

Restructuring of Pub Companies

- 11.24 Enterprise Inns has approximately 1,300 agreements expiring over the next few years. If the Government proposals come to fruition Enterprise Inns may decide to position itself as a very large managed pub estate and retain its economies of scale. Enterprise Inns would consider this a huge shame for thousands of its great publicans whose livelihoods would be taken away. Unfortunately a hybrid model would not operable for Enterprise Inns – its either all or nothing.
- 11.25 Alternatively, Enterprise Inns can trigger a free-of-tie option in all of our leases at any time. This in turn would trigger a rent review, which would be upwards only. We would then create a structure to enable us to become a REIT.
- 11.26 A newly free-of-tie tenant could be substantially worse off by the end of the term if the pub company chooses to oppose the tenant's lease renewal on a "no fault" statutory ground G under the Landlord & Tenant Act 1954. Or ground F (redevelopment) or, if Enterprise Inns decides to sell the reversion e.g. to Tesco for them to use, subject to ownership qualifications, and turn the pubs into convenience stores.

Enterprise Inns tenant: *"The tied model and business support gives people in my situation the opportunity to start up their own small business, without it we would be overrun with large companies, managed houses and multiple operators who are likely to contribute less to local economies, community spirit and cohesion"*

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code, the Industry Framework Code is working
- Introducing a mandatory free of tie option would result in severe unintended consequences for in the pub industry

Q12. Other than (a) a mandatory free-of-tie option or (b) mandating that higher beer prices must be compensated for by lower rents, do you have any other suggestions as to how the Government could ensure that tied tenants were no worse off than free-of-tie tenants?

- 12.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section *I. The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 12.2 The Government's analogy between tied and free-of-tie tenants is fundamentally flawed and fails to appreciate the fact that more free of tie pubs are closing than tied pubs.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- We suggest that BIS embarks on a much more proportionate response. Namely an awareness campaign to inform all tied tenants of the regulation currently available under the IFC and explain the PIRRS and PICAS systems.

Q13. Should the Government appoint an independent Adjudicator to enforce the new Statutory Code?

- 13.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section I. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 13.2 No.

Enterprise Inns tenant: *"My concern with government intervention is that there will be yet another body involved in the trade which is already saturated with professional bodies involvement and can be extremely confusing for us, the tenants. I also believe that the industry has made huge steps in the right direction and would continue to do so to improve the profitability of their leaseholders and tenants"*

- 13.3 The current voluntary system allows tenants several routes of redress - through PIRRS/PICAS and through the court system or other dispute resolution mechanism as set out in the lease or tenancy agreement (i.e. expert determination or arbitration).
- 13.4 Government's proposals to introduce an Adjudicator for tenants of pub companies with more than 500 pubs would serve to limit those tenants' access to justice; with only one dispute resolution mechanism which has limited rights of appeal.
- 13.5 The PIRRS and PICAS already provide this role at a lower cost and with less red tape and bureaucracy. As stated by the BBPA: *"No other industry to our knowledge provides such a comprehensive low cost mechanism for complaints"*.
- 13.6 A further benefit for tenants is that the current PIRRS and PICAS forums do not preclude a tenant from subsequently going to court, should they not like the decision of the PIRRS or PICAS review committee.⁹² This benefit will likely not be available under the Adjudicator system.
- 13.7 If the proposed Statutory Code and Adjudicator were enacted, the Adjudicator would act as "arbitrator" of disputes between pub companies and tenants presumably under the auspices of the Arbitration Act 1996 (which applies to the Groceries Code Adjudicator). The Arbitration Act 1996 offers very limited rights of appeal against an arbitral decision.
- 13.8 How does Government proposes to appoint an Adjudicator for pubs? The Groceries Code Adjudicator only has one area to cover and Government has appointed someone who knows the industry and the retailer/supplier relationships. What the proposed Statutory Code sets out for the Pubs Adjudicator is effectively two jobs, does this mean there will be a pool of potential adjudicators - some to carry out rent reviews and some who can deal with code breaches/investigations? The costs for such a regime would be extremely high.
- 13.9 An analysis undertaken by Fleurets indicates that there are approximately 6,400 rent review or lease renewals each year on leased pubs. However, evidence from the industry shows that a very low number of disputes are referred to a formal dispute resolution process. The principle reason is usually to avoid damage to the business relationship that often accompanies a dispute.

⁹² An Enterprise Inns' tenant recently went to PICAS and was unsuccessful. That tenant, not agreeing with that decision, then took the case to court and was, again, unsuccessful.

In addition the management time involved is not proportionate and so the parties will often reach a negotiated agreement. The PIRRS annual report shows that only 13 cases have been completed by PIRRS in three years out of a total of 285 enquiries. There are currently 25 live cases which suggest that the numbers are increasing as the scheme has established itself. PIRRS now allows tenants to take the initiative and challenge rents with no risk of costs being pursued against them.

- 13.10 Any proposed pubs Adjudicator would require a team of industry specialists to advise him/her on rent valuations. Valuers of pubs are highly specialised in their particular market. They have knowledge of the operational aspects of the industry and they have a fundamental understanding of market transactions and how these are analysed.
- 13.11 The appointment of an Adjudicator will take time. His/her first actions will be to produce guidance which will then have to be considered. It is unlikely to be "open for business" for some time after the introduction of any Act which only serves to extend the uncertainty.
- 13.12 There is also a lack of evidence as to costs of the proposed Adjudicator in impact assessment. Is it envisaged there will be different Adjudicators in different geographical areas of the UK?

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- There should be no Adjudicator
- BIS should launch a campaign to increase tenants' awareness of the PIRRS and PICAS systems

Q14. Do you agree that the Adjudicator should be able to:

i. Arbitrate individual disputes?

- 14.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section 1. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 14.2 There is no need for a statutory Adjudicator in the pubs industry. Tenants (and pub companies) already have means of redress (including fines and censures) through PIRRS, PICAS, the court system, arbitration or alternative dispute resolution. Adding another layer will simply add cost, bureaucracy and red tape which will not benefit anyone, except maybe lawyers.

ii. Carry out investigations into widespread breaches of the Code?

- 14.3 There is no need for a statutory Adjudicator in the pubs industry. Tenants (and pub companies) already have means of redress (including fines and censures) through PIRRS, PICAS, the court system, arbitration or alternative dispute resolution. Adding another layer will simply add cost, bureaucracy and red tape.
- 14.4 Notwithstanding the above, what does "widespread" mean? Does it mean a widespread breach by one pub company or at least several? Or one breach or a continued breach? How would an Adjudicator deal with vexatious claims from disgruntled publicans? Who bears the cost of the investigation if it is determined that the pub company has not breached the code? Has the cost to pub companies in man hours been considered?

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- There should be no Adjudicator
- BIS should launch a campaign to increase tenants' awareness of the PIRRS and PICAS systems

Q15. Do you agree that the Adjudicator should be able to impose a range of sanctions on pub companies that have breached the Code, including:

I. Recommendations?

II. Requirements to publish information ('name and shame')

III. Financial penalties?

- 15.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section *I. The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 15.2 There is no need for a statutory Adjudicator in the pubs industry. Tenants (and pub companies) already have means of redress (including fines and censures) through PIRRS, PICAS, the court system, arbitration or alternative dispute resolution. Adding another layer will simply add cost, bureaucracy and red tape which will not benefit anyone, except maybe lawyers.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- There should be no Adjudicator
- BIS should launch a campaign to increase tenants' awareness of the PIRRS and PICAS systems

Q16. Do you consider the Government's proposals for reporting and review of the Adjudicator are satisfactory?

- 16.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section I. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 16.2 There is no need for a statutory Adjudicator in the pubs industry. Tenants (and pub companies) already have means of redress (including fines and censures) through PIRRS, PICAS, the court system, arbitration or alternative dispute resolution. Adding another layer will simply add cost, bureaucracy and red tape which will not benefit anyone, except maybe lawyers.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- There should be no Adjudicator
- BIS should launch a campaign to increase tenants' awareness of the PIRRS and PICAS systems

Q17. Do you agree that the Adjudicator should be funded by an industry levy, with companies who breach the Code more paying a proportionately greater share of the levy? What, in your view, would be the impact of the levy on pub companies, pub tenants, consumers and the overall industry?

- 17.1 Enterprise Inns' response to this question should be read and considered in conjunction with Section I. *The Issues* which contains the legal and socio-economic arguments as to why there should be no statutory intervention in the pubs industry.
- 17.2 There is no need for a statutory Adjudicator in the pubs industry. Tenants (and pub companies) already have means of redress (including fines and censures) through PIRRS, PICAS, the court system, arbitration or alternative dispute resolution. Adding another layer will simply add cost, bureaucracy and red tape which will not benefit anyone, except maybe lawyers.
- 17.3 The impact on pub companies could be catastrophic if Government's figures are wrong. There is no empirical evidence presented that they are right. If they are wrong it will lead to pub closures, job losses, declining standards as less money is invested into pubs money, micro brewery closures, dominance of large foreign breweries and large managed house chains, detriment to consumers and loss of revenue for the Treasury.

ENTERPRISE INNS RECOMMENDATION:

- There should be no Statutory Code; the Industry Framework Code is working
- There should be no Adjudicator
- BIS should launch a campaign to increase tenants' awareness of the PIRRS and PICAS systems

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Pub companies and tenants consultation

**Enterprise Inns plc
Annexes to response to
Government consultation June 2013**

References to harm or detriment in the Consultation documents

<ul style="list-style-type: none"> This table sets out the references, both explicit and implied, within the Consultation documents to alleged harm or detriment occurring in the pubs industry, together with any evidence cited substantiating the alleged harm.
<ul style="list-style-type: none"> Two other tables at page 17 and 23 of Enterprise Inns' Annexes to Response to Government consultation June 2013 respectively list (i) references to market failure in the Consultation documents and (ii) references to increasing detriment or the failure of the BBPA Industry Framework Code. References included in the table below may also be included within the other two tables.

	BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
1.	Consultation: Explanation of wider context for the consultation and what it seeks to achieve	"The focus [of serious concerns and numerous complaints re the relationship between pub companies and their tenants] has been on tied pubs and the share of reward gained by pub owning companies, for example through large unjustified rent increases"	Pub tenants as a result of receiving an unfair share of the reward	Large unjustified rent increases; Unfair share of reward achieved by publicans in comparison to pub companies	None cited
2	Consultation: Explanation of wider context for the consultation and what it seeks to achieve	"Tied tenants are more likely to face serious hardship"	Tied pub tenants	Not explained	None cited
3.	Consultation: Foreword from the Secretary of State	"It has become clear to me that the self regulatory approach...has not been sufficiently far reaching, with many publicans continuing to face significant hardships and difficulties."	Publicans/pub tenants	Not explained	None cited

References to harm or detriment in the BIS Consultation documents

BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
4. Consultation: Foreword from the Secretary of State	"We are all familiar with well managed, popular pubs in our constituencies being driven to the wall by, frankly, exploitative financial practices."	Publicans/pub tenants and consumers Implied that the pub companies are passing on the harm suffered by them (in 4) to tenants and thus the community and consumers	Not explained – but implicit that pubs are suffering and closing, and this affects the local area and constituents.	None cited
5. Consultation: Foreword from the Secretary of State	"The evidence I have received makes it clear that in too many cases tenants are being exploited and squeezed through a combination of unfair practices, lack of transparency and a focus on short-termism at the expense of the long term sustainability of the sector."	Pub tenants	Exploitation and squeeze of profits as a result of pub companies trying to maximise their income in the short term; 'unfair practices' / 'lack of transparency'	Evidence that the Secretary of State has seen is not expanded on; what these unfair practices are is not expanded on here
6. Consultation: Foreword from the Secretary of State	"This behaviour [as set out in (5)], especially alongside the many other challenges facing the sector, risks damaging the British pub industry."	Pub tenants, pub companies, communities, consumers, Britain generally	As in (5), and general social and economic downturn of the industry, with knock on and filter down effects to employment, taxation, community cohesion etc	None cited
7. Consultation: Foreword from the Secretary of State	"what is clear is that it is the abuse of the [beer] tie, like the abuse of rent calculations and other factors, that are causing problems in certain circumstances"	Tied pub tenants, consumers, communities	Not explained	None cited – the Secretary of State immediately prior to this statement argues that beer tie, when operated fairly is a valid business model, the removal of which would significantly disadvantage British brewing

References to harm or detriment in the BIS Consultation documents

BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
				industry.
8. Consultation: Executive Summary	As in (1)	As in (1)	As in (1)	As in (1)
9. Consultation: Executive Summary	"Evidence indicates that tied tenants are also more likely to face serious hardship"	Tied pub tenants	Not explained	None cited
10. Consultation: Executive Summary	"...the Government is now proposing to legislate to ensure that the pubs sector operates more fairly."	Tied pub tenants / consumers / general pub industry	Not explained, but presumably harm generating from unfair practices (i.e. high rent, unfair tenancy terms etc)	none cited
11. Consultation: Paragraph 3.2	"Following a call for evidence in October 2012, it has become clear that the self-regulatory approach has not been sufficiently far reaching. There has been a lack of necessary culture change within the industry, with no concerted long-term effort made to inform tenants of their rights and discussions on future progress deadlocked on numerous issues."	Pub tenants	Not all aspects explained i.e. necessary culture change/deadlocked matters. Lack of information being made available to tenants to make them aware of their rights under the self-regulatory framework.	Call for evidence from October 2012, but not information given as to what evidence was received, what gave the evidence, and which pub companies it concerned.
12. Consultation Paragraph 3.3 and 3.4	"The British Institute of Innkeepers has received over four hundred complaints on its hotline over the past three years...the vast majority were about pub owning companies with large numbers of tied pubs. There are several other people...who act independently and estimate they receive	Pub tenants	Unjustified rent increases; misleading estimates of potential sales; overvaluing of additional services.	None given other than BII hotline data, and statements that such behaviour has been reported to BIS.

References to harm or detriment in the BIS Consultation documents

	BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
		over 10 cases a week that directly relate to the "Pubco model"there have been numerous letters to MPs and representations to BIS Select Committees...Examples of the types of unfair behaviour that have been reported to the Government include: tenants at rent review being old of large rent increases without justification; misleading estimates of potential sales; and overvaluing of additional services provided such as business development advice."			
13.	Consultation Paragraph 3.5	"This problem can be exacerbated by tenants who go into the pub sector as a 'lifestyle choice' rather than as a commercial business decision."	Pub tenants	Lack of commercial awareness being displayed by pub tenants – presumably the Government's point is that such tenants should have the risks, obligations, and rights associated with being a tenant more expressly explained to them.	None cited
14.	Consultation Paragraph 3.5	"Many publicans do not shop around for pubs or invest based on business reasons: rather they choose a pub they like or on the basis of the attached living accommodation."	Pub tenants	as in (14)	CGA stating that 73% of respondents only looked at one pub owning company when deciding which pub to rent.
15.	Consultation Paragraph 3.5	"There have also been concerns regarding the chronically low levels of literacy and numeracy amongst tenants. The tie gives an additional route of abuse as beer prices are changed more frequently than rents. The tie	Pub tenants	Implied that the harm again comes from lack of awareness of nature of commercial investment in renting a pub, exacerbated by a low level of literacy and	An article is cited on the Publican's Morning Advertiser which claims up to 40% of publicans may have trouble with numeracy or literacy.

References to harm or detriment in the BIS Consultation documents

BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
	also complicates the relationship, making it tougher for tenants to know if they are getting a good deal.”		numeracy amongst pub tenants.	This is an estimate, and no evidence is produced to substantiate the claim. No reasons or evidence is given to support the claim that the introduction of a beer tie complicates the relationship to the extent that tenants cannot see if they are getting a good deal.
16. Consultation: Paragraph 3.6	“Tied tenants are more likely to face serious hardship -46% of tied publicans earn less than £15,000 per year, compared to just 23% for tenants who are free-of-tie...the fair working of the beer tie is particularly important because of the hardship many publicans face including the possibility of losing their home.”	Tied pub tenants	Lower levels of personal income; potential financial difficulty (presumably in paying their rent, thus risking being in breach and having their tenancy terminated).	Evidence of cited statistics appears to be come from an August 2011 Report by the Institute for Public Policy Research titled “Tied Down”, although the Govt does not reference the source of the statistic in the Consultation.
17. Consultation: Paragraph 4.3	The current system has not done enough. As the Government has previously said too many tenants continue to be badly treated and are suffering hardship. There has been a lack of the necessary culture change within the industry, with no concerted, long-term effort made to inform tenants of their rights and discussions on future progress deadlocked on numerous issues”	Pub tenants	as in (12) Note that in Paragraph 4.2, the benefits to date of the self-regulatory approach are set out, in particular in the areas of transparency and pre-entry training, RICS guidance, and PIRRS and PICAS ADR.	Cites the Secretary of State’s Jan 8 th letter to BIS (link in “Worsening Pub Situation”, point 7)

References to harm or detriment in the BIS Consultation documents

	BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
18.	Consultation: Paragraph 4.4	“Both pub companies and tenants have accepted that a self-regulatory code cannot address the fundamental issue of risk and reward between pub companies and tenants.”	Pub tenants	Unbalanced level of risk compared to reward when compared with pub companies	None cited (FOIR sent regarding which pub companies have accepted this)
19.	Consultation: Paragraph 4.4	“The self regulatory approach relies too heavily on the ability of individual tenants to know their rights and to be able to take their own case to PIRRS or PICAS.”	Pub tenants	Lack of awareness and knowledge of self-regulatory approach and tenant’s rights.	None cited
20.	Consultation: Paragraph 4.17	“The Government does recognise that, based on the evidence above [BII hotline data], some large pub companies appear to be treating their tenants significantly better than others.”	Pub tenants	General and not explained further	BII hotline date
21.	Consultation: Paragraph 4.24	“The provisions of the Code would cover all non-managed pubs, not just all tied pubs [because]...were the Code to cover only tied pubs, there would be nothing to stop a pub company from removing the tie and immediately increasing the rent to well beyond market rent values.”	Free-of-tie tenants who were previously tied tenants	Unjustified rent increases, with an inaccurate value placed on the beer tie, so that subsequent dry rent is then increased beyond market values	No evidence cited of this occurring; seemingly no consideration to safeguards already in place (i.e. general contract law, continuing leases, negotiated rent reviews, and possibility of arbitration where rent cannot be agreed)
22.	Consultation: Paragraph 5.2	Although version 6 of the Industry Framework Code contains a number of valuable provisions that are of use to tenants, in particular in the area of pre-entry training and transparency, it does not go far	Pub tenants	Balance of risk and reward for pub tenants	No evidence cited to substantiate current failure in area of risk and reward. In fact, the only evidence cited is a quote by the Association of

References to harm or detriment in the BIS Consultation documents

	BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
		enough in the area of risk and reward...			Licensed Multiple Retailers from February 2013 which endorses Version 6 as being “immeasurably better” (presumably than Version 5)
23.	Consultation: Paragraph 5.4	[Re the principle of fair and lawful dealing] “Key aspects of the provision, other than fairness, include the need to cover formal and informal arrangements, the need to avoid duress and the need to provide tenants with clear information.”	Pub tenants	Duress, a lack of information and understanding about the obligations and risks faced by publicans, and the need to ensure informal agreements are also protected by the Code	No evidence cited as to any instance of this kind of harm, purely set out as the types of harm that the Code should protect against.
24.	Consultation: Paragraph 5.10	“The ability to request an open market rent review – and, if necessary, take it to the Adjudicator – is fundamental to ensuring tenants are treated fairly.”	Pub tenants	Unjustified rent increases / unfair rent review terms	No evidence cited to suggest that the current rent review system is harming tenants
25.	Consultation: Paragraph 5.12	“It is important that tenants have the ability to fairly and openly access information to ensure that they are being treated fairly”	Pub tenants	Pub tenants, particularly at rent assessments and rent reviews, do not have access to information that would indicate whether or not they are getting a fair deal.	No evidence cited to substantiate suggestion that the level of information currently provided to tenants does not get them a good deal. Also, Govt states in the Consultation that the Framework Code has valuable provisions, especially in the area of transparency (see (23) above)
26.	Consultation:	“It is clear that there is no consensus as to whether the [flow monitoring] equipment is	Tied pub tenants/ pub	Being exposed to monitoring equipment, the accuracy of which	Statement in Select Committee

References to harm or detriment in the BIS Consultation documents

BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
Paragraph 5.19	accurate enough to be used to determine whether a tenant is complying with purchasing obligations”	companies	cannot be guaranteed (tenants) Pub companies limited in how they can ensure compliance with contractual purchasing obligations of tied tenants	Report Assertion that since the beer tie operated in the 18 th Century without flow monitoring equipment, it is clearly possible to operate and enforce the tie without the equipment today (no evidence substantiating the validity of the comparison)
27. Consultation: Paragraph 5.25	“We are interested in views about whether these measures [those currently outlined in the Code] would be a sufficient and proportionate means to address the harm or whether further measures would be merited”	Pub tenants/ communities/ consumers/ general Pub Industry (the wording is not specific and seems to imply all the harm previously mentioned	No explanation as to what “harm” is referred to, although context implies all types of harm that the Code is designed to protect against (i.e. lack of transparency, balance of risk and reward, unjustified rent increases, ‘exploited’ tenants, unfair pub company practices etc)	As it is presumably a general reference to all harm previously mentioned, no evidence expected. However, expectations of evidence of previously mentioned ‘harm’ are not contained in the Consultation. FOIR has been submitted asking for clarification on what is meant by ‘harm’ in this paragraph.
28. Consultation: Paragraph 5.27	“Although rents would be expected to rise to some degree under a free-of-tie option, without enforcement, pub companies, should they so choose, would be free to raise rents to well above the fair values.”	Recently ‘free-of-tie’ pub tenants	Unjustified rent increases above fair value resulting in artificial exploitation of free-of-tie rents	No evidence cited that this takes place; also does not consider the nature of rents being negotiated rather than set, and the ultimate possibility of arbitration under

References to harm or detriment in the BIS Consultation documents

BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
				the current PIRRS/PICAS system
29. Consultation: Paragraph 5.32	“The last major Government intervention into this market, the Beer Orders, led to the unanticipated rise of major pub companies and, arguably, contributed to the concerns that the industry faces today.”	General Pub Industry	Not explained	No evidence cited
30. Consultation: Paragraph 5.33	The benefits that of [the beer tie business model] offers to small and medium sized brewers, granting them a guaranteed market to sell their beer and build their brands, is significant. Uncertainty created by a mandatory free-of-tie option could undermine this, potentially leading to an increased risk of pub closures.	Pub tenants, Pub companies, general communities, general pub industry	Instability and uncertainty surrounding free of tie pubs, causing pub closures	Evidence cited is the list of potential negative consequences of a mandatory free-of-tie option
31. Consultation: Paragraph 6.6	“Although arbitrations are effective at tackling individual disputes, they do little to tackle underlying or systemic issues. Particularly as many tenants may not know their rights, it is possible that a pub company could systemically breach the Code and consider that the cost of the minority of cases that went to arbitration were simply ‘a cost of doing business’”	Pub tenants	Harm here is likely to mean the harm that follows from a pub company’s breach of the Statutory Code. However, the basis of the harm comes from a tenant not knowing their rights and being unaware of the avenues available to them for redress.	No evidence cited to suggest that pubcos would operate in this way. Nor is evidence cited to substantiate the claim that many tenants do not know their rights.
32. Consultation: Paragraph 6.7	[regarding the Adjudicator’s investigatory powers] “...when looking across several hundred pubs it would be very easy to tell if a company was, for example, consistently	Pub tenants	Withholding awareness training, or documents, and grossly inflating projected turnovers (which could mean increased	Although the Government is only giving examples of what the Adjudicator could look into, it gives no evidence as to

References to harm or detriment in the BIS Consultation documents

	BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
		not providing pre-entry awareness training, withholding documents or grossly inflating projected turnovers”		rent)	the current existence of these practices which, presumably, is one of the reasons that necessitates the Adjudicator.
33.	Consultation: Paragraph 6.10	“Investigations would, therefore allow the Adjudicator to tackle and publicise any widespread abuses in the industry”	Pub tenants	Generally mentioned and not specified.	As in (33)
34.	Impact Assessment: Summary	As in (1)	As in (1)	As in (1)	As in (1)
35.	Impact Assessment: Summary	The aim of this policy is to reduce exploitation of pub owning companies’ licensees and increase the share of profits going to the licensees”	Pub tenants	Exploitation by pub companies taking advantage due to greater knowledge and awareness of the market than their tenants.	No evidence cited, although this is expected as it is part of a general summary. As a general note, we have submitted a very extensive FOIR on the Impact Assessment, asking Govt to substantiate their assertions.
36.	Impact Assessment: Paragraph 10	“Tied licensees have less choice and flexibility with regard to how they run their pub. This can vary from a limit on which beers they stock to restrictions on décor and branding. This is obviously a real downside for the individual publican...”	Tied pub tenant; consumer	Less autonomy in how they run an stock their pub; less choice in beers for the consumer	No evidence cited
37.	Impact Assessment:	Profits for licensees of tied products are lower than they would be [without the tie]	Pub Tenants, Pub	Reduced profits for tenants, resulting in less incentive to sell,	No evidence cited

References to harm or detriment in the BIS Consultation documents

	BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
	Paragraph 11	giving licensees less incentive to sell them. This can be socially inefficient as licensees will not consider the profit that the pub owning company makes.”	Companies	resulting in reduced profits for pub companies	
38.	Impact Assessment: Paragraph 13	“The tie adds an extra layer of complexity to the landlord-licensee relationship compared to a fixed rent and separate beer supply agreement. This complicates the relationship between pub owning company and licensee making it tougher for licensees to know if they are getting a good deal.”	Tied pub tenants	Increased complexity leads to a reduced understanding of how their overall rent is assessed. General detriment of lack of awareness and understanding by pub tenants of the nature of their agreements	No evidence cited, although the article citing poor literacy and numeracy levels in tenants is cited in the Consultancy document when the same point is made.
39.	Impact Assessment: Paragraph 13	“Many [tenants] complain that they pay above market rates for beer and while this is a deliberate part of the beer tie it is hard for licensees to judge the fairness of the prices they are charged. This complexity also gives greater potential for abuse.”	Tied pub tenants	Higher than market prices for beer; uncertainty over the fairness of prices charged; complexity of beer tie may lead to abuse	No evidence cited about complaints received; no evidence cited to substantiate claim that beer tie has potential to lead to abuse
40.	Impact Assessment: Paragraph 14	“The inability to change supplier also reduces licensees’ ability to drive the pub owning company to provide a good service at a good price”	Pub tenants	Limited bargaining power once tenancy entered into; low quality of service at high prices	No evidence cited to substantiate the claim
41.	Impact Assessment: Paragraph 14	“A more likely problem might be pub owning companies providing a poor service that is inconvenient but doesn’t necessarily damage trade, for example awkwardly timed deliveries.”	Pub tenants	Inconvenience suffered due to poor service	No evidence cited, merely conjecture

References to harm or detriment in the BIS Consultation documents

	BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
42.	Impact Assessment: Paragraph 14	"Another potential problem is if the pub owning company wants to sell the pub to a developer. The pub owning company may deliberately offer a poor service in order to force the license out or seek to extract as much rent as possible knowing that the long term viability of the business is not important."	Pub tenants	Poor service; lack of support from pubco; exploitation if pub looking to be sold to developer	No evidence of these practices cited, only an assertion of what "may" happen.
43.	Impact Assessment: Paragraph 15	"Overall pub numbers have been in steady decline since at least 1980...closures did accelerate somewhat during the recession but have since returned to the previous trend"	Pub companies, pub tenants, consumers, communities	Increasing pub closures, due to a wide range of factors including changing cultural habits, increased taxation, rise of low-cost selling supermarkets and the smoking ban	No specific evidence cited, although the reduction from 70,000 to c. 50,000 from 1980 to today is also mentioned in the Consultation document; evidence of pub numbers decline is also in public domain
44.	Impact Assessment: Paragraph 17	"Some campaigners argue the tie plays a factor, but pub numbers do not support this. Figures from the latest CGA Survey commissioned by CAMRA show that between March 2010 and September 2012 the closure rate was lower in tied pubs, 4.3%, lower than in free of tie pubs. 4.5%."	Pub companies, pub tenants, consumers, communities	As in (44)	CGA Survey 2012
45.	Impact Assessment: Paragraph 18	"In 2008 and 2009 large numbers of pubs transferred out of the tied sector into the free of tie sector. This led the overall number of tied pubs to fall by over 3000 and the number of free of tie pubs to remain roughly constant. This does not show that	Pub companies, pub tenants, consumers, communities	As in (44)	CGA Survey relating to 2010-2012 figures; no evidence cited to substantiate earlier figures.

References to harm or detriment in the BIS Consultation documents

	BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
		the tie is causing pubs to fail, just as the more recent smaller number of transfers the other way does not show that being a free house is causing pubs to close. The two business models have different benefits and movement between them reflects this.”			
46.	Impact Assessment: Paragraph 26	“There are numerous complaints of pub companies exploiting their licensees to gain an unfair share of profits. The OFT received a large number of submissions from individual pub lessees outlining concerns about the prices and rent levels that they pay to their pub landlord, and/or with the rent assessment process more generally.”	Pub tenants	Not receiving a fair share of profits; unfair prices and rents; problems with rent assessment process	No evidence cited to substantiate these complaints, or evidence given to elaborate on the nature of the complaints, other than citing BII hotline data
47.	Impact Assessment: Paragraph 26	As in (13)	As in (13)	As in (13)	As in (13)
48.	Impact Assessment: Paragraph 27	As in (14)	As in (14)	As in (14)	As in (14)
49.	Impact Assessment: Paragraph 27	As in (15)	As in (15)	As in (15)	As in (15)
50.	Impact Assessment: Paragraph 28	“The tie also complicates the relationship, making it tougher for tenants to know if they are getting a good deal.”	Pub tenants	Lack of awareness from tenants of the commercial viability of their tenancy deal – exacerbated by fact that tenants often make	No evidence cited to substantiate claim that tenants find it tough to know whether they are getting a good deal, or

References to harm or detriment in the BIS Consultation documents

	BIS Document	Reference	Party Suffering Alleged Harm	Nature of Alleged Harm	Evidence
				the decision based on a lifestyle choice.	what might be meant by a good deal.
51.	Impact Assessment: Paragraph 29	As in (17)	As in (17)	As in (17)	As in (17)

References to market failure or similar in the Consultation documents

<ul style="list-style-type: none"> This table sets out any reference, explicit or implied, within the Consultation documents to alleged market failure in the pubs sector, whether relating to alleged unsustainability or instability of the market or similar, and to the alleged need for Government intervention in the market to ensure its proper functioning.
<ul style="list-style-type: none"> Two other tables at page 1 and 23 of Enterprise Inns' Annexes to Response to Government consultation June 2013 respectively list (i) references to general harm and detriment in the BIS consultation document, and (ii) references to increasing detriment or the failure of the BBPA Industry Framework Code. References included in the table below may also be included within the other two tables.

	BIS Document	Reference	Nature of alleged failure	Alleged consequences	Evidence cited
1.	Consultation: Foreword from the Secretary of State	"It has become clear...that the self regulatory approach...has not been sufficiently far reaching, with many publicans continuing to face significant hardships and difficulties. Therefore, further Government action is required in order to maintain a level playing field in the business environment."	Market cannot ensure fair playing field; has resulted from exploitative measures	Pub companies activities, in particular their "highly leveraged business model, have intensified the crisis" which has resulted in 18 (net) pubs closing per week.	None cited
2.	Consultation: Foreword from the Secretary of State	"The pub industry faces a wide range of challenges and the number of pubs has declined from 70,000 in 1980 to approximately 50,000 today. At present, 18 (net) pubs are closing every week. Whilst the financial crisis has brought into stark relief the slow process of sectoral decline, it is undoubtedly the case that the activities of the major pub companies...have intensified the crisis."	Sectoral decline – emphasised by the economic and financial crisis, but also due to major pub companies leveraged business model. Suggests that current market cannot sustain the current number of pubs (although reasons not given).	Closure of pubs as in (1) above	Numbers of pubs closing, although no reference is given for where this information has been obtained.
3.	Consultation: Foreword from the Secretary of State	"With the banking collapse and subsequent recession, the weakness of companies with high debt-to-equity ratios has been rather	Financial structure of pub companies have resulted in difficulties in sustainability of	Pub companies trying to retrieve and better their financial position at the	None cited

References to Market Failure or similar in BIS Consultation documents

BIS Document	Reference	Nature of alleged failure	Alleged consequences	Evidence cited
	State	brutally exposed"	expense of their tenants	
4. Consultation: Foreword from the Secretary of State	"The evidence I have received makes it clear that in too many cases tenants are being exploited and squeezed through a combination of unfair practices, lack of transparency and a focus on short-termism at the expense of the long term sustainability of the sector."	Implied that the market is not sustainable in the long run due to pub companies trying to improve their current financial standing.	The logic is presumably that there will be long term unsustainability, as pubs are being squeezed to such an extent that they then close resulting in the industry being driven to extinction.	Evidence that the Secretary of State has received is not expanded on; what these unfair practices are is not expanded on.
5. Consultation: Executive Summary	"A self-regulatory approach has been tried since at least 2004, with a last chance given in 2011, but this did not work. As such the Government is now proposing to legislate to ensure that the pubs sector operates more fairly"	Failure of self regulatory approach to allow the market to operate "fairly".	None referred to, although presumably similar to (1) due to similar description of the issue.	None cited
6. Consultation: Paragraph 3.7	"It has therefore become clear that further Government action is needed to address this situation and create a level playing field in the business environment"	May not necessarily be market failure, as reasons Govt discusses in 3.7 relate in part to poor tenant literacy/ numeracy and failure to base decision on commercial needs, rather than personal and social needs. Govt trying to address what may be a social problem with a commercial remedy.		IPPR Report "Tied Down", and Publican's Morning Advertiser article discussing poor publican literacy and numeracy levels
7. Consultation: Paragraph 3.8	"We also want to safeguard the long term stability and sustainability of the industry, through proportionate and targeted	Not explicitly set out; implied by previous that current model unsustainable, although that	Uncertain as no specific reasons for the market being unsustainable / unstable are	None cited

References to Market Failure or similar in BIS Consultation documents

BIS Document	Reference	Nature of alleged failure	Alleged consequences	Evidence cited
	interventions where needed.”	assertion is also not substantiated. Paragraph 3.10 makes clear not intervening on competition grounds but grounds of fairness for the tenant	set out	
8. Consultation: Paragraph 4.4 and 4.6	Both pub companies and tenants have now accepted that a self-regulatory code cannot address the fundamental issue of the balance of risk and reward between pub companies and tenants...accordingly, the Government therefore considers that a legislative approach based on a Statutory Code enforced by an Adjudicator, would be more effective in delivering the needed change and ensuring fair treatment for tenants.”	Inability of self-regulation to balance risk and reward between pub companies and tenants. Linked to the idea put forward that it is an issue of fairness (and not competition).	Presumably instability in the industry and an unsustainable situation for tenants if practices continue; however, no evidence is put forward for how the current balance would bring about such consequences.	No evidence cited (FOIR issued requesting evidence of pubcos accepting this assertion).
(9) Consultation: Paragraph 4.11)	“The Government proposes that the Statutory Code should only be binding on pub companies which have 500 or more pubs, thereby targeting the companies with the greatest market power and exempting smaller companies, about whom very few complaints have been received and who, for the evidence received thus far, are widely recognised as behaving responsibly.”)	(Not a reference to market failure, but a clear reference to market power, thus bringing the issue back into the realm of competition law and in contradiction of the OFT CAMRA decision)		Only evidence cited is the BII hotline data
10 Impact Assessment: Paragraph 11	Profits for licensees of tied products are lower than they would be [without the tie] giving licensees less incentive to sell them. This can be socially inefficient as licensees will no consider the profit that the pub owning	Inefficient market as licensees do not consider the added profits being taken by pub owning companies		None cited (however, recent CGA survey suggests drastically lower profits for

References to Market Failure or similar in BIS Consultation documents

	BIS Document	Reference	Nature of alleged failure	Alleged consequences	Evidence cited
		company makes.”			tied publicans)
11.	Impact Assessment: Paragraph 24	“The tie has been found to hinder market access where a significant number of pubs were tied to companies which acquired their beer largely from one source. In these cases, the tie benefited from an exemption to competition law as it was found to lead to an improvement in the distribution of beer and provided countervailing benefits for tied lessees.”	Reduced access to market		CAMRA super-complaint, OFT final decision
12.	Impact Assessment: Paragraph 31	“Secondary to the main rationale is a concern over the long term impact on the industry of licensees not receiving a fair share of profits. An increased share of profits would help reduce the churn of licensees and increase their incentive to invest and innovate. This will help improve the long term health of the pub industry which is of special importance because pubs contribute substantially to community spirit and cohesion.”	Possible future failure of the industry due to lack of incentive of publicans to invest; proposal intended to increase incentive to invest back into the industry by increasing profit share		None cited

References to increasing detriment in the Pub Industry and the alleged failure of the BBPA Industry Framework Code

<ul style="list-style-type: none"> This table sets out any reference, explicit or implied, within the Consultation documents to harm or detriment having increased in the Pub Industry since 2011 or to allegations that the Industry Framework Code has not worked. Two other tables at page 1 and 17 of Enterprise Inns' Annexes to Response to Government consultation June 2013 respectively list (i) references to general harm and detriment in the BIS consultation document, and (ii) references to market failure in the BIS consultation document. References included in the table below may also be included within these other two tables.

	BIS Document	Reference	Nature of detriment	Comparison	Comments/Evidence cited
1.	Consultation: Explanation of wider context for the consultation and what it seeks to achieve	"One longstanding issue in the sector is that, for many years, serious concerns and numerous complaints have been raised about the relationship between large pub companies and their tenants."	General, although "unjustified rent increases" referred to shortly after the quotation cited.	N/A	Mention of a longstanding issue, but nothing noted about the situation worsening over time.
2.	Consultation: Foreword from the Secretary of State	"The pub industry faces a wide range of challenges and the number of pubs has declined from 70,000 in 1980 to approximately 50,000 today. A present, 18 (net) pubs are closing every week. Whilst the financial crisis has brought into stark relief the slow process of sectoral decline, it is undoubtedly the case that the activities of the major pub companies...have intensified	Continuing closure of pubs.	Comparison with 1980.	No evidence cited, although figures for pub closures are available in the public domain.

References to increasing detriment in the Pub Industry and the failure of the BBPA Industry Framework Code

	BIS Document	Reference	Nature of detriment	Comparison	Comments/Evidence cited
		the crisis.”			
3.	Consultation: Foreword from the Secretary of State	“What we have seen in recent years is some pub companies trying to retrieve their financial position at the expense of their tenants”	Pub companies with high debt-to-equity ratios have been exposed by financial crisis. Pubcos trying to pass on detriment to tenants.	Nothing concrete, although implicit is the comparison with the situation prior to the banking and financial crisis.	No evidence cited to substantiate assertion that pubcos are engaging in this behaviour.
4.	Consultation: Executive Summary	As in (1)	As in (1)	As in (1)	As in (1)
5.	Consultation: Paragraph 3.2	“Following a call for evidence in October 2012, it has become clear that the self-regulatory approach has not been sufficiently far reaching. There has been a lack of necessary culture change within the industry, with no concerted long-term effort made to inform tenants of their rights and discussions on future progress deadlocked on numerous issues.”	Lack of culture change, lack of effort to inform tenants of their rights	N/A	No evidence cited.
6.	Consultation: Paragraph 3.17	“The pub industry faces a range of pressures including the current economic climate, the impact of the smoking ban, competition from	Economic downturn; smoking ban; supermarket competition; improving home	Nothing expressly stated, save the comparison between 1980 and now. However, it is likely	Multi-faceted reasons behind decline in the pub industry. No evidence included to suggest what impact each of the reasons has had relative to actions of pubcos.

References to increasing detriment in the Pub Industry and the failure of the BBPA Industry Framework Code

	BIS Document	Reference	Nature of detriment	Comparison	Comments/Evidence cited
		supermarkets, improving home entertainment, social and demographic changes and a trend towards drinking alcohol at home. Beer sales in pubs are declining. There has been a big contraction in the industry over the last three decades: from 70,000 pubs in 1980 to around 50,000 today. Over the last 6 months 18 (net) pubs have closed every week.”	entertainment; social and demographic changes; tendency to drink at home	that the comparison is not intended to just be between two snapshots of 1980 and today, but is a look at the overall changes between the two years that may have led to the current situation.	
7.	Consultation: Paragraph 4.3	“The current system has not done enough. As the Government has previously said too many tenants continue to be badly treated and are suffering hardship. There has been a lack of the necessary culture change within the industry, with no concerted, long-term effort made to inform tenants of their rights and discussions on future progress deadlocked on numerous issues”	as in (5)	N/A	As in (5) Noted that where stating that the Govt has previously stated that the framework is not working, the evidence provided is a link to the Secretary of State's Jan 8 2013 letter http://news.bis.gov.uk/Press-Releases/New-proposals-to-stand-up-for-British-pubs-and-prevent-unfair-practices-685c4.aspx This should be read in the light of Jo Swinson's comments in Oct 2012 claiming that the commitments of the framework agreement 'have now been achieved' (http://www.morningadvertiser.co.uk/General-News/Exclusive-Government-washes-hands-of-self-regulation-deal-over-pubco-tenant-relationship). Paragraph 4.2 also sets out the benefits gained from the regulatory approach. No evidence cited as to what changed from October to

References to increasing detriment in the Pub Industry and the failure of the BBPA Industry Framework Code

	BIS Document	Reference	Nature of detriment	Comparison	Comments/Evidence cited
					January.
8.	Consultation: Paragraph 4.5	“The self regulatory approach relies too heavily on the ability of individual tenants to know their rights and to be able to take their own case to PIRRS or PICAS.”	Lack of awareness and knowledge of self-regulatory approach and tenant’s rights.	N/A	No evidence has been given to substantiate this claim – how many existing cases have not been brought to PIRRS or PICAS due to a lack of knowledge? FOIRs have addressed the issue of how an Adjudicator or Statutory Code will bring about greater awareness of tenants’ rights.
9.	Consultation: Paragraph 4.6	“Although the current Industry Framework Code (Version 6) provides a starting place for the Statutory Code, it is clear that any Statutory Code will need to be significantly strengthened in order to address the fundamental issues of risk and reward, and to ensure the core principles of fairness and that the tied tenant must be no worse off than the free-of tie tenant.	Balance of risk and reward between pub company and tenant	Current Framework Code with intended benefits of Statutory Code	No evidence to substantiate the assertion that the Framework Code has to be strengthened.
10.	Consultation: Box 1, Paragraph 4.8	“The Adjudicator’s power to investigate will allow him or her to tackle systematic breaches of the Code that could not be solved by individual tenants going for arbitration.”	Various detriments, but stemming from main detriment of tenants not being aware of their rights, or various commercial points that affect their pub	Current Framework against proposed legislation	Highlights the information gap that exists between tenants and landlords with a view to having an Adjudicator who could intervene, even without referral by a tenant. Hypothetical examples of pre-entry training and misleading expected turnovers given, but no evidence of to substantiate the suggestion that these practices are being exercised or are widespread is cited.

References to increasing detriment in the Pub Industry and the failure of the BBPA Industry Framework Code

BIS Document	Reference	Nature of detriment	Comparison	Comments/Evidence cited
11. Consultation: Paragraph 4.27	“The Government recognises that self regulation has had some positive impact on the industry.”	Not related to detriment, but rather the positives that have come out of the Industry Framework COP, in particular PIRRS and PICAS.	N/A	Further adds to the argument that the relationship between pubcos and their tenants has improved since 2011, and, if there has been increased detriment to pub tenants, it may be more to do with other external factors. If this cannot be so easily inferred, this at least gives us a statement in support of the measures of the Framework Code; Moreover, in Paragraph 4.29, the Govt encourages PIRRS and PICAS to continue operating after Adjudicator established to “introduce a degree of healthy competition”. This suggests a degree of substitutability between the Adjudicator and PIRRS/PICAS, calling into question how much added value will the Adjudicator bring.
12. Consultation: Paragraph 5.2	“Although version 6 of the Industry Framework Code contains a number of valuable provisions that are of use to tenants, in particular in the area of pre-entry training and transparency, it does not go far enough in the area of risk and reward...the Government considers that although it may use Version 6 as a starting point, it must be strengthened considerably if it is to achieve the Government’s policy aims”	Balance of risk and reward for pub tenants	Current Framework against proposed legislation	No evidence cited to substantiate current failure in area of risk and reward. In fact, the only evidence cited is a quote by the Association of Licensed Multiple Retailers from February 2013 which endorses Version 6 as being “immeasurably better” (presumably than Version 5)
13. Impact Assessment:	“Overall pub numbers have been in steady decline since at least 1980...closures did	Increasing pub closures, due to a wide range of factors	N/A	Evidence provided for closures between 2010 and 2012, but no evidence cited for closures before this period, other than the long term decrease from 70,000 – 50,000 since

References to increasing detriment in the Pub Industry and the failure of the BBPA Industry Framework Code

	BIS Document	Reference	Nature of detriment	Comparison	Comments/Evidence cited
	Paragraph 15	accelerate somewhat during the recession but have since returned to the previous trend”	including changing cultural habits, increased taxation, rise of low-cost selling supermarkets and the smoking ban		1980. BIS skims over the fact that closures have ‘returned to the previous trend’, which is actually saying that pub closures are falling year on year, which suggests an improving situation relative to previous years. See point 14 for further information relating to 2010-2012 closures
14.	Impact Assessment: Paragraph 17	“Some campaigners argue the tie plays a factor, but pub numbers do not support this. Figures from the latest CGA Survey commissioned by CAMRA show that between March 2010 and September 2012 the closure rate was lower in tied pubs, 4.3%, lower than in free of tie pubs. 4.5%.”	Closure of pubs	Closure of free of tie pubs v tied pubs	Not necessarily looking at an increased detriment in the pub industry, but showing that there is steady decline in the number of both tied pubs and free of tie pubs. Evidence cited is CGA Survey of 2012
15.	Impact Assessment: Paragraph 32	A self regulatory approach has been tried since at least 2000, but this has not worked. As such, a stronger intervention may now be needed. A statutory code of practice and an adjudicator would reduce the imbalance between pub companies and licensees and its impact.	The Framework agreement has not worked (no evidence given, although presumably the reasoning is that it does not address the balance of risk and reward as stated in the Consultation)	Framework v Proposed legislation	Citation that the 04-05 Select Committee report stated that if the industry didn’t comply with a voluntary code then a statutory code should be imposed, but no evidence produced that the voluntary code has not been complied with; if anything the voluntary code has been complied with (see Jo Swinson’s email comments above) but the Govt wants a further reaching code.

Competition Commission (“CC”) Guidelines and Groceries Market Investigation evidence

1. The important role that properly established and considered evidence plays in informing the CC’s conclusions on potential breaches of competition law, and potential actions required to remedy such breaches is extensively set out in the CC’s *Guidelines for market investigations: Their role, procedures, assessment and remedies* (the “**Guidelines**”).
- 1.1 The CC’s practice of both gathering and analysing evidence from a number of sources in order to inform its conclusions is evident throughout its 2008 market investigation into the groceries market, *The supply of groceries in the UK market investigation* (the “**Groceries Report**”).
- 1.2 Paragraphs 2 and 3 below summarise and highlight the nature and types of evidence which the CC is likely to consider, and the methodology by which they will analyse the evidence gathered. Paragraph 4 sets out, by way of example, the various types of evidence considered by the Competition Commission when formulating its Groceries Report.

Competition Commission Guidelines

2. Nature and Types of Evidence

- 2.1 The Guidelines provide commentary on the role that evidence has to play throughout a CC market investigation. The CC is clear that extensive gathering and analysis of evidence will be undertaken as part of any market investigation.
- 2.2 The Guidelines refer to the following types of evidence that the CC will consider when looking at both an adverse effect on competition (“AEC”), and potential remedies for such an AEC. This is a non-exhaustive list and the CC makes clear that the appropriate evidence will vary on a case by case basis and be informed by the nature of the harm that is being alleged to exist in the market.
 - (i) Data and information on a range of factors, including pricing and quality of goods and services
 - (ii) Surveys commissioned by the CC
 - (iii) Market and financial questionnaires put to interested parties
 - (iv) Internal company documents (including management information)
 - (v) Discussions with customers, investors and market participants
 - (vi) Publically available information on the market and companies involved in the market
 - (vii) Evidence gathered from site visits to parties, which may include presentations given to the CC by the parties
 - (viii) Information on the background of the market, its operation, the performance of parties in the market, and market definition, including historical data such as past entries and survival rates in the market
 - (ix) Price patterns in the market (to be taken in conjunction with other evidence so as not to distort the reasons behind price variations)

- (x) Economic modelling
- (xi) Empirical evidence of behavioural biases in the market
- (xii) Oral evidence given at hearings with interested and affected parties
- (xiii) Submissions by parties
- (xiv) Working Papers
- (xv) Other relevant items of evidence

3. Methodology of analysing the evidence gathered

- 3.1 The Guidelines state that the depth and sophistication of any analysis of evidence should be tailored to the importance and gravity of the evidence and the issue to which the evidence relates. This applies equally to the consideration of evidence substantiating an AEC as to evidence relating to the impact of potential remedies on customers, businesses and other affected parties.
- 3.2 As part of the process of analysing evidence, the Guidelines suggest that meetings take place between the CC and interested parties, where the methodology used by the CC in analysing evidence is explained, and the CC can explain the reasoning behind the conclusions it has drawn from the evidence. These meetings and other hearings conducted by the CC are also designed as an opportunity to test the evidence that has been received by the CC.
- 3.3 Before announcing provisional findings, an Inquiry Group will disclose the CC's developing approach and its method of analysis.
- 3.4 The CC takes into account a variety of evidence and uses both qualitative and quantitative techniques to analyse the effects of a potential remedy, including the costs associated with implementing a remedy. The Guidelines state that the CC will place most weight on estimates regarding the costs of implementing a remedy where the estimate is provided with a clear explanation of how the estimate was reached, together with supporting evidence and the assumptions used to derive the estimate.

4. Examples of evidence considered by the CC in formulating the Groceries Report

- 4.1 In regarding its conclusions on any AEC in its Groceries Report, the CC adduced the following examples of evidence. This is not an exhaustive list, but provides an example of the various sources through which evidence was obtained and analysed.
 - (i) Advanced Institute of Management Research: Local Choice Report
 - (ii) GfK report: Research on Suppliers to the UK Grocery Market
 - (iii) GfK report June 2007: research on local case studies
 - (iv) Economic Roundtables
 - (v) Tesco Staff Comment Cards
 - (vi) Ronald Cotterill expert opinion—Market Definition and Market Power
 - (vii) Margaret Slade expert opinion—UK Groceries Market Definition

- (viii) Various interested and third party submissions
- (ix) Hearings
- (x) Independent surveys
- (xi) Industry publications
- (xii) Emerging Thinking report
- (xiii) Working paper on Buyer power
- (xiv) Working paper on Grocery wholesalers
- (xv) Working paper on Land holdings and use issues
- (xvi) Working paper on Market definition
- (xvii) Working paper on Planning issues
- (xviii) Working paper on Pricing practices
- (xix) Working paper on Supply chain practices
- (xx) Working paper on Supply chain profitability
- (xxi) Economic modelling of consumer demand
- (xxii) Revenue data from incumbent Grocery stores
- (xxiii) Evidence on supply chain practices of grocery retailers
- (xxiv) CC commissioned party questionnaires
- (xxv) CC commissioned party surveys

empower

The Retail Standards Edition
May 2013

enterpriseinns.com

Business Feature

Raising the bar on retail standards

In this month's feature, we look at how you can establish and maintain great retail standards, which are essential in securing your customer base, gaining stand out from the competition

Great end-to-end retail standards can make a huge difference to a Publienn's business. If a pub is in great condition and its products taste great, it has a

"We look at how to ensure beers are kept to a high standard through line cleaning"

better chance of attracting customers and securing return visits.

In this feature on retail standards, we look at how to ensure beers are kept to a high standard through line cleaning, how you can attract more customers with an improved 'kerbside appeal', and we hear from Cask Marque trainer Annabel Smith on the retail standards specific to cask ales.

Continued on pages 2 and 3



First impressions count: maintaining high standards both inside and out will help to increase your trade

The
Retail Standards
Edition

BUSINESS

E-Learning
courses available

page 4



COMMUNITY

Community
Hero Awards
update

page 5



Online Level 2 Award in Food Safety

- Our Level 2 Award in Food Safety (Catering) is offered in conjunction with the Safer Food Group and is fully accredited by Qualifi.
- Designed to provide you and your staff with knowledge of basic food safety practices, this course is a quick and simple way of ensuring you are compliant with food safety regulations.

Why choose it?

- No staff release time required
- Online course – learn wherever and whenever you are online*
- Take the course in 10 min bite sized chunks or all in one go; the choice is yours
- No need to attend a test centre to take your exams
- We even give you unlimited FREE exam re-takes
- Helps make your business stand out from the competition
- Benefit from a better working relationship with your local EHO
- Lost your certificate? – just log in and download it FREE

**It couldn't be easier...
simply purchase a code
and away you go!**

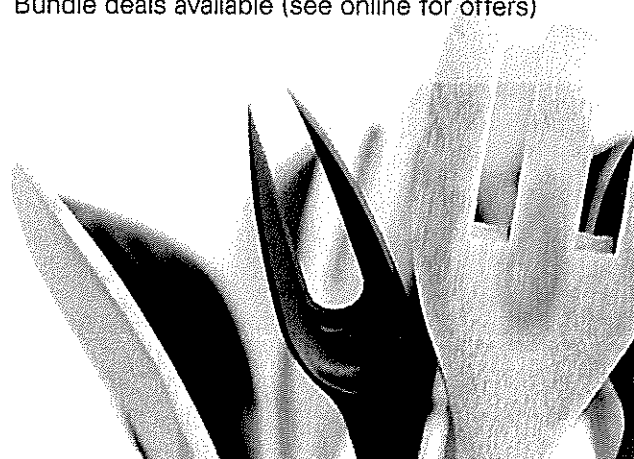
Just £11.50

- Fully Accredited Food Hygiene Certificate
- Bundle deals available (see online for offers)

For further information and to
purchase a code, go direct to
enterpriseinnstraining.com

Any queries, call 0800 953 0072.

* You will need a unique email address to register and complete the online training.



Profit Through People

Would you like to get the best out of your team? Improve your overall business performance? Exceed your customers' expectations?

Profit Through People

examines how to manage your performance and your team to maximise the potential of your businesses.

You will explore the systems, processes and skills which will enable you to consistently get the best out of your team, improve your overall business performance and exceed customers' expectations.

We realise you are busy so the workshop is completed in one day and runs from **9.30am to 4.30pm** with lunch included.

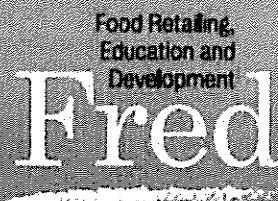
At the end of the Profit Through People workshop you will be able to:

- Develop the skills and knowledge required to coach and develop a motivated team
- Identify the underpinning components that make up a successful, profitable and sustainable business
- Strategically review customer care, understanding why businesses lose customers and identifying what you can do about it
- Establish the five key ways you and your team can consistently exceed customer expectations
- Manage your own time effectively, to build the business you need to meet your personal goals
- Identify the specific tasks you need to delegate to enable you to maximise your efficiency as a business owner
- Effectively assess the current level of performance of your team members
- Review the various methods available to assess and manage all of the roles within your business
- Conduct those difficult discussions around poor performance in a professional and constructive way
- Action plan your approach

To book your **FREE** place on this course, please contact the Training Department on: 0800 953 0072

enterpriseinns.com

Pub Food Development Free One Day Workshop



Introduction

FRED (Food Retailing Education and Development) is our unique one day workshop developed specifically to assist publicans introduce or develop their pub food offer. Pub food is continuing to grow in importance and our one day workshop will help compete in this increasingly competitive area.

Why you should attend

Pub food now represents around 30% of all UK pub sales, the managed house sector (businesses like M&B, Weatherspoons and Whitbread) are highly focused on growing their market share so if you do not have an appropriate food offer it is highly likely you are missing out on a substantial profit opportunity!

At the end of the FRED (Food Retailing Education & Development) workshop you will walk away with:

- **An appropriate food offer for your pub**, taking into consideration your knowledge and skills, your pub's facilities, your competition and your existing and potential customers.
- **A turnover and profit forecast** based on the selected food offer.
- **A comprehensive plan** to set up and develop the food offer.

Comments from previous FRED delegates

"Really thought provoking, I did not realise how important food was to the survival of a pub"

"I love the simple stepping stones approach, to be honest I was nervous about my ability to do food, now I realise I can start with a simple offer and build it over time"

"It's great that at the end of the workshop you end up with a plan for your own pub"

"I would definitely recommend this course to any Retailer who does not sell food"

"I am going back to my pub tomorrow and will definitely do things differently"

Length of workshop

We realise that you are busy so the workshop is completed in one day and runs from 9.30am to 4.30pm with lunch included. Don't worry, this workshop does not involve you having to cook! We strongly believe the benefits of FRED will make taking a day out of your pub really worthwhile. Occasionally, working on your business instead of in the business can pay huge dividends!

To find out about course dates and book your FREE place, please contact the Training Department on; **0800 953 0072**

Or visit our website; **www.enterpriseinns.com**

Free Training

One day workshop in your area



Winning in a local market area

WILMA (Winning In a Local Market Area)

Is our exciting and innovative business development programme aimed at supporting Publicans who want to build their business that is fit to compete and Win In their Local Market Area.

Why should you attend?

If you are interested in making the most of your pub and avoiding the mistakes that most people make in the first year of running any business, then this course is a must for you.

The programme is much more than just a one-off course.

You will gain access to online networks and support tools that will enable you to build your business over the coming months and years. The programme will provide you with practical tools and techniques that can easily be put into practice in your pub.

Best of all, it's totally free!!

Content

Over the day the main topics we will cover are:

- Identify the components of successful and sustainable business
- Understand and assess the 10 proven steps to increase profits
- Assess the local marketplace
- Identify and benchmark your competitors
- Diagnose the current position of your business
- Identify your route to a competitive advantage
- Establish the barriers to business growth

Here are some of the comments that delegates who have already attended have made:

"It is probably the best licensed trade course I have been on"

"It makes you take a step back and look at your business from a different perspective"

"Very supportive and ideal for any business"

"I wish I could have gone on it earlier"

"This course is essential in the current climate"

"I would definitely recommend this course to everyone in the trade"

Length of workshop

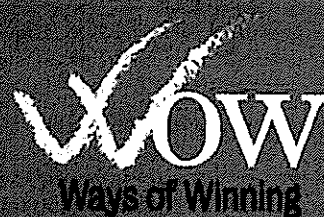
We realise that you are busy so the workshop is completed in one day and runs from 9.30am to 4.30pm with lunch included.

To book your free place, please contact the Training Department on; 0800 953 0072

www.enterpriseinns.com

FREE TRAINING

1 day workshop in your area



WOW (Ways of Winning)

Is our innovative one day workshop which has been designed specifically to help publicans identify ways to promote and market their business in the most cost effective way.

Why you should attend?

To many of us marketing seems daunting, it is something we know we should be doing but are not quite sure how to go about it. Our WOW workshop aims to take the mystery out of promoting your business by encouraging you to think about what type of customer you want to target and how exactly you wish to get your message across.

The workshop will explore a range of simple and effective marketing methods that are currently being used by some of the most successful businesses in the UK. If you are serious about making more money and building a reputable business within your local area then this course is a must!

Best of all, it's totally FREE to existing Enterprise Inns publicans.

Content

The course will cover a range of theory and practical applications. By the end of the workshop you will be able to:

- Understand why most marketing doesn't work and avoid the mistakes that many businesses make.
- Review and evaluate the shape and size of your market place.
- Identify potential consumer occasions and footfall generators for your local market i.e. bank holidays / sporting events.
- Understand the methods available to market your business and identify the ones that will work for you.
- Understand the cost implications and potential benefits of the various methods.
- Plan the implementation of your marketing strategy and develop key marketing messages.
- Identify all of the support and services available through Enterprise Inns.

Remember, marketing doesn't have to be expensive or complicated. If you get it right it can give you a massive

Length of course:

We realise that you are busy and wish to minimise disruption to your business. Therefore, the one day workshop will run from 9.30am – 4.00pm ensuring that you will be back in your business in no time.

To book your free place or to find out where your nearest course is, please call the Training and Recruitment team on 0800 953 0072.

Full joining instructions will be issued by the Training Department.



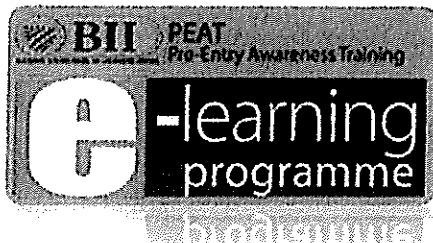


BII Membership – Key Benefits

BII members enjoy access to a huge range of support services provided by BII. Some of these key support services are detailed below:

- **Professional status:**
 - Membership of an organisation which is recognised by the police and licensing authorities
 - Code of conduct to display, showing your customers you are a true professional
 - Post-nominals after your name (e.g. MBII)
 - Plaques, window stickers, certificate and lapel pin
 - Member logo for your stationery
- **Free Helplines:**
 - Legal advice – both business (e.g. HR employment, property, contracts, Health and Safety) and personal, 24hrs a day, 365 days a year
 - Licensing helpline direct to licensing solicitors to answer any queries on the Licensing Act
 - Fire regulations helpline and online risk assessments for your business property
 - Financial advice helpline – VAT, PAYE and NI assistance
 - Licensees' Business Support help line – expert advice on rent reviews, leases etc
 - Mentor service – advice & guidance from experienced long-term BII members
- **Business savings**
 - Excellent PDQ processing rates with HSBC, with headline rates between 1.056% and 1.156% for credit cards and from 8.5p-10.8p for debit cards
 - Access to HR employment documents; free downloadable letters, policies and procedures
 - Savings on frozen foods, BOC gases, cleaning supplies, disposables and glassware
 - Savings on bespoke business insurance
 - Outlet cleaning discounts
 - Compliance packages; a one stop shop to managing health and safety and employment
 - Free advertising on BII's Pubsearch website for MBII, FBII and CBII members
 - Discounts on online marketing materials for promoting your events – banners, posters etc
 - Free downloadable business calculators inc cash flow, margins, accounts etc
- **Personal benefits**
 - Discounted eye care, health insurance & gym membership savings
 - Discounted holidays, short breaks and airport parking
 - Discounted AA membership
 - Discounted mobile phones, landlines & personal broadband.
- **Other**
 - BII PubHealth advisory service to review current operations and assist licensees in improving the business performance of individual outlets
 - Discounted Academy of Food & Wine Service membership
 - Training vouchers for discounts on BIIAB & AQLT courses

.. and of course our monthly magazine, BII BUSINESS, packed full of information, hints and tips on running a successful business!



BII Pre-Entry Awareness Training (PEAT)

PEAT is an e-learning package that identifies the main issues which need to be considered and investigated before signing a pub tenancy or lease agreement.

It is accredited by BIIAB, the Ofqual regulated awarding body which is part of BII, the professional body for the licensed retail industry.

If you are looking to take on a pub lease or tenancy in England or Wales, then taking *PEAT* will give you the necessary knowledge to evaluate the agreement which you are seeking to enter as well as advising you of other issues which you may not be aware of.

Who is it for?

Prospective tenants/lessees who are considering signing a pub tenancy or lease agreement. *PEAT* is designed to ensure that you fully understand the implications of the pub tenancy or lease which you are considering signing.

It will give you an awareness of the tied pub model as well as provide information on business plans, the different types of agreements available, rental calculations, the legal consequences of breach of agreement and much more.

What's involved?

PEAT is designed to be taken online. It will take approximately 2 hours to complete by following an interactive programme with mini quizzes throughout to test your knowledge. At the end of the training there is a short test to complete. On successful completion you will be provided with a BIIAB certificate.

How to take PEAT

Enroll on the BII Website, www.bii.org/PEAT. It costs £30 + VAT which can be paid through their secure online payment system.

Enterprise steps up support for Summer



Thousands of business support kits are being distributed to participating Enterprise Publicans across the country, continuing the practical support designed to enable pubs to make the most of upcoming business opportunities during the summer months.

The kits are designed to enhance three categories of trade: Drinks, Food and Sport.

"We recognise there are a host of different businesses across the estate," said Head of Pub Marketing Robert Dale. "Our aim is to provide support that suits a variety of occasions and styles of operation.

The comprehensive kits include the traditional point-of-sale materials, such as banners, posters, menus, loyalty cards and glassware, as well as guides to enable Publicans to make the most of a variety of occasions.

Each pub signed up to take part will receive the drinks kit, which includes a host of materials that link to key calendar dates including Father's Day and the August Bank Holiday. Point-of-sale promoting refreshing long drinks, cider festivals and the celebration of the birth of the Royal Heir are included and have been designed to help increase custom and drive bottom line.

For those pubs who have a strong food offer, their kit will be supplemented with material to help promote summer-style sharing platters and BBQs, as well as tips on creating the perfect environment to celebrate the various occasions.

Or, for those pubs who actively promote sport, a supplement is provided to make the most of a cracking summer calendar of sport, including the British and Irish Lions Tour, Wimbledon and England's battle to retain the Ashes.

"Within each of the kits we provide a 'Making the Most of' guide," said Robert, "This helps Publicans to plan well in advance so that they can maximise the opportunity to let their customers know what activity is taking place at the pub. Whilst not exhaustive, the kits are a practical, free aid to business that proved to be a hit last year and we are delighted to be able to continue our investment into this type of marketing support."

Lorraine Williams, manager of the Duke of York in Aldershot said: "The quality of the materials that make up the business support kits are superb. We use them for various events whenever we can to raise awareness and help drive traffic into the pub. It's great to have the extra support from Enterprise and to receive them again for this summer's events is a big help as the cost of producing similar materials for a business our size would be significant."

BUILDING YOUR BUSINESS

Our priority is to empower our Publicans to run exceptional businesses. Our bespoke programme, Building Your Business (BYB), is compulsory if you are taking an Enterprise lease or tenancy and has been developed by industry experts to help you understand more about running your own business before you invest in a property.

You will gain a range of industry required qualifications and also get the opportunity to meet other Publicans embarking on the same journey.

The Steps to Building Your Business:

GETTING STARTED

1

Prepare yourself for the five day course by obtaining your **Level 2 Award in Food Safety** via our unique learning package.

We will send you details in advance. All you need do is log-in online, read the training material at your own pace and complete a series of multiple choice questions.

You will be told instantly whether you have passed and your certificate will be emailed directly to you.

Don't worry if you don't pass first time; just log on and sit the test again.

ATTEND BUILDING YOUR BUSINESS

2

This five day course will prepare you for the journey you are about to embark on and covers the essentials of running a successful business. Whether you are new to the pub trade or have run successful pubs before, Building Your Business will help. The topics covered include:

Day 1 – Health and Safety, Finance, Stock Control and Gaming & Machine Income

Day 2 – Retail Legislation, Bar and Product Knowledge

BII Award in Beer and Cellar Quality (includes multiple choice exam)

Day 3 – Staff Management and Customer Service

Day 4 – Marketing, Merchandising and Retail Standards

Day 5 – Catering and Marketing Assessment

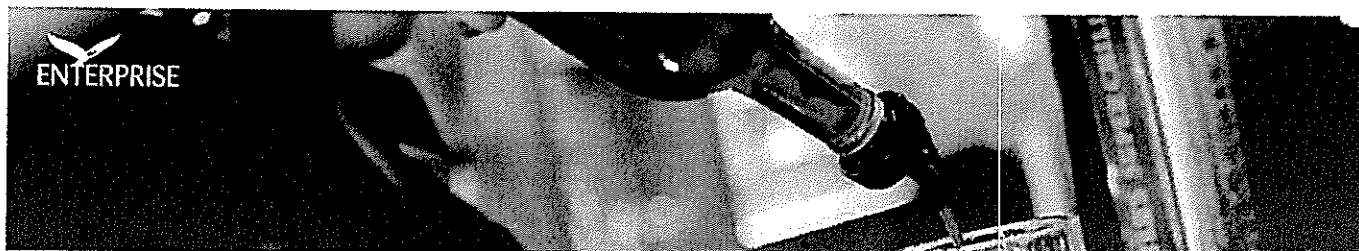
BII Award in Licensed Hospitality Operations (includes a multiple choice exam)

GAIN ACCESS TO ON-GOING SUPPORT

3

Once you have completed BYB you will also be given a free code to complete our **Level 2 Award in Health & Safety** e-learning course.

You will have access to our other training programmes, all designed to help you succeed in your business. Details can be found overleaf.



WHAT IT WILL COST?

The whole package is only:

£495.00 (+ VAT) for one person

£695.00 (+ VAT) for two people

This includes:

- Unlimited access to our online Food Safety and Health and Safety courses to gain your qualifications
- Building Your Business (five days)
- All training materials, exam fees and certificates
- Lunch and refreshments throughout the week (courses are non-residential)
- Access for you and your staff, to a range of development workshops once you have completed Building Your Business.

As an added bonus we will also pay for either;

Associate Membership to the British

Institute of Innkeeping (BII) in your first year saving a total of £112.50 + VAT

or

Annual Membership to the Federation of Licensed Victuallers Association (FLVA) in

your first year saving a total of £150 + VAT

Book your place today

To find out where your nearest course is please contact your regional manager or call the Training Team on 0800 953 0072.

Alternatively you can log on to:
www.enterpriseinns.com

ONGOING SUPPORT

Once you have completed Building Your Business you will be entitled to attend a range of FREE workshops designed to provide ongoing support and give you the tools, skills and confidence to continue to run a great business.

- **WILMA (Winning in a Local Market Area)** is our one day business development workshop designed to help you increase profits, identify and beat your competition and grow your business. You will also have the opportunity to talk with other publicans to share your experiences and to plan for the future.
- **WOW (Ways of Winning)** is a one day workshop which has been designed specifically to help you identify ways to promote and market your business in the most cost effective way.
- **FRED (Food Retailing, Education and Development)** is a unique one day workshop developed to help you to introduce or develop your pub food offer.
- **Profit Through People** is a one-day course, the focus is on establishing the key ways in which you and your team can consistently exceed customers' expectations and maximise efficiency.

OTHER BENEFITS

Help with Cask Marque membership – 50% off your first year application and a further 50% off renewal fees.

Access to our empower communications platform including monthly newspapers, weekly emails and text alerts keeping you connected with wider industry news, commercial offers, updates on Enterprise and events throughout the year.

Access to a bespoke support services package which includes the opportunity to sign up for salary management, cellar cooling and heating maintenance schemes.

Working in Partnership with:

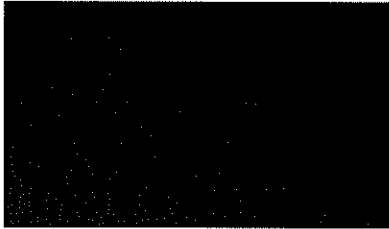


Tel: 0800 953 0072

enterpriseinns.com

Our ref: WST/RSW/CLM

22nd December 2011



Dear Publican

As a Publican operating under a tied tenancy or lease agreement with Enterprise Inns plc or any of its subsidiaries (Enterprise) you will have received a copy of our Code of Practice in respect of our agreement with you. You may also view a copy at www.enterpriseinns.com

The Enterprise Code of Practice satisfies all of the provisions of the UK Pub Industry Code of Practice for Tied Tenanted and Leased Pubs (IFC) which was published in January 2010. You can be certain that this is the case because our Code is accredited by the British Institute of Innkeeping Benchmarking and Accreditation Service (BIIBAS).

The purpose of this letter is to advise you that the IFC is being updated and strengthened, and to provide you with an open and unlimited offer to benefit from the protections and obligations of the IFC which you may rely upon in any dispute between us and in a Court of Law. The same applies to any successor code as may be agreed from time to time by the British Beer and Pub Association (BBPA), the British Institute of Innkeeping (BII) and the Federation of Licensed Victuallers Associations (FLVA).

A copy of the Industry Framework Code is available on the BBPA website www.beerandpub.com. Alternatively, you can find this on our website www.enterpriseinns.com or we can provide a copy on request.

Enterprise is firmly committed to the obligations placed upon it by the IFC, all of which are contained within our own Code of Practice, and you may rely upon this commitment in all of your dealings with us. Should you believe that we have committed a breach of the IFC, you may escalate your complaint internally to us or you may register your complaint with the Pub Independent Conciliation and Arbitration Service (PICAS) which will be established in early 2012. Ultimately, you may also seek legal resolution of your complaint via a Court of Law

By making such a complaint you will be invoking and relying on the IFC and therefore you will be indicating your acceptance of our offer. You should be aware that in making such a complaint, and receiving the benefit of the IFC, you will also be accepting the obligations placed upon you by the IFC.

You do not need to formally accept this offer; it is open and unlimited and will remain in force whilst the pub is tied.



Mr G E Tuppen CBE
Chief Executive
Enterprise Inns PLC
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B90 4SJ

Bob Neill MP
Parliamentary Under Secretary of State

*Department for Communities and Local
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Fax: 0303 444 3986
E-Mail: bob.neill@communities.gsi.gov.uk

www.communities.gov.uk

Our Ref: BN/006715/12

A handwritten signature in black ink, appearing to read "G E Tuppen".

07 MAR 2012

INVITATION TO JUDGE ENTERPRISE INNS' COMMUNITY HERO AWARDS

Thank you for your letter of 24 February 2012 inviting me to be on the judging panel of your Community Hero Awards.

I would be delighted to be part of the panel and would be grateful if you could contact my Diary Secretary, [REDACTED] to arrange the details.

I am sure you are aware that the Government recognises the important role that local institutions, such as community pubs, play in strengthening local relationships and encouraging wider social action. However a successful pub would not be possible without the hard work, dedication and innovation of the local publican. As such I would like to take this opportunity to congratulate you on the development of this scheme which recognises their efforts.

A handwritten signature in black ink, appearing to read "Bob Neill".

BOB NEILL MP

The following pages have not
been published as they were
blank: 15, 16, 21, 22, 29, 30,
34, 36, 38, 40, 42, 44, 46, 48, 50, 52,
55, 56, 59, 60 and 62.

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