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From:
Sent: 14 June 2013 15:54
To: Pubs Consultation Responses
Subject: Pubs consultation
Attachments: Fair Deal for Your Local - Consultation Response.docx

Please find attached Paul Farrelly's response to your consultation on pub companies and tenants.

Best wishes

Member of Parliament for Newcastle-under-Lyme

www.paulfarrelly.com

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05/12/2013

Pub companies and tenants - A government consultation

Response form

The consultation will begin on 22/04/2013 and will run for 8 weeks, closing on 14/06/2013

When responding please state whether you are responding as an individual or representing the views of an organisation. If you are responding on behalf of an organisation, please make it clear who the organisation represents by selecting the appropriate interest group on the consultation response form and, where applicable, how the views of members were assembled.

This response form can be returned to:

Pubs Consultation
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Orchard 2
1 Victoria Street
Westminster
SW1H 0ET

Email: pubs.consultation@bis.gsi.gov.uk

Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.
Representative Organisation
Trade Union
Interest Group
Small to Medium Enterprise
Large Enterprise
Local Government
Central Government
Legal
Academic
Other (please describe):

The Department may, in accordance with the Code of Practice on Access to Government Information, make available, on public request, individual responses.

Consultation questions

Q1. Should there be a statutory Code?

YES

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.

YES

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?

YES

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

The statutory code should contain a provision that all agreements that contain tied provisions, whatever they are called, should be fair, reasonable and comply with all legal requirements.

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

Tied licensees will be able to negotiate lower tied rents as the current rents do not countervail the inflated tied product prices adequately. Lower rents equal high net earnings to the licensee. This kind of improvement will encourage entrepreneurial flair where it is currently lacking, reinvestment, training jobs, and most importantly profitability will ease the closure of pubs and business failure rate of tied publicans.

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

Self regulation thus far has delivered nothing in material reforms.

The new proposed self Regulatory Board does not share the same commitments as Government, seeking to deliver fairness and a tied licensee no worse off than if they were free of tie.

Self Regulation is not accepted as 'independent' by many licensees.

Until it can commit to the same objectives for reform it has little future.

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

YES

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

YES

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.

YES

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.

YES

- iii. *Abolish the gaming machine tie and mandate that no products other than drinks may be tied.* **YES**
- iv. *Provide a 'guest beer' option in all tied pubs.* **YES**
- 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.* **YES**

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

1. There needs to be a Market Rent Only option - where a licensee can choose to remain tied or simply pay a market rent and purchase beer (and any other formerly tied products from any source).

Without this the rest fails.

2. Like the Industry Framework Code (in which it is an empty promise as it can not be enforced) there needs to be a clause in the Statutory Code that :

"All contracts will be fair reasonable and comply with all legal requirements."

3. It should be made clearer that ALL rent assessments (especially at rent review and lease renewal) need to be undertaken on the basis that RICS guidance should be interpreted on the principle that the tied licensee is no worse off than the free of tie licensee.

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? **YES**

The opportunity to review and amend was the main failing of the Beer Orders which led to the unintended consequences being uncontrolled. The statutory code and Adjudicator proposals seek to avoid such gaming of well meaning Government intentions.

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

It is essential, as it offers the opportunity for a licensee to sever unfair contract terms presented in tied agreements. Without Free of Tie option and an open market rent the code can be easily exploited.

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?

This is not an either or deal. A package of reforms are necessary all outlined in the proposed Statutory Code with the exception of the most important feature a mandatory free-of-tie option with an open market rent. If the rent can not be agreed between the parties then it should be determined (in accordance with the lease terms) by an independent third party in accordance with RICS rent assessment guidance.

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

YES

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

i. Arbitrate individual disputes?

YES

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

YES

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?

YES

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

YES

III. Financial penalties?

YES

Adjudicator needs more powers than this. They should have similar powers to those afforded to the OFT in the case of Unfair Contract Terms in consumer Tenancy Agreements, essentially have the power to render an unfair contract term unenforceable.

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

YES

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?

YES

What, in your view, would be the impact of the levy on pub companies, pub tenants, consumers and the overall industry?

Pubcos and brewers are already paying for the self regulatory approach, the levy for the statutory code will reduce the funds for self regulation but the work load for the regime will be dramatically decreased (as most complaints are from pub owning company licensees of the 6 biggest firms). The costs associated with the Adjudicator and statutory regulation will largely depend on the behaviour of the pub owning companies, worse behaviour = more complaints = more work = higher costs.