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BII Response To BIS: Pub Companies And Tenants Consultation

Response to BIS Consultation

**Pub Companies and Tenants
Executive Summary**

14 June 2013

Preamble

To underpin its response as the professional body for the licenced retail sector, the BII has undertaken a formal consultation within its membership through a survey and more in depth discussion to arrive at its conclusions. These do not include the views of corporate members who will be making their own response to the consultation. This response therefore reflects the views of the tenant/lessee members of the BII.

Executive Summary

- The BII supports the introduction of a Statutory Code.
- We disagree with a threshold of 500 and our members want protection for all tied tenants and lessees..
- We support the view that should the threshold of 500 pubs or some other threshold be adopted, that those Companies who are not bound by the Statutory Code should sign up to a voluntary Code.
- We support the over-arching principles underlying the Statutory Code but remain concerned as how the principle that the tied tenant should be no worse off than as free of tie is to be delivered given the difficulty expressed within the consultation itself.
- More clarity is required regarding the fundamental principles underpinning the Statutory Code to ensure that all tied tenants and lessees are aware of them
- We favour the notion that Self-regulation measures should remain in place once the Statutory Code is brought into existence for the benefit of those tenants and lessees not covered by the Code
- BII members are not convinced of the value of the abolition of the machine tie or the introduction of a guest beer provision and we suggest that this might be better introduced as a compulsory option to be taken if the tenant wishes to avail himself of the opportunity.
- We urge the Department to undertake further research to ensure that the intended outcomes can be reached without damaging either the availability of pubs to rent or inadvertently damaging the position of existing tenants by creating further economic uncertainty in the sector.

BII's Mission & Vision

Mission Statement

- *To be the professional body for the licensed retail sector in all its dimensions. We will encourage new entrants and help them develop their long-term careers. We will provide all our members with high quality qualifications, information, skills and business benefits to help them succeed*

BII's Vision Statement

- *To be the defining professional body delivering consistently high standards, employment practice, and social responsibility within the licensed retail sector*

Introduction

The BII, as laid out in the statements above, is the professional body for the licensed trade which seeks to raise standards and provide professional development for its members through the development and provision of training qualifications; the promotion of responsible alcohol retailing; and other services and activities. The membership of the BII is composed primarily of a membership made up of 11,000 which includes inter alia individual licensees, industry professionals and corporate members who support the aims and objectives of the professional body.

The BII's response to the consultation is the result of a survey of its individual members and discussions and consultation with those members. The views of corporate members do make up any part of this response as they will be making their own representations either individually or their trade associations or both.

The BII has undertaken a survey of its licensee members as part of its decision –making process in arriving at its considered view of the Government proposals. We achieved a response rate of nearly 15% of our members, a reasonable response rate given the nature of such surveys. The opinions expressed through these surveys have been supported with individual discussions with members and the governing body of the BII and the responses given below are reflective of both these approaches.

The survey which generated nearly 400 responses revealed that while 62% were aware of the Industry Framework Code, 18% said they didn't know whether or not they were aware and 14% that they were not aware. This does not reconcile to the other answer

we received as to whether they had seen their company code which was significantly higher at nearly 80%. It is however more important that they are aware of the codes that directly relate to their own agreements that that these derive from an over-arching Industry Framework Code.

Before responding to the specific questions we would like to make some general observations and outline the BII's role and participation in the existing self-regulatory processes.

The BII first became actively involved in the landlord/tenant relationship through its setting up and promulgation of an accreditation of company codes of practice. This was a voluntary process in the first place and was taken up mainly by the larger companies.

The BII together with the Association of Licensed Multiple Retailers (ALMR); the Guild of Master Victuallers; the BBPA and the LVA established the Rent Review Service known as PIRRS. The BII undertook the administration of the service.

The BII continues to participate in the development of the Code and in the services that are associated with that. The BII will be a member of the Regulatory Board that is being put in place to provide overall governance of the self-regulatory processes. The accreditation and administrative services will be provided by the BII through its contract with the Regulatory Board. The BII will take one of the six places allocated to tenant representatives and will represent its tenant and lessee members on the Board.

We have expressed our concern in answering a number of the questions posed about the uncertainties contained within the consultation and the acknowledged fears of producing unintended consequences. We share these fears and urge the Department to undertake further research to ensure that the intended outcomes can be reached without damaging either the availability of pubs to rent or inadvertently damaging the position of existing tenants by creating further economic uncertainty in the sector.

Over the last few years, the BII and its associated company BIIBAS have gained much experience about the working relationship between tenants, lessees and their landlords, the pub companies and family brewers.

The intervention of previous Government select Committees has highlighted the position of the tenant and the need for greater clarity, transparency and openness in their initial and on-going lease negotiations. The resolution of disputes and the way in which disagreements are resolved is at the centre of those reviews. During the past 5 years, three new services have been set up aimed at improving self-regulation and it's important to note the success those services have had. The services include:

BIIBAS:- Benchmarking and accreditation of the Codes of Practice

PIRRS:- Rental dispute resolution service

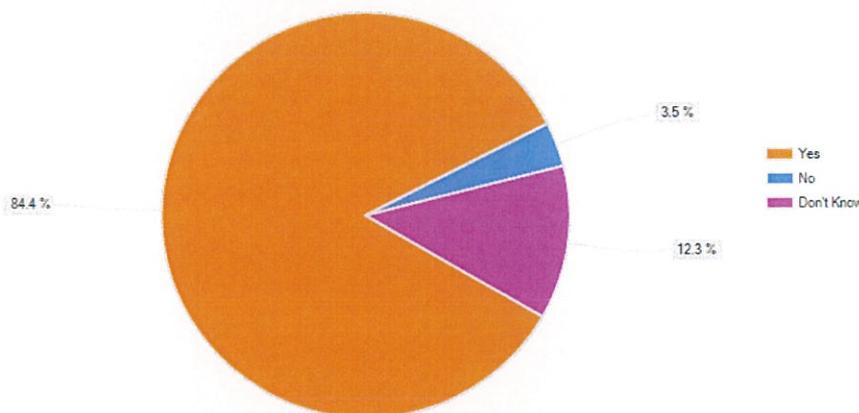
PICA:- Conciliation and arbitration of disputes in relation to breaches of the codes

Q1. Should there be a Statutory Code?

The majority of the members of the BII favour the introduction of a statutory code.

While the BII has been supportive of the voluntary approach and believes that much good work has been done by the BII and others in delivering self-regulation through the

Do you believe that the industry would benefit from the additional introduction of a Statutory Code?



accreditation process and PIRRS and PICA-Service, the Government is right to seek a Statutory Code where clarity can be brought into what has proved to be an intractable problem.

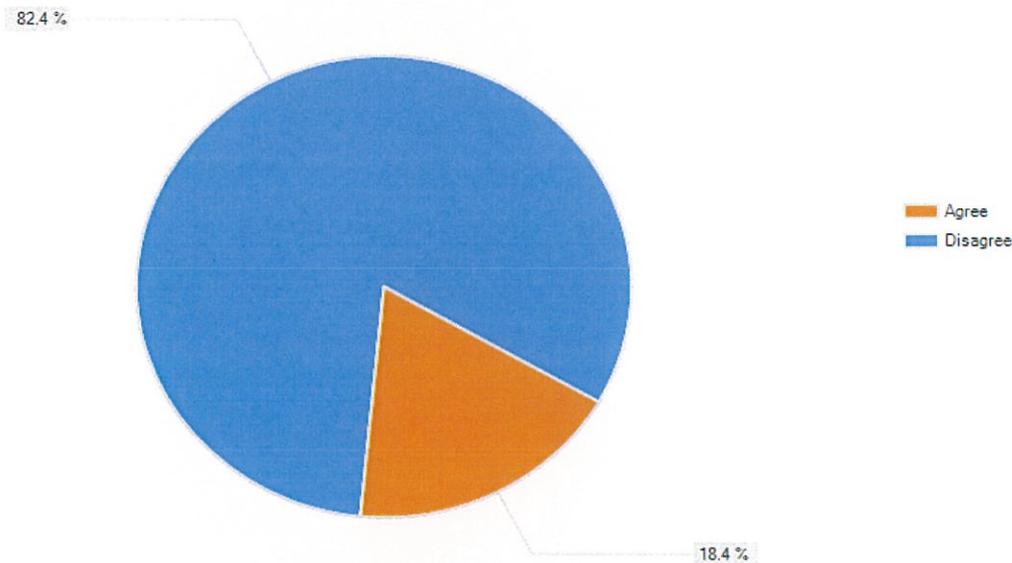
It's important to note however that some members believe that self regulation with the correct industry framework code and properly tailored individual pub-co codes of practice is the sensible way to proceed given the uncertainties which surround statute. No other industry to our knowledge provides such a comprehensive low cost dispute mechanism for complaints

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 supporting evidence?

To the question that the Code should be binding on companies that own more than 500 pubs BII members were overwhelmingly against the proposition. This is clearly demonstrated in Figure 2. In answer to second part of the question members were less unanimous but nevertheless nearly 60% believed that there should be no de minimus

level. Around 4% believe that the figure should be higher than 500 proposed by the Government and the remainder gave figures between 100 and 500.

The Government proposed that the Statutory Code only be binding on all companies that own more than 500 pubs to meet their objective to only regulate as much as is necessary. Do you agree or disagree with the proposal that the Code should apply solely to Landlord Companies with over 500 pubs?



Our considered view is that the Statutory Code should apply to all Pub Company and Breweries with tied tenancy or leased agreements. This supports the BII position that as a membership body we should not have two classes of BII members, those who are protected by the Code and those who aren't. We would wish to see all our tied tenanted and leased members offered the same protection by the Statutory Code. In support of this approach the BII is aware through its dealings with members and its involvement with the PIRRS and PICA-Service, that the smaller companies are immune from problems and that the differential pricing can be as much as an issue as with the larger companies, the difference being that the majority of agreements with the smaller companies are as fixed term, usually three years, tenancy agreements. This does mean that problems may not persist for as long since the tenant has a much earlier option to terminate the agreement.

A further concern that has been raised is the separation of the market may in fact favour the larger companies since prospective tenants may be attracted to agreements covered by a Statutory Code rather than one that is not. This would be undesirable consequence that although not necessarily working to the disadvantage of the tenant

would adversely affect smaller companies and smaller brewers might find it more difficult to recruit or find a route to the market for their beer.

It's also been pointed out that the methodology behind assessing tenant dissatisfaction with the major pub owning groups by referring to the number of BII helpline enquiries is flawed.

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?

If the Government does introduce a 500 pub limit or indeed a different threshold the BII would agree that the managed house estate should be excluded from any calculation of qualifying pubs. *The consultation, however, seeks to include non-tied within the code.* We are unable to agree to their inclusion since much of the complaint against the pub companies and hence the need for a code is the differential pricing applied to tied products. Where a pub is not tied the tenant is free to buy on the market and there is no relationship between that and the rent. As a consequence the majority of the Code would not and could not apply. This question ceases to be relevant if the BII's preferred option of no limit is adopted, thereby simplifying the system and making the position fairer on our tenant and lessee members.

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

On the same basis the Statutory Code as presented in the consultation is not and should not in our view be applied to franchise agreements. Such agreements are a long way from traditional tied agreements and different again from the more recent long-term agreements and are protected by the British Franchise Associations Code of Practice. We do agree with the consultation's proposal that the Statutory Code should be applied equally to tied tenancies and long-term leases.

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

We are not able to quantify the effects on pubs and the pub sector and although we believe there are benefits to be derived from a well-regulated sector and that the certainty such regulation could introduce would be very beneficial, we have some reservations. These centre around the possible unintended consequences of such regulation, unintended consequences that the consultation itself acknowledges in relation to a Mandatory free of tie option but which may also arise in other areas and referred to in our response. A great attraction of the tied tenancy model is that it is possible to enter the industry and run one's own business without investing great sums of money and the introduction of another barrier to entry should be avoided. In compiling further evidence, the BII urges BIS to robustly investigate the consequences of the transfer of assets and potential wide-scale disposals and the significant impact this would have on the industry shape.

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

With the possibility that the Statutory Code will only be binding on Pub Companies with over 500 pubs, the BII questionnaire asked a number of questions with regards to the future involvement of self-regulation. In particular, we asked our members whether, *'if the threshold for the Statutory Codes is set at 500 pubs, should those Pub Companies with under 500 pubs agree to sign up to a voluntary Code enforceable by their tenants and lessees?'* Our members responded in favour of this question with 93% of participants holding the opinion that Companies not bound by the Statutory Code should continue with a voluntary code. This would ensure that all tied tenants and lessees are afforded some protection whether this is by a Statutory Code or a voluntary Code. However, an early question with regards to whom the Statutory Code applied to demonstrates that our members would prefer all to be protected under the Code. Furthermore while we believe that companies not falling under the Statutory Code should continue with a voluntary code, since it would be voluntary there is no mechanism to ensure that this would be so. As the probable administrator of any such voluntary system we would also be very concerned as to whether we could acquire the necessary level of funding given that only a relatively small number of pubs would be contributing to the cost, while the overheads in maintaining the voluntary would decrease proportionally.

The self-regulation approach incorporates the PIRRS rental determination model and a methodology which allows the tenant to select the Independent Expert who then determines the rent. The BII believes this is a very fair approach. Likewise, the criticism of the PICA-Service appears to revolve around confidentiality and yet Arbitration legislation refers to 'Arbitration as being a private Tribunal'

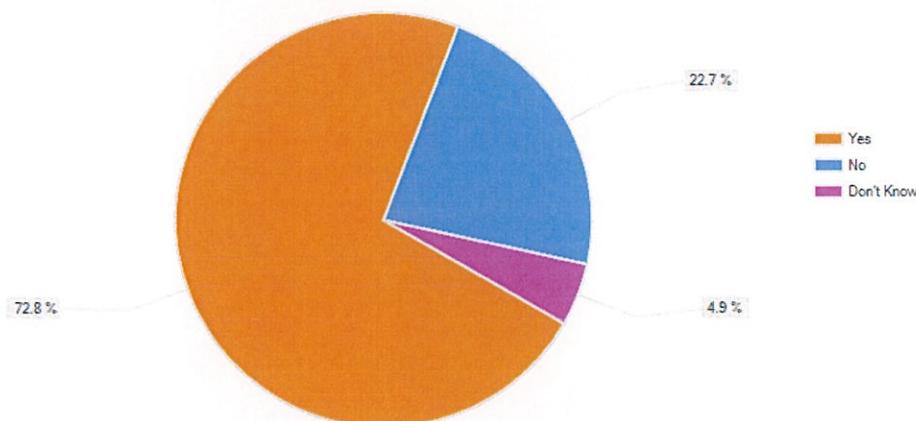
Both PIRRS and PICAS have been energetically pursued, albeit that the BII recognises that the service could and should have been better communicated.

The BII further questions the wording of paragraph 4.29 of the Consultation document which suggests 'healthy competition' between an adjudicator and PICA-Service to be unfortunate. What is required is an equitable and effective Tribunal. By competition is it meant that a wronged tenant should take a view as to whether the Adjudicator or a PICA-Service panel would be likely to present him with the higher award?

As well as asking the above question, we also asked whether members were aware of the current self-regulation measures in place (PIRRS and PICA-Service). We were pleased to see that the majority of our members are aware of these services.

We remain concerned that the survey also reveals a significant minority that are not. As the professional body we will continue to promote the existence of these services to our member so that they are better informed of how PIRRS and PICA-Service can be of assistance to them in times of dispute.

Are you aware that tied tenants and lessees can refer disputes regarding Rent Reviews determinations to the Pubs Independent Rent Review Scheme (PIRRS), whilst all other complaints can be referred to the Pubs Independent Conciliation and Arbitration Service (PICA-Service) for independent resolution?



Members believed that PIRRS and PICA-Service should continue in operation once the Statutory Code is brought into action if they are included within the code and support their continuance within a voluntary system if such a system remains in place for any pubs not included within the remit of the Statutory Code.

We are bound to repeat here that a Statutory Code that applies to all tied tenancies and lessees would avoid the difficulties that will arise in trying to run the two systems together. Furthermore, the BII would have some difficulty in providing a service to what would be a small and separate part of its membership, the vast majority falling under the statutory regulator.

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

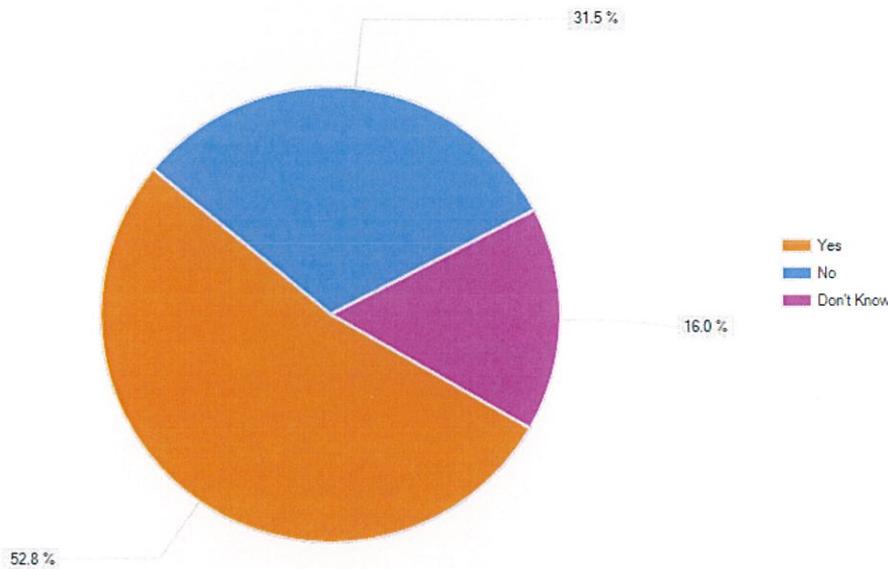
- i. Principle of Fair and Lawful Dealing
- ii. Principle that the Tied Tenant Should be No Worse Off than the Free-of-tie Tenant

Our survey asked our members whether they were clear about the fundamental principles underpinning the Statutory Code as proposed in this consultation. Of the responses received 54% were clear about the principles of fair and lawful dealing and that the Tied Tenant Should be No Worse Off than the Free-of-Tie Tenant.

These results clearly show that despite the vast experience and qualities of the operators working in the industry, there exists a common failure to ensure they are sufficiently prepared for the world of landlord and tenant and other increasingly complex issues.

However, 31% were not clear about the fundamental principles of the Statutory Code with a further 16% answering the question by stating they 'didn't know' if they were clear about the principles.

Are you clear about the fundamental principles underpinning the Statutory Code?



The BII has expressed its support for the principles but also expresses its reservations as to how the second principle can be applied such that it can be applied in a straight-forward manner keeping the areas of dispute to a minimum. The BII believes that the Department

will need to undertake further research and study to provide a robust definition and application of the principle. It's worth noting that the 'notion' has been tested in Court and again the BII urges BIS to ensure that the credibility of such an approach is vigorously tested as among many issues, it would have implications on the RICS Guidance Note. Furthermore the examples and theories employed in the consultation document do not represent market evidence.

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.*

The BII agrees that the Statutory Code should include a provision whereby they could request an open market rent review in the situations as listed above.

- 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.*

The 'free-of-tie' rent assessment is supported by the BII as it should enable prospective tenants and existing ones during rent review to apply a measure against the balance between rent, prices and benefits can be assessed.

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

To ascertain our members' thoughts on this, we asked them the following question: *Do you feel it would be in your interest to pay extra rent for all AWP Machines to be free of tie?* We felt it necessary to make this distinction as companies will inevitably seek to replace the revenue through an increase in the rent.

In answer half of the respondents felt that it would not be in their interest to pay additional rent to be released from the AWP Machine tie, whilst 30% would be happy to exchange an increased in the rent if this allowed for them to be free of tie on machines. This left 20% who expressed no definitive view on the issue.

Given the difference in members' views on this we suggest that an alternative approach might be to ensure that within the Statutory Code companies are still able to offer a tie on machines but must provide the alternative free of tie option.

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

As with the previous question we included the likely consequence on rents. Here members were even more definitive in their view that it would not be in their interest to have a 'guest beer' provision if it meant their rent would increase, 62% stating their opposition on that basis. On the contrary view 30% were in favour.

As we suggested in relation to the machine tie the Code could provide that companies must offer a 'guest beer' free of tie but that the prospective tenant may choose not to avail himself of the option. The shadow P&L would reflect whatever option was chosen after the company have made it clear the effect of either option on the rent.

- 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*

We are surprised that the Government dismisses the use of flow monitoring equipment on the grounds that it was not available in the 18th century. On that basis any number of technical innovations used to ensure compliance could be equally dismissed. The consultation itself suggests that the Code may need to be reviewed in the light of technological changes (Para 5.22). The Code could include the provision that ‘...flow monitoring equipment alone may not be used to determine whether a tenant is complying with purchasing obligations.....’

BII members acknowledge that there are compliance issues and responded by suggesting the following measures in support of flow monitoring could be adopted:

- Ensuring physical evidence is available to support the data (as this computerised information can be inaccurate).
- Cellar and random spot checks along with more closely monitoring of deliveries.
- Regular contact between the Pub Company representatives responsible for monitoring the purchasing obligations.
- An improvement in the mutual trust between the Landlord Company and Tenants/lessees (since most abide by the tie) which could be achieved through the introduction of the Statutory Code.

It is worth noting however that there are sound examples where the use of technology has helped publicans to understand their beer sales and improve stock control, however there are those who have had equipment installed and who are not using it effectively.

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

We have made some suggestions within this response where improvements might be made. We also repeat our view that further consideration and research is required as to what the likely effect of the introduction of the Code might be and that such consideration might lead to other changes and improvements. We urge the Department to continue the dialogue with ourselves and others while the responses to the consultation are being considered and evaluated.

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?

The BII agrees that if implemented, there should be a periodic review of the Statutory Code. We are inclined to leave it to the adjudicator to determine as and when such a review should be taken based on the evidence acquired in the course of operating the adjudication process.

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

The consultation recognises that there are potential benefits and possible harms in the introduction of a mandatory free of tie option. The BII is concerned that the introduction of such a provision would have the effect of removing choice from the market place which would be governed very much more by price than any other consideration. Since in our view the Code should be extended to all tied pub agreements such a provision would have the effect of removing most of the protection contained within the Code and would be particularly damaging to the smaller brewery companies.

As with Question 9 we urge a much closer examination of this question and a full evaluation of the likely consequences of such a move, particularly since the European Block Exemption was renewed as recently as 2010.

Q.12 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?

We have been unable to address this question but fail to see how introducing a mandatory free-of-tie option ensure that the tied tenant is no worse off since by such a mechanism he will be a free-of-tie tenant and then by definition he can be no worse off. The evaluation as to whether the agreement meets the test should be based on the assessment of the free market rent, the price differentials and the valuation of the benefits provided under SCORFA. We do not, as yet, see how else such an evaluation can be made.

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

Yes if implemented, however the BII urges BIS to ensure that PIRRS and PICA-Service is maintained as an impartial and independent element of tenant support

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

i. Arbitrate individual disputes?

Yes, but it is not clear from the consultation paper how that might be applied in the more straight-forward disagreement on rent reviews currently dealt with under PIRRS as opposed to wider remit of complaints dealt with by PICA-Service. We believe that the Government must consider how PIRRS and PICA-Service are replaced in the event that they do not survive the change-over.

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

This is a role for the Adjudicator since the BII will have no statutory role in accrediting company codes that fall under the statutory provisions. In the existing self-regulatory regime BIIBAS has the ability to deny or remove accreditation from companies where their codes do not comply or persistent practice in contravention of the provision of the Framework are found to exist. This could not apply to companies governed by the statutory regime. It may be retained for companies below a threshold number of pubs if that transpires to be outcome of the consultation, but it by no means certain that it would.

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?*

The BII acknowledges that these are expected facets of a regulated system and as such it's important that the adjudicator has at its disposal a range of punitive measures which can be applied. We would also expect that the adjudicator would seek to redress problems and compensate tenants, award costs and where deemed necessary pending on the level of a breach apply a financial sanction. This could go towards the costs of the adjudicator by only penalising those who breach the statutory code.

Q16. Do you consider the Government's propose 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? What, in your view, would be the impact of the levy on pub companies, pub tenants, consumers and the overall industry?

We agree that companies who breach the code more, should pay a higher levy. The impact of the levy therefore is similarly one for those companies to consider but there are wider implications contained in the impact assessment which have not been able to consider in sufficient depth. These questions might be better addressed once the major questions such as the scope of the Code and the questions of 'guest beer' and the inclusion of a mandatory free-of-tie have been determined.