

**FAIR PINT CAMPAIGN**

14th June 2013

Pubs Consultation  
Consumer and Competition Policy  
Department for Business, Innovation and Skills  
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Dear Sirs

**RE : PUB COMPANIES AND TENANTS - A GOVERNMENT  
CONSULTATION  
Consultation beginning 22/04/2013, closing 14/06/2013**

Please find below submissions on behalf on the Fair Pint Campaign, a representative organisation with around 1,500 tied, or formerly tied, licensee members (many of which have now lost their pubs), addressing the questions raised by the Public Consultation Paper.

Should you have any queries please do not hesitate to contact me.

Yours sincerely

SIMON CLARKE

BUSINESS, INNOVATIONS AND SKILLS COMMITTEE INQUIRY INTO PUB COMPANIES

Submission by the Fair Pint Campaign

### Consultation questions

#### Q1. Should there be a statutory Code?

Yes

Four of the five participants of PIRRS/PICAS, the self regulatory bodies, have conceded that the self regulatory code is inadequate.

Peter Thomas CEO BII said in September 2012 (when they confirmed their agreement to the code) "...it is not perfect and it still needs work..."

Martin Caffery FLVA said in February 2013 "...we still have reservations..." and Nigel Williams "we will not be signing up to V6..."

(n.b. As far as we know signing up to V6 was not a necessity for its implementation and it has been bulldozed through.)

Bill Sharp GMV said 12 June 2013 " The Guild is of the view that self-regulation is not the way forward..."

Kate Nicholls ALMR said at BISCOM on 11 June 2013 of V6 "...it does not cover a lot of the core issues there's a big hole..."

#### 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.

Fair Pint Campaign (FPC) were originally for abolition of the beer tie in its entirety, we would certainly not shed a tear if this were executed. We have, however, risen to the compromise put forward by successive select committees and are absolutely behind the proposal that a mandatory free of tie option (FOT) should be offered to all licensees of pub owning companies with more than 500 pubs.

We support the proposal that the statutory threshold can be amended by the Adjudicator should it be seen to be necessary.

We remain concerned that the self regulatory regime, in place now and proposed, is unable to confirm that their ambition is to deliver the same commitments as Government, fairness and now worse off principle (Appendix III). IPC have requested this confirmation and been advised it is not a self regulatory ambition. In view of the latter, we believe that, with the exception of the mandatory FOT option, all other statutory provisions

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should apply to all pub owning companies. Size of company should be no excuse to fail to deliver fairness or a tied licensee being no worse off than if they were FOT.

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?

Pubcos and brewers have begun to offer 'alternative' agreements. In our view almost all of these are simply alternative ways of skinning the same cat and attempts at circumvent any effort to implement reform. One new agreement is the so called franchise. We understand some may fall under the regulation of the British Franchise Association, but are unclear whether this is self regulation or not. It would be wrong to allow unfairness to prevail and for tied licensees, whether described as franchisees or not, to be denied the right to be no worse off than if they were FOT.

Typically these so called franchise agreements amount to the licensee becoming a self employed manager on a percentage of turnover (usually 20%). This percentage is for all staff costs and since the average payroll cost (excluding a managers salary) is around 14% for a community local, c24% for food led pubs, (according to the ALMR benchmark survey of 2012) it follows the most the 'franchisee' can expect is 6% of sales, and quite possibly they would be running at a loss. As the pubs typically selected to be available on franchise agreements are under performers, and we estimate the average pub turnover to be around £250,000, the licensees salary would be c£15,000, quite possibly less - in line with the recent findings of CAMRA.

Gaming of the Governments commitments must be carefully monitored and regulation of franchises kept under scrutiny and review by the Adjudicator.

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

Costs - Would be to the pub owning companies. We would agree the proposals for financing the Adjudicator, levy being a fair way of apportioning costs. Fines could also assist in financing. We do have doubts over the estimates of transfer, these are in part based on an assessment of the value of SCORFA which we believe to be virtually non existent but the pub owning companies have maintained have considerable value. We believe SCORFA's have to be quantifiable and contractually binding and if they are therefore not present in that form then the pub owning companies

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will have effectively hung themselves by their own petard. SCORFA's are often listed and reeled off like some extensive benefit package but few are free and all, that we know of, are discretionary. These may have a 'notional' value but a 'benefit' such as this can not be used in the assessment of rent as it may be withdrawn the day after rent assessment.

Benefits - We would estimate the average tied licensee could be better off to the tune of around 5 -10% of sales. In the case of Enterprise Inns, they have stated (based on no evidence) they estimate their licensees on average achieve an average sales level of £360,000 in 2012 (<http://www.morningadvertiser.co.uk/General-News/Enterprise-claims-increased-taxation-is-biggest-threat-to-tenant-profitability>), this would amount to a possible improved licensee earning of between £18,000 and £36,000. Clearly, FPC believe that the Enterprise estimate of earnings is wildly over estimated and consider an average level of sales is more to the order of £250,000, equating to improved earnings of between £12,500 and £25,000.

We foresee the above being the case with either the formulaic approach, to achieve a tied licensee being no worse off, or the FOT mandatory option, however, the formulaic approach is fundamentally flawed in several ways, not least as it can be gamed by simply increasing prices or restricting product choice by exploiting the 'unfair' tied terms.

Mandatory Free of Tie option with open market rent review

This needs to apply at the rent review, **lease renewal**, new leases **and on the sale of the pub owning companies property interest**, and be enshrined in the statutory code. It is in our opinion the only way to rebalance risk and reward, either the licensee stays tied under fair terms, or chooses a FOT future.

#### Impact

Pub companies and brewers state the majority of their licensees are happy and content with the tied agreement and that only a small handful of 'well organised campaigners' are the dissatisfied and claim this not to be the case. The simple solution to this dispute is to offer the FOT option. If they are right a handful of licensees will take up the offer and the impact will be minute, if they are wrong then the impact could be extensive. We believe once again they are wrong, and will be hung by their own petard, hence our reluctant recommendation, to avoid a floodgate effect, that the option is phased by being made available at rent review, **lease renewal**, new leases **and on the sale of the pub owning companies property interest**.

This is the BISCOT recommendation that *"...over a period of time offering lessees the option of being tied or being free of the tie is the only way to judge properly the fairness of the tie."*

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The notion that major brewers will take over the market if pubs have a FOT option is, in our opinion, unfounded as almost half the market is not tied now and no such dominance is present.

Equally the notion of brewery closures seems unlikely as they would have greater access to market, if licensees went FOT, they could charge more for their beer (than they receive from companies operating the tied pubco style model) and at the same time the licensees would have a greater gross profit. With this potential improved gross profit licensees can choose to either lower prices or invest in promotions and advertising both of which should increase sales and have an overall catalyst effect on business improvement. Also, again, the brewers claim their licensees would not go FOT if they had the opportunity so it is difficult to see how the 'option' is so revered.

The risk of decreased investment is ludicrous. Whilst pub owning companies large sums of investment we should consider what that actually gets spent on. Enterprise Inns claim that they will be investing £60m in this year, last year their annual report revealed they spent £6m, not £60m, on repairs and maintenance in the estate. It follows that £54m is 'invested' in other ways, perhaps on isolated rent subsidies or product discounts or management companies paid to run otherwise empty on £1 a week and full FOT equivalent discounts. FPC know of very few members who have had any investment from their pub company in the fabric and structure of the building and those that have are subsequently required to pay an increased rent - it is little more than a high interest loan that is incapable of being paid off.

#### Overall Benefits

The benefits of a FOT option could change the sector and we agree with IPC that :

- It allows a cheap and simple form of enforcement at a personal level for licensees
- It will lessen the burden on the Adjudicator
- It re-empowers the licensee
- It undermines the relative dominant position and 'take it or leave it' attitude of pub owning companies. It empowers the smaller trading partner - the licensee.
- It avoids costly litigation if made a straight forward code provision
- It does not necessitate any variation to existing lease terms or the existing company codes

Pubs will either have a fair tied rent reflecting the high product prices appropriately or will be FOT, either event equal :

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- Improved licensee profitability
- Better chance of flourishing small business
- More employment
- More training
- More investment in the structure and fabric of pubs
- Saving thousands of pubs from closure
- Encouraging microbrewers

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

Government may have noticed, and it became very clear at BISCOP on the 11th June 2013, the pub owning companies, through their mouthpiece the BBPA, are not prepared to address the issue of rebalancing risk and reward, which is and always has been, the fundamental area of dispute.

We consider self regulation is a sham. we appreciate some bodies may have participated in an effort to bring about some significant change and fully accept that a few concessions have been achieved. The abolition of up only rents reviews and requirement that flow monitoring data is no longer sufficient to bring about an allegation of buying out, on its own, are both progressive steps. These are however the only significant steps.

Version 6 has increased provision for the supply of information which are, we believe, empty promises. This is not, for once, the fault of the pub owning companies. The information required to undertake a professional rent assessment is quite probably in the possession of the pub owning company but they are restrained from disclosing it due to confidentiality reasons. They have committed to providing such information under confidentiality agreements but those same agreements then restrain the recipient from seeking clarification or additional information. This 'loophole' allows the pub owning company to disclose the information it chooses, a fraction of what is needed, that supports its own argument but tied the hands of the licensee, or their surveyor, to probe deeper. **Another fundamental flaw of the formulaic approach.**

Some peripheral issues have been addressed and we commend the efforts of participants who had a genuine aspiration to deliver meaningful reforms. We believe all, with the expectation of the BBPA, would agree they have been unable to secure any terms dealing with the key issues, the rebalancing risk and reward. Like in supermarkets, banking and media, self regulation is doomed to failure as if anything actually meaningful were to be introduced those under regulation can simply walk away.

The current and future self regulation regimes have limited powers, they can secure some financial compensation but can not consider 'legal issues' (PICAS Service Procedures para 1.4). They are not seen as independent

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despite the presence of tenant organisations as the BBPA still have ultimate control all be it covertly.

Despite written requests by IPC the self regulatory regime has been unable to agree that it is committed to deliver fairness and the tied licensee no worse off than if they were free of tie.

FPC have absolutely no interest in the continuation of self regulation, we consider it is an ineffective and unnecessary burden on the industry as a whole and little more than a BBPA inspired illusion to avoid statutory regulation.

There is one provision in the IFC which should be transferred into the statutory code (which is in any event unenforceable by the self regulatory regime).

**"ALL CONTRACTS WILL BE FAIR, REASONABLE AND COMPLY WITH ALL LEGAL REQUIREMENTS."**

FPC consider it is essential this clause is enshrined in the statutory code and that the Adjudicator has the power to enforce it where they find it to have been breached. Powers to render unfair contract terms unenforceable should be afforded to the Adjudicator.

FPC envisage a self imposed much streamlined self regulatory regime will probably exist after a statutory code is implemented as small brewers will wish to demonstrate there is no necessity to alter the statutory threshold below 500. Behaviour of companies with less than the threshold should be under review by the Adjudicator.

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

FPC recall the Governments original commitment was to "...ensure fairness for tenants", which we take to mean licensees. We are concerned fair and lawful dealing might be a dilution of the original statements and remain of the view that delivery of 'fairness' should be the underlying fundamental aim in this instance.

The inclusion of the provision **"ALL CONTRACTS WILL BE FAIR, REASONABLE AND COMPLY WITH ALL LEGAL REQUIREMENTS."** may well be a significant step in that direction.

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

Yes

This goes hand in hand with fairness and is a measure of its success. There can be no either or. This can not be delivered by the formulaic approach alone as, whilst we consider the formula an important breakthrough tool in transparency, calculation of the rent only serves to resolve the rental issue once every 5 years. Rent reviews and long and expensive procedures. Variables and formulas easily manipulated by pub company place men in the RICS and the settlement of a fair rent do nothing to curtail the exploitation of contract terms which can bankrupt a licensee within weeks rendering a process of rent review impractical and ineffective. Product price and choice restriction give a pub company ultimate power to control the events. Leaving aside these most obvious control opportunities, we have other terms unique to tied agreements like flow monitoring, none can be managed by the formulaic approach.

Other submissions will be offered in respect of the problems with the RICS but in summary their involvement at best has been irresponsible. BISCOM and Government sought clarification of the RICS guidance after it was revealed in the revised guidance was still capable of manipulation by valuer's on the pub company pay roll. There were disputes even between RICS guidance writing panellists which the RICS have systematically failed to even try and resolve. Rob May, National Rent Controller for Enterprise Inns, was the chairman and still sits in the influential RICS Trade Related Valuations Group, who we understand are blocking guidance interpretation clarification, this has to be one of the greatest conflicts of interest ever revealed and still the RICS have done nothing. To further undermine the effect of RICS guidance it has been confirmed that the rent assessment guidance is not mandatory upon its members. It follows that a pubco seeking to circumvent the code provision to comply with guidance, and interpret in accordance with the principle that the tied licensee should be no worse off, can simply instruct a surveyor to undertake the exercise for them. **This has to be addressed.**

BISCOM 2010 said ;

*"The acid test of its [RICS] success will be the extent to which the new guidance provides clarity on valuations and the principle that a tied tenant should be no worse off than a free of tie tenant. ...."*

The RICS have utterly failed in this regard.

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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

It may be better to consider an alternative trigger as 'significant increase' will be difficult to establish and indeed may be imperceptible across an entire estate of pubs.

FPC believe consideration should be given to triggers such as if a licensee's gross profit drops below a certain level (overheads + rent) or if the licensee's earning drops below a minimum wage equivalent.

- 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

As previously mentioned some information is simply not in the pubcos gift to disclose. This is the information needed for effective rent assessment. Confidentiality may restrain disclosure. A parallel assessment model is a useful tool and should be a bare minimum.

- 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

It may be maintained as an 'indicator' but unless covered by legislation, e.g. Weights and Measures, it should have no legal evidential weight. It is simply not acceptable that an unproven method of measurement can be used to fine licensees.

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

Care should be taken to review the code and ensure that all rent assessments (including review and renewals) are covered by the codes provisions, not just new letting assessments.

References to tenants or lessees should be altered to read licensees where appropriate.

**Most importantly there needs to be a FOT option provision.** The rent should be capable of review should the licensee choose to implement the option and if the parties can not agree then the matter can be referred to a third party in accordance with the agreement terms. The third party decision should be capable of appeal to the Adjudicator if one of the parties considers the principle of the tied licensee being no worse off has not been fulfilled in the assessment.

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

This was one of the failings of the Beer Orders and FPC consider the Governments proposals for review and code/threshold variation by the Adjudicator is indicative of learning by this mistake. We welcome it.

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

Without this option we fear the entire statutory intervention will be wasted. All other provisions are capable of being circumvented as we have discovered to our cost. RICS guidance, self regulation and altering agreement names (to franchise) are all attempts to game the intentions of progressive reform. The option is swift, simple and cheap.

If this option is not enshrined FPC envisage we will be in another BISCOM within 12 months of the statutory code being implemented and little improvement will have taken place. The time allowed for self regulation to 'have a chance' has been used not to reform but to asset strip and industry and that will continue without a FOT option implemented swiftly.

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We are conscious that there may be concerns about how this could work in practice and therefore outline in Appendix I a briefing note and at Appendix II a draft deed of variation.

**The inclusion of this FOT option clause empowers the individual licensee, strengthens their bargaining position and should require little, if any Adjudicator participation, saving on administration and money.**

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?

These two go hand in hand as a package. They are not an either or.

**Interestingly, at BISCOM 11th June 2013, even the BBPA raised their concerns that the formulaic approach to deliver (b) could not work - for once we are in agreement with the BBPA.**

It is imperative that some statutory control is put in place to restrain exploitation of unfair contract terms in tied commercial agreements. The statutory code should provide that unfair tied contract terms are not binding on licensees and make it open to licensees themselves to challenge terms they consider unfair.

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

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### *III. Financial penalties?*

Yes

FPC absolutely concur with the IPC submission in this regard.

The Adjudicator needs further powers, for example similar to those afforded to the OFT in the case of Unfair Contract Terms in Tenancies (Unfair Terms in Consumer Contracts Regulations 1999 & Enterprise Act 2002, Part 8).

Under the new statutory code the Adjudicator should have a duty to consider any complaint it receives about unfair tied contract terms.

Where the Adjudicator considers a term to be unfair, they should have the power to take action on behalf of licensees either individually or in general to stop the continued use of the term, if necessary by seeking an injunction in England and Wales. The power should have a similar effect to that afforded by the Competition Act 1998 relating to anti competitive provisions in commercial agreements enable severing of the offending term from the document leaving the remainder in force.

Bearing in mind the Government commitment for 'Fairness' and that the self regulatory process and IFC already purportedly commit BBPA members to fair contracts, this should amount to formalising existing promises under a statutory regime. Such a proposal may meet with strong opposition from pub owning companies and their representatives which will serve to demonstrate that their initial self regulatory promises were empty and there was never any intention of delivery.

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

The 500 threshold should be 500 pubs not 500 tied pubs. If a pubco has 600 pubs 490 managed and 110 tied tenanted/leased then they should be bound to comply with the code on those 110 pubs. The funding by levy means that they would not be disproportionately treated. The point here is that the brewers new 'game' will be to acquire pubs from pubcos simply transferring ownership from pubcos back to brewers, the reverse

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of what happened after the Beer Orders. If they want to expand their estates that should not be restrained but it should be within the confines of the Governments commitments of fairness and tied licensee being no worse off. Brewer, like Fuller Smith and Turner, are already acquiring pubco pubs and exploiting the tied terms

, to drive out the licensee so they can revert the pub back into their managed house estate, *pub name* at Sheen and the *pub name*, Soho being to perfect examples, we understand the licensees will be putting in their own submissions but would be pleased to provide further details on request if required.

## **SIMON CLARKE (WITNESS) NOTES FROM BISCOM 11TH JUNE 2013**

### **1. Self-regulation**

What went wrong under self-regulation ? Government saw it for what it was - a facade of regulation. Ed Davey persuaded into thinking he was delivering something meaningful - essentially its how pubcos want to be regulated not now they should be regulated.

**Nutshell - there are contract terms unique to tied contracts allowing pubcos to have full control of product price and product choice - they are the terms most exploited - they are the terms that bleed the financial resources of a licensee and there is not one self reg code provision that aims to address them.**

Davey package

Immediate Improvements - most not new at all - price lists still not public, information still not provided (not in their gift - false promise)

Further Improvements -

TOP OF LIST WAS BALANCE OF RISK AND REWARD - NOT TOUCHED IN FRAMEWORK CODE

Evolution of machine tie - abolition was the BISCOM ask ?

Rent assessments - no better, confusion reigns RICS at least partly at fault BISCOM and Govt saw confusion interpretation and they have done nothing to resolve.

No agreement on common ground P&L

Enhancement of PIRRS ? - independence of surveyors questionable - London choice of 5 - 4 have revealed conflicts of interest, leaving only one possible independent - I know this because I am a surveyor and can research the individuals a licensee would be blissfully unaware.

The Government thought it had secured a good deal. Heavy lobbying by BBPA, deal struck between Govt and BBPA, tenants groups excluded from the negotiations, coalition had to give it a chance under their period of office - a year on, no real change - no rebalance of risk and reward, (a recipe without the key ingredient).

Why did it all fall apart ? It never came together - not industry agreed - failed to deal with main issues of concern. Davey persuaded/misled ? into believing pub owning company executives would relinquish control. Ted Tuppen has est. £2.5m annual income (£1m in salary alone) he is not going to relinquish control of anything truly significant to the hands of a board of what he considers to be amateurs, even if he does think he has a degree of influence over some of them, through corporate membership or sponsorship of their organisations.

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Enterprise statements of late = threaten government with legal action and Select Committees/MP's, REIT threat - if they could they would save £35m - do we really believe if they could have done this in 2008 they would not have done it by now ? Latest misleading information in a statement to all MP's only a few days ago. You may recall Ted mentions tenants having free accommodation on top of his estimate of our salary. Here is my rent statement, according to this I pay £441 a month for what amounts to a bedsit over a pub with no self contained entrance -

Tuppen refused to accept the tied tenant no worse off principle in front of this very committee in 2010

How did we get to this point ?

BBPA members never intended to deliver anything meaningful. Point blank refusal to rebalance risk and reward. Participation of other well meaning bodies were an attempt to give the illusion of credibility, even the other four bodies concede their participation has not had the desired result.

The RICS and information disclosure present another problem in that much depends on fair rent assessment Rob May (National Rent Controller for Enterprise Inns) and many other industry surveyors, deriving considerable incomes from pubcos and brewers, are blocking attempts to improve guidance to avoid confusion in interpretation. Important information can not be disclosed due to confidentiality issues. **For these reasons alone a formulaic approach, as suggested, can not hope to satisfy the Governments commitments (there are other reasons the formulaic approach can not work as an ultimate solution).**

## 2. Consultation

The Government has made clear that it will proceed with a Statutory Code which will contain two overarching principles – fairness and free of tie tenant no worse off than free of tie tenant. Do you agree with this ? These principles have been at the heart of the IPC manifesto since day 1. Absolutely good idea, successive select committee recommendations, Govt commitments and should be the commitment of any truly independent regulatory regime. These principles have not been confirmed as ambitions of the existing (PICAS) or new self regulatory board.

Is it a good idea ?

Yes

How best can it be delivered in practical terms ? MRO/FOT option at RR & LR & sale.

What else should have been in ? MRO option "ALL CONTRACTS SHOULD BE FAIR REASONABLE AND COMPLY WITH LEGAL REQUIREMENTS" already in

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IFC make it statutory.

**MRO IS A POTENTIAL "OCCAMS RAZOR" NOT A "SILVER BULLET" - "one simple solution is better than several more complex ones."**

Is the threshold of 500 pubs appropriate and if not should it be higher or lower ? IPC originally had a 500 limit on pub owning because that should offer MRO to tied licensees - we originally envisaged one stat code covering all and a provision for a FOT option to be offered to licensees of pub owning companies with more than 500 pubs. Some would not shed a tear if tie went but this was seen as an acceptable compromise, it was suggested by BISCOM Luff accepted unanimously by IPC.

What will happen to those companies who fall below the threshold ? They will have a choice of effective self regulation or statutory regulation - if they do not behave with the Govt commitments as aims then they may be reviewed and brought under the stat regulation - **essential Adjudicator has that power of altering stat threshold - they are effectively been given a chance to regulate themselves in line with Govt commitments**

How will the framework codes work for them ? FC might be a best practice model or guidance

### **3. Arbitration**

There is a general feeling that PICAS has worked well. Not amongst licensees - handful of cases all 'winners' disappointed, one submitted 'I' in PICAS stood for incompetence or impotence and he's a winner

Where is the IFC available to licensees ? not available on ALMR, FLVA, BII, GMV websites - all participating self regulation members.

What are our views on this approach, very little interest amongst licensees for the scheme, not seen as independent. Indifferent to it being provided in the future.

and how has engagement with lessees and pubcos worked ? Lack of awareness it even exists.

### **4. Adjudication**

What is the best way forward for PIRRS and PICAS ? Needs to be clearly independent and have some meaningful powers - million miles from that now

Is it feasible for them to stay as they are ? No

Should they be subsumed into the Adjudicator ? Yes - but all these processes cost money - MRO, simple, cheap, dispute resolution under terms of lease simple deed of variation, no need for adjudicator at all ?. Would essentially

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offer an enforcement tool for all the side issues as well as main issues and potentially bring flow monitoring and buying out allegations under some degree of control.

How do you manage the schemes going forward ? For the Adjudicator, need real power of remedy and redress and genuine opportunity to shape FC

What powers should the Adjudicator have ? More powers of remedy to Adjudicator, and power to consider behaviour of those under stat threshold and alter threshold if appropriate.

**Must have the power to render unfair contract terms unenforceable.**

## **5. Risk and Reward**

How best should the Code address risk and reward ?

Needs to offer a mechanism to allow licensees to judge the fairness of the tied model against being FOT - this is the formula - a tool not the answer on its own - needs FOT option in order to allow licensee to act on its findings. The option itself is just that - an option. It is not abolition of the tie.

**FOT option allows the tied model to survive on its merits not on exploitation**

It is proposed to be phased @ review, renewal and sale of pub owning company property interest avoiding a floodgate - which of course we are told would not happen anyway as all licensees 'love' the tie.

**It will therefore be the tied agreement that will determine the models future not the FOT option being given.**

What are your views on each of the proposed options ?

We need a package deal not an either/or. There are proposals for demanding a rent review, dual assessments, banning flow monitoring etc, good practice in a civilised relationship, they should be taken for granted not bargaining chips.

There is only one 'option' at the moment - Formulaic approach - only deals with rent on a particular day once every 5 years, does not deal with other provisions that are presented by the tied agreement and being exploited - FOT option does deal with all as it allows the licensee to sever all ties.

Formulaic approach is still needed at review and renewal and is the computation that a licensee would need to consider tied agreement against FOT agreement before making a decision on taking the option or not. Formula is not the answer but a necessary tool of transparency.

Are these the things which are lacking in self regulation ? Yes - anything

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meaningful that rebalances risk and reward restrains exploitation of unfair contract terms.

Are there any of the options on which all sides can agree ? It seems IPC and BBPA agree the formulaic approach is not the answer.

How would a guest beer option work in practice ? We would like to see guest ales supporting smaller brewers - for competition reasons it may not be possible to restrict guest beers to say UK brands. CAMRA have outlined how this could work in more detail without raising a competition issue and we fully support their proposal.

To be clear this is an option where by the licensee can acquire a beer from an alternative source to their pub owning company - should they choose to remain tied.

Will it really expand the range of beer available in pubs or will lessees simply opt for the cheapest or most profitable option ? Depends on the end definition of Guest Beer option - one beer that can be acquired from any source outside the tie provisions. There are c870+ micro brewers in this country. This would offer them a route to market. It would promote more locally brewed beers and, as this sector is a growth area in the UK (despite the limitations), it should be encouraged. Some licensees may choose the cheapest or most profitable.

## APPENDIX I

# FAIR PINT CAMPAIGN

### MARKET RENT ONLY OPTION - HOW IT WORKS

The Governments announced a Public Consultation on pubs on the 22nd April 2013. The document proposes a statutory code which is to contain an overarching principle of fairness and that the tied pub licensee should be no worse off than if they were free of tie.

"Free of tie" simply means that the licensee, be they lessee or tenant, pays a **market rent only** and can acquire any products for sale to their customers from any source in the open, competitive, market place.

A "tied licensee" is obliged to acquire products **from the company that own the pub**, such as beer, **in addition to paying rent**. The idea is that if the price of 'tied' products are higher than the open market price then the tied rent is lower, to 'countervail' the disadvantageous pricing structure, i.e. the tied licensee should be no worse off than if they were free of tie.

It is too naive to expect this to be delivered looking at this strictly financially, by a rent assessment formula - comparing a pub licensees profitability both on a tied and free of tie basis. The difficulty is that rent assessments are usually at 5 yearly intervals whereas tied product price increases can be more than one a year. A 5 yearly reassessment allows a party of a mind to abuse the opportunity to manipulate the dominant position afforded to them by the tied agreement and simply increase product prices to gain on the swings what they lost on the roundabout.

The key to success of this Government initiative is to produce an innovative mechanism to ensure the delivery of their commitments to the sector.

One question the Government are seeking responses on is whether their commitments could be delivered by offering tied licensees a free of tie option, a recommendation originally put forward by the Business and Enterprise Select Committee chaired by Peter Luff in 2009 and re endorsed by the Business and Innovations committees of 2010 and 2011, chaired by Adrian Bailey.

This free of tie option essentially means a tied licensee can choose whether to remain in the same agreement, paying extra for tied products and a lower rent to compensate them or swap onto an agreement under which they simply pay a market rent and acquire products from any source.

### **HOW IT WORKS**

The tied licensees requirement to purchase products from the pub owning company are called 'Purchasing Obligations'. It is perfectly simple to sever these provisions from the main document leaving the remainder in force. The possible eventuality of just such an event as being proposed in the Governments Public Consultation has been pre considered by the pub owning companies and their agreements already contain provisions triggering a rent review (rent recalculation to reflect changing circumstances) to open market rental value. **Given the latter there is no necessity to alter lease or tenancy agreements in any way.**

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A typical provision would read :

(Example from a lease - summary from Enterprise Inns)

***Changes in the Tie***

*We may give you notice in writing at any time (and more than once) to:*

*(a) release you from all or any of your purchasing obligations under clause 18.1(Purchase of Drinks) ; or*

*(b) vary any of Your purchasing obligations in clause 18.1 (Purchase of Drinks) in order to take into account any law which may make the relevant obligations unenforceable;*

*with effect from the date in that notice and We may then choose to review the Rent to the Market Rent by serving a Review Notice on You and if any Rent Concessions are still applicable at that time they will cease to apply from the date of Our notice to You releasing or varying Your purchasing obligations.*

(Example from a tenancy - summary)

*The pub owning company may vary the provisions of the Purchasing Obligations in order to take into account any enactment whereby any of the provisions might be or become, in whole or in part unenforceable or restricted in scope or effect in the event of such a variation the rent firstly reserved shall be reviewed in accordance with the agreement terms.*

There is no call for unnecessary red tape in fact a licensee choosing the market rent only option releases the pub owning company from red tape. The Governments statutory code can have a simple to understand clause indicating that any pub owning company, it is proposed with more than 500 pubs, must offer their tied licensees the option to have a market rent only agreement.

This 'option' could be activated :

(a) at rent review or lease renewal or

(b) if the Pub Company makes a significant alteration to the price at which it supplies tied products to the licensee or

(c) if there has been an event outside of the Tenant's control and unpredicted at the time of the previous Rent Assessment that impacts significantly on the licensee's ability to trade.

Dispute on interpretation of any of these events should be capable of referral to the proposed industry Adjudicator.

The pub owning company should propose terms on tied and a free of tie basis to the licensee.

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The tied licensee would then consider the two alternative agreements that would be similar in every way, other than the 'Purchasing Obligations' and rent. One would have a requirement to purchase products from the pub owning company with a current price list, and the other agreement the freedom to acquire products in the open market, it would be for the licensee to establish open market prices (this is readily available from industry stock takers and accountants). Rents applicable to each agreement should be open market rents reflecting the respective agreement terms, including any onerous or beneficial provisions that may be individual to them, and capable of being challenged, in accordance with the existing lease terms dictating the open market rental value, but with an ultimate third party referral to the industry Adjudicator should it be necessary.

Should a tied choose to implement the option they would be selecting to no longer be subject to purchasing obligations of any form and therefore the sum paid to the pub owning company would be market rent only like the majority of other normal commercial agreements in high street bars, restaurants, shops, hotels, offices and warehouses.

Once effective, and the rent established either by agreement or independent third party, just as it is in the usual way through rent review terms already contained within the agreement or in lease renewal terms already contained in legislation (Landlord and Tenant Act 1954 Part II), the pub owning company would issue a deed of variation, as they are already required to do under the existing agreements, but with the additional provision stating that the licensee is no longer bound by the Purchasing Obligations of the original agreement.

Currently, there is a certain amount of administration involved in operating the tied model for pub owning companies, establishing orders, purchasing, collecting, storing and delivering products. Should a licensee choose to opt for a market rent only option the pub owning company would be released from their administrative obligations - thereby reducing their red tape.

The current proposal by Government deliberately seeks to ensure that smaller pub owning companies, like the regional family brewers, are not directly effected by the statutory code unless they expand to ownership of over 500 pubs.

Most pub companies and brewers claim that their tied rents balance the higher tied beer and product prices. All the market rent only (free of tie) option seeks to achieve is that licensees are able to monitor that claim themselves and opt out if it proves untrue. Ironically, the existence of such an option ensures that the tied agreements can continue to exist if operated fairly and reasonably as was first intended.

## APPENDIX II

DATED .....

PUB COMPANY PLC (1)

LESSEE LIMITED (2)

and

JOHN SMITH AND FRED BLOGGS (3)

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DEED OF VARIATION

The Pub, Main Street, London W1 6HL

THIS DEED is made on .....(date).....

BETWEEN:

- (1) PUBCOMPANY PLC (Registered Number 123456) whose registered office is situate at .....address..... (the "Lessor") ;
- (2) LESSEE LIMITED (Registered Number 78910) whose registered office is situate at .....address.....(the "Lessee") ;
- (3) JOHN SMITH AND FRED BLOGS of .....address.....  
.....("The Guarantors")

WHEREAS :

- (A) This Deed is supplemental to the lease of .....date.....("the Premises") short particulars of which are set out in the schedule hereto ("the Lease")
- (B) The premises are now vested in the Tenant for the residue of the term granted by the Lease and the reversion expectant upon the determination of the term granted by the Lease is vested in the Landlord
- (C) The Landlord and the tenant have agreed to vary the terms of the Lease in the manner hereinafter appearing

NOW THIS DEED WITNESSED as follows :

1. With effect from the date hereof the Lease shall be varied to the intent that from that date the rent reserved by the Lease shall be varied from £..... per annum subject to review as provided in the Lease and any relevant provisions of the current statutory code ("the Existing Rent") to £..... per annum subject to review as provided in the Lease and any relevant provisions of the current statutory code ("the New Rent") and to give effect to such variation:
2. the Tenant covenants to pay the New Rent with the effect from the date hereof at the times and in the manner provided in the Lease for payment of the Existing Rent
3. the Landlord and the Tenant agree that with effect from the date hereof all the provisions of the Lease shall take effect in relation to the New Rent as they previously took effect in relation to the Existing Rent
4. The Guarantor consents to the variation of the Lease as above and confirms that its covenants contained in clause ..... of the Lease shall continue in full force and effect

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notwithstanding such variation and covenants that the same shall extend to the Tenant's obligations as varied by the Deed

5. In consideration of Tenant paying the New Rent with effect from the date of this Deed the Lease shall be further varied to the intent that from that date the Landlord agrees to release the Tenant from all tie obligations contained within the lease including, but not limited to, the "Machine Tie" and the "Purchasing Obligations" contained in the ..... Schedule of the Lease in relation to all tied products, including beer, cider, wine, spirits and minerals ("the Released Products")
6. Save as varied by this Deed the covenants and conditions contained in the Lease shall remain in full force and effect

IN WITNESS of which the parties have executed this Deed and delivered it on the date above written



Schedule

(The Lease)

| Date           | Term     | Parties   |
|----------------|----------|---|
| 1st April 2005 | 20 years | (1) Pub Company plc<br><br>(2) Lessee Limited<br><br>(3) John Smith and Fred Bloggs |

SIGNED as a DEED by  
PUB COMPANY PLC  
acting as a Director and its Secretary (or Two Directors)

Director

Director/Secretary

SIGNED as a DEED by  
EDWARD TRIFLE

in presence of :

Name (in BLOCK CAPITALS)

Address

SIGNED as a DEED by  
SAMUEL CITYSTART

in presence of :

Name (in BLOCK CAPITALS)

Address

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## APPENDIX III - LETTER FROM PIRRS

siclarke@aol.com  
karl@open-water.ca

Dear Simon and Karl,

In view of the correspondence between myself as Chairman of the PIRRS Board and more latterly with Tim Hulme as Chief Executive of the BII, I thought it would be useful to set out the response from the PIRRS Board to the questions and observations that you have made and merit a detailed response from us.

This response has been seen and approved by all the organisations represented on the PIRRS Board, namely the ALMR; BBPA; BII; FLVA; and the GMV, all of whom have been closely involved and have approved the formation of the Regulatory Body, its function and modus operandi.

Before dealing with specific points you have raised I would just like to explain that the new Regulatory Board is to be constituted using the same company vehicle as the Pub Independent Rent Review Scheme (PIRRS) whose name is being changed to the Pub Regulatory Board (PRB) and whose Memorandum & Articles are being changed in accordance with the agreement reached by the Board of PIRRS. This will include the provision that the Board will comprise of nominations from the participating bodies as set out in the letter sent to you on the 3<sup>rd</sup> May 2013.

For the sake of clarity we have encapsulated your concerns into a number of questions and addressed each in turn, as below:

### **1. What are the aims and objectives of the Regulatory Body?**

These were sent to Simon Clarke in an email from Martin Rawlings acting as a Director of PIRRS at the request of and behalf Bernard Brindley as Chairman of the Board to whom Simon's request was directed.

The aims and objectives to be contained in the Memorandum & Articles of the Regulatory Board were recently confirmed at the last PIRRS Board meeting and are given below:

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2.1. The Company is established for the following purpose (Objects)

- (a) to provide directional and strategic input to the operation of the Pub Industry Framework Code Edition Six and any subsequent revisions or editions of the Code, which governs the relationship between pub owners and tenants and lessees of those pubs.
- (b) to award the contract for the Accreditation Service which accredits Company Codes against the Pub Industry Framework Code and performs the audit service carried out in accordance with Pub Industry Framework Code.
- (c) The award of contracts for the management and administration of the Pub Independent Rent Review Service (PIRRS) and the Pub Independent Conciliation and Arbitration Service (PICA-Service), establish the rules of governance and case protocols for these bodies, and agree the management fees for these.
- (d) To receive and disburse fees from the pub owning companies that comply with the Code of Practice to cover the cost of operating the Company (PRB), and the contracts awarded in (c) above and any other future activity as agreed by the Board commensurate with the objects of the company.
- (e) To determine the audit requirements required under the UK Pub Industry Framework Code by agreement with the Accreditation Body.
- (f) To review the Pub Industry Code of Practice on a periodic basis as determined by the Directors and to invite relevant stakeholders to contribute to that review. To establish a mechanism for consultation and engagement on matters relating to the operation of the self-regulatory regime with key stakeholders going forward.
- (g) To receive and decide upon recommendations received in connection with the operation and management of the accreditation process, PIRRS and PICA-Service and to advise and determine any changes and processes as required.
- (h) Any other matters as considered by the Directors as relevant to the advancement and improvement of Landlord (Pub Owning Companies) and Tenant Relationships.

**2. How have the Directors of the Pub Regulatory Board been determined?**

The Participating organisations can nominate who they choose as their representatives, which may be an executive, member or nominee of that organisation.

Landlord representatives: Brigid Simmonds, Mike Clist, George Barnes, Martin Rawlings

Tenant/Lessee representatives: Bill Sharp, Kate Nicholls, Martin Caffrey, Tim Hulme

In addition there is to be a non-voting Chairman, Bernard Brindley.

There remain two positions to be filled by Tenant<sup>1</sup> representatives who will be determined by the existing tenant organisations.

The constitution of the Board is such as to allow sufficient expertise and resource to be placed at the disposal of the Board in carrying out its functions. That the BBPA nominates four Directors is the result of the fact that there is only one organisation representing landlords, whereas there are a number of different organisations representing tenants. While the decision making process of the Board is not reliant on a voting system but rather and preferably on the basis of consensus, no decisions can be reached unless there is a preponderance of tenant representatives present. The minimum quorum is set at two landlord representatives and three tenant representatives.

**3. What is the position and status of Martin Rawlings?**

Martin was a Director PIRRS since its inception and remains a Director at the request of the BBPA who have retained his services on a consultancy basis and will continue as a Director with the Regulatory Board.

**4. Is any participant member of PIRRS/PICAS able to appoint a consultant to represent their interests as prospective directors on the panels?**

Should any organisation feel that their best interests are served through the appointment of a consultant as a Director of the Board they are free to do so.

**5. What is a "properly constituted, national body"**

As we explained in the letter of the 3<sup>rd</sup> May the Board were keen to ensure that participants "were properly constituted, national bodies that are supportive of the aims and objectives of the Regulatory Body and represent pub tenants and or lessees in their relationship with the pub owning companies." Without being overly prescriptive such bodies would have a constitution that empowered that body to make representations on behalf of its members to and about that relationship and would be open to tenants throughout the country and not restrained by location. The determination as to which bodies would be appropriate rests with the current tenant organisations already participating. It is self-evident that members of the Board are supportive of the aims and objectives of the Regulatory Body irrespective of what the Government may or may not see fit to introduce by way of legislation in the future.

**6. Is it correct that it was BII, not BBPA, that were steering the PIRRS, PICAS and Regulatory Body programmes?**

PIRRS, PICA-Service and now the Regulatory Board are collaborative services governed by the participating organisations and as such the programmes you refer to are those that will be agreed to by the Regulatory Board. The BII operate the accreditation process by virtue of their

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<sup>1</sup> Tenant is taken to include tied tenants and lessees throughout

expertise and the funding provided by the fees charged to those seeking accreditation. The contract for the administration of PIRRS and PICA-Service are awarded by the Regulatory Board and given the BII's expertise in these, they will remain with the BII. The BBPA along with the other organisations, including the BII, provide the strategic direction and advice to the administrative services along with its overall remit to monitor and promote the Industry Code of Practice.

**7. Will the Regulatory Body's objectives include the principle that the 'tied licensee is no worse off than if they were free of tie.'?**

The Government consultation seeks to include the principle and is asking for views on that and how it should be interpreted. This is a question for the respective organisations to examine and respond to. It is not for PIRRS or its successor, the Regulatory Board, to respond to Government consultation.

**8. Will The Regulatory Board seek to deliver the same principles (fairness and tied licensee no worse off), in respect of companies having less than 500 pubs as the statutory code will to those licensees of pub owning companies with more than 500 pubs.**

The Regulatory Board's function is to deliver Version 6 in its current form according to the form and content established to date. Should that change as a result of the consultation the Regulatory Board will have to react to those changes that are made and act accordingly. The Board must act in accordance with what currently exists.

**9. Is the BBPA is intent on maintaining as much influence as possible over what you are claiming is to be an independent process?**

The question misunderstands the nature of the purpose and function of the Regulatory Board and the processes it governs. As explained earlier the work of the Board is a collaborative process and one that has worked well in the setting up and operation of PIRRS and PICA-Service. The ratio of 6:4 in favour of the tenant representatives has been set to ensure that the BBPA does not exert overdue influence.

**10. IFC Version 6 (along with its predecessors) contains a specific provision that contracts should be fair, reasonable and comply with all legal requirements. Is this specific provision included in all accredited company codes?**

The over-riding condition of accreditation of company codes is that they agree to comply with the Industry Framework Code. To that extent all company codes are compliant and can be held to account if they do not comply with those provisions. That includes the provision that "contracts should be fair, reasonable and comply with all legal requirements". The IFC has been put in place to enshrine this principle and it is the over-riding purpose of the Code that Companies which subscribe to the IFC agree to "act with integrity and honesty at all times and conduct business in a professional and fair manner".<sup>2</sup>

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<sup>2</sup> Page 3-4 IFC Version 6

The accreditation service (BIIBAS) has considered the point raised by you and in the interests of providing certainty and the avoidance of doubt we are introducing the requirement as a condition of accreditation that specific commitment is made to the provisions contained in relevant clauses 35 and 133 as refer to tenancies and leases respectively.

#### **11. Who is paying for the Regulatory Board and how much?**

The Regulatory Board, its administration, PIRRS and PICA-Service are paid for through a levy raised on pub companies who are accredited under the Code. Those costs amount at present to something just under £100,000.

I hope that the above answers the points you have raised and that the purpose and function of the Regulatory Board is now clear. I would be happy to meet up with either or both of you if that would be helpful.

Just to be clear the tenant organisations are still looking to involve other representative organisations and are keen to fill the other two places.

Yours Sincerely,

Bernard Brindley (Chairman of the PIRRS Board) on behalf of:

The Association of Multiple Licensed Retailers  
The British Beer & Pub Association  
The British Institute of Innkeepers  
The Federation of Licensed Victuallers  
The Guild of Master Victuallers