INDEPENDENT PUB CONFERDERATION

14th June 2013

Pubs Consultation
Consumer and Competition Policy
Department for Business, Innovation and Skills
3rd Floor, Orchard 2
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Westminster
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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 the IPC submission below.

The Independent Pub Confederation (IPC) comprises national trade bodies and campaign groups representing lessees, consumers, licensees and small brewers. IPC brings together all existing representative bodies under one banner. The group provides a common voice in lobbying MPs, landlords and other stakeholders on a wide range of legal, political and legislative issues affecting the pub trade.

Members of the IPC include The Association of Licensed Multiple Retailers, CAMRA, The Fair Pint Campaign, Federation of Small Business, Guild of Master Victuallers, Justice for Licensees, Unite the Union, Brighton and Hove Licensees Association and SIBA. It aims to be inclusive and welcomes support for its objectives from others in the pub industry.

For any further information please contact:

Simon Clarke
Campaign Manager
Independent Pub Confederation

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.

IPC's original proposals, on which we were formed, included a provision that all pub owning companies with more than 500 pubs should offer their licensees a market rent only option (a free of tie option with an open market rent). This provision remains one of our primary objectives. It has not been introduced by self regulation. We proposed it is offered in a statutory code.

It is of great concern that the proposed 'self regulatory body has been unable to confirm, despite written requests (Appendix I see para 7 and 8), that it will seek to deliver the Government's commitments of 'fairness' or that a 'tied licensee should be no worse off than if they were free of tie' by enforcement of a self regulatory regime.

All codes, statutory, self regulatory and company should contain, as a bare minimum requirement, confirmation that they seek to deliver on the Governments fundamental commitments. These commitments should form the core values of all codes.

The very fact that the self regulatory process is unable to offer any reassurance that it seeks to deliver the same commitments as Government, indicates that their aims and objectives are NOT in harmony with those required by the wider industry and Government. The absence of such assurances undermines the credibility of the self regulatory code and its enforcement. This inconsistency of regulation objectives should be borne in mind when considering whether to set a statutory threshold for the Code of 500 pubs.

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

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

Pub franchises are rarely franchises in the true sense of the definition. They are perhaps an effort to circumvent any future developments in delivering fairness by describing the agreement as something else. There is every reason to seek to include all agreements however they are described under the banner of regulation. We have seen that Marston's, Punch Taverns and Star Pub Company claim to offer franchise-style agreements. Marston's and Star Pub Company are members of the British Franchise Association. A traditional

franchise agreement involves taking on the operation of a branded outlet supported by centralised marketing of the brand to consumers. That would not be the case here. For example, there is no consumer awareness of Punch Taverns as a brand of pub. We feel that the pub franchise model is a tying agreement and should be governed by the statutory code.

The objective is to deliver fairness and a fair balance of risk and reward by ensuring a tied licensee is no worse off than if they were free of tie.

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
Adjudicator - we have no reason to dispute the Governments estimates of the costs associated with the set up and operating of an adjudication system. It should however be noted that if a self regulatory process remains, and the 500 pub limit becomes a reality, those companies with more than 500 pubs will be unlikely to sponsor both regimes.

Benefits
There will be a re-balancing of profits between pub owning companies and their licensees. Most tied pubs are over rented and few, if any, have rentals that truly reflect the effects of high tied product prices and SCORFA's adequately, the overall effect is additional burden on licensees which needs to be offset by a commensurately lower rent.

Transfer
In calculation (BIS Impact Assessment, para 76), BIS have estimated that the average licensee will be better off to the tune of £4,000 ('Best' estimate). IPC confirm that we believe the average transfer is far more likely to be to the order of the 'High' estimate range. We are unaware of any significant quantifiable SCORFA's that begin to outweigh the 'wet rent' and consider the OFT's estimates of average price differential of 30%, between FOT and tied wholesale prices to be under the real differential. We are aware of many examples where tied wholesale prices are as much as double those of the FOT wholesale prices. Our best estimate concurs with the 'Sample Rent Assessment Statement' offered by BIS in Annex A of the BIS Consultation Paper amounting to a transfer average of around £11,000 per pub. This transfer may take the form of a lowering of tied product prices, genuine (quantifiable and contractually enforceable) SCORFA's, a lower rent or a combination of any or all.

Mandatory Free of Tie option with open market rent review

This needs to apply at the next rent review, **lease renewal** and new leases, in addition to the statutory code and Adjudicator.

It must be remembered that most licensees, whilst possibly suffering unfair terms in their relationship with the pub owning company, are protected to a degree under the provisions of the Landlord and Tenant Act 1954 Part II. A pub owning company can not simply evict a licensee in occupation or terminate the agreement prematurely. Indeed the provisions of the Act offer protected licensees the right to renew their agreements at the termination of their existing agreement. The possibilities outlined in Impact Assessment para 93 and 94 are therefore not available to pub owning companies unless the licensee agrees to terminate his contract. Contrary to para 94 (Impact Assessment) offering a Free of Tie option does not restrain a brewing company from selling its beer it simply encourages them to ensure the tied agreement they offer and terms thereof are fair and competitive. Brewing companies stating they do not consider they can continue to trade if required to operate fairly are not presenting a convincing argument against the Free of
Tie option.

Impact
The pub owning companies have always maintained that they believe their licensees would choose to remain tied if offered the choice of being Free of Tie. In view of their claimed beliefs it is difficult to comprehend the resistance to satisfying the compromise offered by the BISCOM conclusion 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."*

The most important point to note here is that the Free of Tie option proposal is staged over a period, at review, renewal, letting and pubco sale. Should it transpire that many licensees choose the option the substantial 'lead in' period offers pub owning companies the opportunity to adjust their agreements increasing their fairness, improving their behaviour, reducing tied rents and tied product prices and increasing genuine SCORFA's. The impact can be controlled by ensuring fairness prevails. It gives pub companies the opportunity to genuinely compete in a free and fair market and we believe it will be to the long term benefit of their business to do so. They will have to become efficient.

Costs
Simply put, if the claims of the pub owning companies are correct and their terms are fair and reasonable then no tied licensee will choose to exercise the option. Essentially the proof of the pudding will be in the eating. Even if the licensee exercises the option then there is nothing stopping the pub owning

company from offering itself as a supplier. The pub owning companies claim that they are securing the best deals possible through bulk purchasing although as we know little of the benefit is passed on to their licensees. Why, if it is the case that they are securing the best prices possible are pub companies not supplying other premises beyond their own estate? In the case of brewers that are also pub owning companies - Marston's and Greene King for example - then they do supply the free trade and have to compete in it. In the case of Enterprise Inns and Punch Taverns then they produce no products and operate no wholesale distribution of their own. They simply use their tied agreements to restrict access to substantial part of the market they own (around 25% of pubs in Britain) the producers with which they contract effectively pay an 'access fee' through deep discounting and that money is retained by the pub owning company rather than being passed on.

IPC believe the perceived threat of large international brewers monopolising the supply market place, outlined in para 103, is unfounded. Over 20,000 pubs in the Britain are not subject to the constraints and effects of the tied model yet large international brewers do not dominate that arena and further more micro brewers, denied entry to the 24,000 tied pubs due to tied terms, are growing at an encouraging rate. In fact, the micro brewing sector is the only growth area in UK brewing and should be encouraged to flourish with the proposed reforms.

At para 104 (Impact Assessment) there is the statement that there is a chance of brewery closures as a result of loss of scale. As stated earlier it is the terms of the tied agreements and behaviour of the brewer that would result in their licensees choosing to go Free of Tie not the opportunity to choose to go Free of Tie. This seems to be a contrary admission to that of the brewers to the various BISCOM's, speculating that they would not expect their licensees to abandon the tied agreements if given the choice. IPC consider this to be little more than scaremongering by the brewers. They have subsidiary operations exporting overseas, supplying supermarkets, free of tie operators and multiple managed groups in addition to distribution in their own managed estates, all of which appear to be achieving like for like sales and profit growth whilst their tied estates continue to decline and fail.

Para 105 makes the assumption that the pub owning companies are actually investing in their estates now. It is the lessees not the pub owning companies liability to invest, maintain, repair and decorate in a pub under the terms of 'full repairing' leases. Enterprise Inns state they invested £30m in the first half of this year in around 860 pubs, this leaves around 4,840 with no pub owning company investment at all. In addition, IPC would dispute the breakdown of this purported investment some of which it seems may actually be put to payment of management companies occupying pubs on a temporary basis when a licensee suffers business failure. Let us not forget it is the profits extracted from surviving licensees that is being re-circulated into these 'investment' funds.

Benefits
The benefits of a FOT option could be immense :

- 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 :

- 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?

Self regulation is little more than a BBPA inspired distraction to attempt to avoid the real issues. The BBPA engaged a few tenant organisations they thought they could manipulate, or ones that have a strong pub company influence, to give 'self regulation' some credibility. It offers some morsels which, for most licensees, are of little, if any, meaningful benefit when faced with the overwhelming problem of a tied pub making no net profit after rent due to an unfair relationship incapable of effective regulation. The GMV, an organisation participating in the development of self regulation since 2009 confirmed at the BIS round table meeting on the 13th June 2013 that "...self regulation can not work."

IPC recognises that self regulation provisions have taken some tentative steps forward (e.g. abolition on upward only rent reviews) and may be able to resolve some peripheral issues but the BBPA has confirmed it does not have, as an objective, the delivery of rebalancing risk and reward. There is little faith amongst licensees that self regulation can deliver anything substantial to resolve the issue of fairness in the relationship.

PICAS, the self regulation dispute resolution service, has confirmed that its powers are limited to fining and are unable to consider 'legal issues'. PICAS is

soon to be subsumed into a new self regulatory body, comprising largely the same individuals, to be chaired by Bernard Brindley, the current PICAS chair.

The Government has committed to deliver 'Fairness' and 'Tied licensee is no worse off than if they were free of tie'. The BII, as PICAS coordinators, were asked 17th May 2013 to confirm that the new regulatory body would be sharing the same commitments (fairness and tied licensee no worse off) as Government. Almost three weeks later Mr Brindley has failed to confirm their position. IPC was asked if it would wish to participate in the formation of the new self regulatory body but has declined on the grounds that it has yet to be confirmed that the bodies objectives will be aligned with our own (and those of Government). In addition, further details need to be disclosed regarding the structure and powers of the organisations represented, particularly the BBPA who will retain 4 of the proposed 10 voting rights with perhaps significant financial influence also in some of the other voting parties. This is not a case of balancing landlord against tenant votes, it is a case of ensuring that the voice of meaningful reform is not constantly overpowered or vetoed by the BBPA and any other groups that may have internal conflicts. Members of the BBPA have established tight control over the market in which they operate leading to distortion of market conditions and damage to many thousands of small businesses. The self-funded attempt at supposed self-regulation does seem to be an attempt by small controlling group of companies to retain control of the market they have carved up between them.

Recent investigation by IPC members has resulted in some concerning revelations in respect of the future of self regulation.

In order for a company code to be accredited it must fulfil the 'Minimum Obligations' contained within the Industry Framework Code (IFC), ironically not agreed by the industry.

IFC states, as a Minimum Obligation, at para 33 and 135 that :

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

This clause has been present in every incarnation of the IFC since and including the original in 2010.

IPC has not seen any company code containing this basic and fundamental provision. Bernard Brindley has confirmed, in correspondence, the benchmarking accreditation panel are now "taking specific measures to ensure that these paragraphs are included in every COP accredited.". It follows that all those company codes where the paragraph has been omitted have been wrongly accredited. We have asked what those specific measures are and have received no response.

It is a PICAS requirement that a licensee with a complaint is required to take it through the company in questions grievance procedure despite their company codes failing to offer fairness in their contracts.

A situation where a contract is unfair would present a potentially continuing financial/physical loss for the licensee and fining alone (the only remedy available to PICAS) may not be a satisfactory remedy to eliminate the breach. In addition, such an activity may be abandoned by a pub owning company in an individual case but remain in all their other agreements.

What is needed is a remedy ensuring that a contract, or contract term, which falls foul of the 'fairness' provision should be rendered unenforceable. In most cases it may be possible to sever offending provision from a contract leaving the remainder in force.

The IFC is purported to be legally binding document. If this is the case then surely every complaint a licensee makes is potentially a 'legal issues', one which PICAS have committed to consider and potentially act upon, to the best of their limited remedy abilities. This is contrary to the statement made by PICAS, that they can not consider 'legal issues' (Appendix II - Para 1.4).

IPC understanding that PICAS has no remedial powers other than fining.

PICAS do not have the power to deal with a legal issue such as severing a clause from a contract where it transpires it is unfair. This power of course exists to courts, and in some cases the OFT, in cases where a contract term is proved to be anti competitive, or unfair in consumer contracts.

IPC is aware that, until the IFC was considered legally binding, no power to sever commercial contract terms where they transpire to be unfair was available, as there is no provision in commercial contracts that they will be 'fair'. Clauses 35 and 133 of the IFC potentially change all this as they confirm that companies have now made a legally binding commitment, as a 'Minimum Obligation" to ensure that "All contracts are fair, reasonable and comply with all legal requirements." Offering 'fair contracts' as part of the legally binding code renders that provision in itself a 'legal requirement'. This is a provision of the IFC that PICAS have subsequently confirmed is beyond their remit to either consider and, even if they could, they are not empowered to offer satisfactory remedy.

That company codes have slipped through the accreditation net without having the minimum requirement provision contained therein does little to dispel the concerns attached to self regulation.

At the time of writing three BBPA members have still not had a company code accredited (since 2010), including Harveys brewery who have a tied tenanted

estate.

IPC's intention here is to highlight where self-regulation may fall short of the Government's expectations of industry reform in order that these shortcomings may be considered in the context of statutory intervention requirements.

Our investigations establish that there are Government expectations (and IFC provisions) that self regulation is not capable enforcing and as a result Government should appreciate the very limited meaningful effect that can be generated by self regulation now or in the future under such constraints.

In summary,

- the proposed self regulatory body cannot confirm they will be seeking to deliver the same commitments as Government on fairness and a tied licensee being no worse off than FOT.
- current company codes have been wrongly accredited as they omit minimum obligations, a failure of the BIIBAS accreditation system
- PICAS has neither the capability or power to consider or enforce a complaint relating to whether a contract is fair, reasonable or complies with legal requirements
- some BBPA members, three and a half years from the introduction of self regulatory provisions, have still not had a company code accredited
- the self regulatory code itself has barely moved on from the original, despite many revised attempts at rewording the fundamental issue, rebalancing risk and reward remains, unaddressed
- the participants of BIIBAS, PIRRS and PICAS panels are the same and it is proposed will remain the same in the self regulatory body that subsumes them, this is not seen as independent by IPC members

Self regulation is voluntary. Any BBPA member can leave the BBPA and be immune from it if they so choose and it is notable that both Greene King and, more recently, Spirit Group (a former subsidiary of Punch Taverns) have left the BBPA with no consequential ill effects. Both companies have an accredited company code, neither company code contains the provision that their contracts will be fair, reasonable or comply with legal requirements.

The very fact that, over 3 years on, some BBPA members still have no accredited company code demonstrates self regulation is considered no genuine threat and receiving little serious thought by those it is supposed to be regulating. We consider the handful of complaints put to PICAS, and before them BIIBAS, demonstrates that most licensees have no faith that the system can deliver a satisfactory outcome to their primary issues, which revolve around fairness and the dominant position of the pub owning company.

To conclude, IPC accepts that the Government is supportive of a self regulatory regime between now and statutory code implementation but doubt its presence will have any notable or beneficial effects for the industry as a whole. IPC's hopes and aspirations lie firmly with the statutory code and adjudicator and the consequential knock on effects that this will have on smaller pub owning companies 'upping their game' under the threat of further regulation if they do not.

Smaller companies will no doubt commit to operate a self regulatory regime after a statutory code is implemented to ensure the statutory threshold proposal is maintained at 500. Under the current circumstances IPC consider this regime will amount to little more than best practice directions. We consider the power of the Adjudicator to alter the statutory threshold, should smaller companies not deliver the Governments commitments of fairness and tied licensee no worse off than being free of tie, will be determining factor influencing the behaviour of such companies in the future.

In view of the latter, IPC certainly see the alternative suggested by 4.30 of the BIS Consultation document to have serious grounds for adoption in conjunction with the Adjudicators powers to alter and amend the statutory regulations where they consider it necessary. This would eliminate the cost of maintaining a self regulatory regime and its ancillary enforcement and accreditation mechanisms.

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

"Fair and lawful dealing" may not be interpreted the same as the previous Governments statements of commitment to "...ensure fairness for tenants" or that "All contracts will be fair, reasonable and comply with all legal requirements". It is the latter that is required in all regulation and should govern the relationship between pub owning companies and their licensees. As has been previously outlined, if its intentions are pure, the IFC has committed all participating pub owning companies to deliver fair and reasonable contracts. Putting the latter into a statutory form and requiring it in any self regulatory or company codes should meet with no resistance, unless of course it was a false promise.

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

The statutory code should be based on fairness and the principle that a tied licensee should be no worse off than if they were free of tie goes hand in hand with that. The delivery of fairness is dependent upon a tied licensee being no worse off than if they were free of tie. The challenge is how to

deliver fairness and a tied licensee no worse off, this can not be achieved by a formulaic approach alone.

Rent reviews and lease renewals present the only opportunity to 'rebalance' the rent in relation to tied product prices and any SCORFA that may exist. On settling said rent the pub owning company can simply increase their tied product prices across the whole estate, gaining on the swings what they lost on the roundabouts. this will not be seen as a significant increase in price (as perceived by the Consultation document para 5.11 b) as it will not be individual to a specific pub. Pub owning companies can implement price increases at any time and in many cases more than one a year. We have just seen the beer duty escalator being scrapped and a 1p drop in beer duty. The reaction to this by Greene King for example was an 11p increase in price per pint.

The tied model enables many forms of manipulation and abuse to a pub owning company with a mind to capitalise on the opportunity presented. Brulines fines based on data collected from flow monitoring equipment are often paid by licensees innocent of allegations simply because the costs of litigation outweigh the fine itself and would result in business failure before the conclusion of the court process. Pub companies implement fines for 'off schedule' deliveries or returned deliveries, yet it is the nature of the tied agreement that culminates in these eventualities. A licensee is required to second guess their customers consumption in relation to their stock in hand on a weekly basis, **and not at the weekend,** the busiest period. If free of tie a licensee can order anytime, from early in the morning to late at night seven days a week from a wholesaler and more often than not a micro brewer for next day delivery.

The ultimate incentive for efficient and competitive market behaviour is the ability of the customer to change its mind about its supplier - to choose what it buys and where it buys it from. It is an agreed position in all markets that where the customer (in our case the tied licensee) is restrained from exercising choice then the market becomes weak, inefficient and prone to complacency and abuse.

There are contract terms unique to tied agreements that a growing number of publicans consider restrain them from performing the necessary functions required to properly satisfy statutory compliance and health and safety requirements. In turn these restraints may undermine risk assessment provisions and may nullify the provisions of insurance policies exposing the licensee to future litigation from staff and/or customers. IPC are aware these issues will be outlined further in additional specific submissions.

Equally troubling is the position of the Royal Institution of Chartered Surveyors (RICS) the detail of which will be presented in an individual

submission by Simon Clarke, publican and chartered surveyor.

Government and BISCOM identified that there was some confusion relating to the interpretation of RICS pub rental valuation guidance. It should be of huge embarrassment to the surveying community that RICS themselves were incapable of rectifying the confusion in interpretation themselves.

Government propose (Consultation Part 3, 10(b)) *"All **'initial'** rent assessments must be : ..... conducted in accordance with the RICS Guidance, interpreted in the light of the overarching principle that a Tied **Tenant** should be no worse off than a Free of Tie **Tenant**.*

We would strongly propose that further provisions are made to ensure the same parameters are applied to expressly encompass rent assessments at rent review and lease renewal and the word 'tenant' is replaced by 'licensee'.

Whilst the Governments intervention and clarification on this issue is most welcome, the self regulatory code does not contain such clarification which leaves licensees of pub owning companies with pubs under the statutory threshold exposed to continued manipulation of rent assessments.

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. ....."

David Rusholme, Valuation Director of the RICS, gave witness evidence to committee in the preparation of session 2010-12, seeking to offer some reassurance but notably he did no confirm the clarity required had been achieved. That committee concluded :

"It is deeply frustrating that within the industry there is still confusion over the
status and interpretation of the principle that a tied tenant should be no worse off than a free of tie tenant when assessing rental valuations. This was a specific
*recommendation made to RICS. **The on-going debate on whether this is being done and how the guidance is being interpreted is a demonstrable failure of RICS guidance.** ....."*

The RICS even now remain silent on the issue of confusion over guidance interpretation which has compounded the problem. Rob May, National Rent

Controller for Enterprise Inns, and many pub sector surveyors, deriving substantial revenue either directly or indirectly from pub owning companies, sit on the Trade Related Valuations Group which control revision, and clarification, of the guidance.

Surveyors are left to their own devices to interpret the guidance as they see fit and as many are conflicted, acting primarily for pub companies and brewers, it should come as no surprise they choose to ignore the prime principle in its entirety.

The knock on effect of this is that, even at RICS Dispute Resolution level, surveyors acting as Arbitrators or Independent Experts have failed to produce one rent assessment that openly and expressly takes into consideration the principle of the tied licensee being no worse off.

The Governments statutory proposals may assist in resolving this reluctance by the RICS to get their house in order. If licensees below the statutory threshold are to be protected, in the absence of any satisfactory activity from the RICS, some statutory regulation is required in respect of all rent assessments not just those of pub owning companies with more than 500 pubs.

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

Gross profit is a factor of selling price achievable and product purchase price. The pub owning company control the inflated tied product prices having a direct influence over the tied licensees achievable gross profitability. Any tied licensee (not just tenant) should have the right to request an open market rent review if their gross profit drops to a level below a 'minimum wage' equivalent. This may avoid gaming of the Governments intentions and restrain, for example developers, using the terms presented by the tied agreement as abusive tools to force a tenant from a pub where they should otherwise have protection under the landlord and tenant act.

The measure of 'significant increase' needs to be defined.

We recognise this provision has been proposed to prevent 'gaming' of fair tied rents - an increase in product prices to cover the loss on an individual

pub's revised lower rent. It will not work as the loss will be spread over the whole estate and be imperceptible as a significant increase to the individual. IPC considers that only the threat of a tied licensee being able to choose to go free of tie will discourage gaming of fair tied rents.

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

Notably this is absent from the self regulatory code despite requests by IPC, ALMR and GMV to include it during the IFC revision process, culminating in V6 (n.b. this is demonstrative of the widely held conclusion that our the participation in the code revision process of other organisations was little more than a box ticking exercise offering the illusion to Government that there was some inclusive cross industry talks).

It would be helpful if the RICS offered the same sort of clarity and transparency in their rent assessment guidance, having said at 7.18 of RICS guidance :

"....The tenant may compare its own property with the circumstances of being free of a supply tie and consider the profit achievable under those circumstances."

and 7.19 :

" the REO may have regard to the fact that free houses are available in the market. Therefore, it could expect to make an increased profit as a result of being able to buy products in the open market and not at the prices charged by the supply tying landlord or its nominated supplier."

The only time a licensee has got anywhere near achieving such a rebalance of risk and reward was following the BROOKER –V- UNIQUE case (2009).

This judgement was issued in September 2009 by Judge Iain Hughes QC in the High Court of Justice Chancery Division sitting at Winchester. It is accepted that the lease that was under consideration was far more constrained than the existing lease of the Eagle Ale. However, in his judgement effectively substantially in favour of the lessee Mr. Brooker, the judge made the following observations in respect of the attitude that the hypothetical tenant would have in the climate regarding lease renewal.

"□ *First, the effect of the economic crisis*

□ *Second, the present restrictions on the availability of ready, inexpensive capital.*

□ *Third, the market-depressing effect of the steady news of public house closures*

□ *Fourth, the smoking ban*

□ ***Fifth, the hypothetical tenant would have regard to the fact that free houses are available on the market and the tenant could expect, other things being equal, to make a much greater profit from being able to buy beer on the open market and not at the nominated suppliers prices***

□ *A positive counterweight to the above is that the hypothetical tenant would also take account of the fact that free accommodation was provided at the public house. I remain satisfied that the market for leases of public houses is, at present, very much a buyer's market and that this would be reflected in the hypothetical tenants bid."*

Judge Hughes also referred to the previous case, overseen by Judge Weeks, in which the judge noted that whilst ordinarily a divisible balance, or net profit before rent, is shared equally between parties in that case he found three reasons why a prudent tenant would negotiate for ore favourable division.

Firstly - the pub was burdened with a partial tie
Second - the tie had the effect of creating a second level of profit for the landlord from the captive market
Third - the net profit before rent was so low that one half did not provide a living wage or an adequate return to working tenants for their efforts, even allowing for free accommodation

The Brooker case relates to a pub near Bristol, rather than London, but the principle, that a hypothetical tenant would consider their circumstances and profitability if they were free of tie before making a rental bid, remains valid and good commercial sense.

Contained within one piece of case law, I appreciate the weight applied to this judgement may be questioned, however, the RICS, on rewriting the rent assessment guidance have practically enshrined this part of the judgement of Brooker in paragraph 7.18 of their guidance (GN 67/2010)

and have subsequently allowed it to be misinterpreted without any attempt at correction despite requests from BIS and BISCOM.

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

Yes

This remains a Select Committee recommendation from 2004 and a core objective of the IPC Manifesto.

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

Yes

This remains a Select Committee recommendation from 2004 and a core objective of the IPC Manifesto.

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

Flow monitoring has never been proven to be accurate in situ and pub owning companies have undertaken all means possible to avoid licensees expert evidence of flow monitoring equipments inaccuracy to remain undisclosed in court cases. Either the cases have failed on a technicality or a court steps deal has been struck negating the production of the evidence of inaccuracy to the court. Many licensees simply pay the fine rather than risk the consequential costs of a litigation against a far better resourced pub company.

It is essential that pub companies are restrained from using data collected from flow monitoring equipment to calculate and penalise licensees for allegations of buying outside the purchasing agreements.

Some IPC members have had accusations of buying out based on flow monitoring data only to have the allegation withdrawn after demonstrating the systems failings. It remains a tool of abuse that we estimate in one year alone contributed £10 million to the pub owning companies income.

The use of such equipment would be rendered totally unnecessary if tied product prices were in line with the free of tie open market price or a licensee chose to take a free of tie option accompanied by a market rent. Detailed reports by industry leading experts l and Trading Standards have found flow monitoring equipment to be inaccurate and unreliable (these are contained in supplemental submissions by individual parties).

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

Yes

The Statutory Code needs a Free of Tie option with an open market rent capable of referral to a third party (in accordance with the rent review provisions of the lease/tenancy/agreement or relevant legislation) in the event of a failure to agree between the parties.

As early as 2008 Vince Cable said "I support the Fair Pint Campaign which is pushing for legislation for leased pubs to be released from their tie."

The Free of Tie option remains an undelivered Select Committee recommendation from 2009, further reiterated by the Committee of 2010 and 2010-12.

The Committee recommendations of 2009 and 2010 were endorsed by the Labour government in 2010.

In March 2010, John Healey, Labour's pubs minister, set out plans to reform the tied agreements including "a Free of Tie option for tied tenants accompanied by an open market review".

In June 2010, Consumers Minister Ed Davey gave an assurance in the House of Commons that the Government would stick to the previous Government's plan to relax the beer tie and timetable for reform.

The current Statutory Code proposes the formulaic approach alone, as a solution to the Governments commitment to deliver the result where a tied licensee would be no worse off than if they were Free of Tie. As previously outlined, IPC envisage any statutory approach that excludes the genuine Free of Tie option, relying on a only a formulaic approach, neglects the following :

- to make allowance for the failings of the RICS clarifying interpretation of their guidance (particularly for licensees of pub companies with ownership falling under the statutory threshold)
- to consider the raft of non financial tied obligations that permit abuses other than rental manipulation
- to dissolve the dominant position of the pub owning company in the commercial relationship
- to restrain unfair tied contract terms in commercial agreements

IPC consider a Free of Tie option is the only way to deliver the Governments commitments of *'fairness'* and *'that a tied licensee will be no worse off than if they were free of tie.'* The free of tie option was a foundation stone of the IPC collaboration and written into our manifesto from day 1.

It is interesting to note that SIBA (the Small Independent Brewers Association) at mediation in 2009 proposed the following :

- *FREE-OF-TIE OPTION We believe this should apply to all "tied" pubs - fully rentalised, based on trade in the pub at the time of negotiations, with transparency within rent calculations. This would form the starting point for the development of a modular tie...*
- *THE "EASY PUB" Having ascertained the fully "dry", free-of-tie rent, the lessee is then allowed the option of choosing tie "bolt-ons" that are priced by the pubco landlord as rental discount. (Working from the opposite starting point, with a full tie, this would reflect the EasyJet model of base low-cost price, with options to buy "tie freedoms" for a higher rent.) At the time of any rent review, the lessee would be allowed to review and alter the operating model, changing the products that are tied and choosing the level of rent and buying freedom.*

This is not so removed from the Free of Tie option we propose today as IPC. The licensee would pay a straightforward open market rent and be under no obligation to acquire products or services from the pub owning company. Essentially the choice of going free of tie does not limit the pub owning company from continuing to offer products or services to licensees who, if they see the value in those offers, will consider taking them up or not.

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 is essential particularly if there is intended to be any reliance what so ever on the self regulatory regime. The sword of Damocles itself, the threat of intervention, has not led to any meaningful reforms in almost 10 years. Any improvement in reforms through self regulation will only be seen if the threat of amendment, by the Adjudicator following review is maintained as a back drop.

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

It is fundamental, anything else is too easily circumvented by the pub owning companies. We are already seeing the family brewers seeking to close the gap between tied and FOT prices by increasing prices to wholesalers, undermining the Governments proposed formulaic approach of rebalancing tied rents before it even is implemented (e.g. despite a 1p duty reduction Greene King have increased beer prices by 11p a pint).

The survival of the tied tenanted model should be determined on its fairness. The existence of a Free of Tie option will not be the undoing of tied agreements. The presence of excessive rents, unfair terms and abusive behaviour will and all are in the control of the pub owning company. If a company wishes to maintain a tied tenanted portfolio is should be able to demonstrate that it can act responsibly and in a manner that is to the mutual benefit of both the participating parties.

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?

(a) and (b) need to go hand in hand. (b) without (a) enables pub owning companies to circumvent any downward rent adjustment by simply increasing their tied wholesale prices across the entire estate. Such increases, countervailing any rent loses as a result of fair rents being established, will not appear significant as they will be across the whole estate not just applicable to one pub therefore the statutory code proposal 5.11(b) will be easily circumvented.

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

III. *Financial penalties?* Yes

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

A saving could be made by dissolving the self regulatory regime once the statutory code and Adjudicator are established, as outlined in 4.30 of the Consultation paper. The savings in maintaining PICAS, PIRRS, BIIBAS and/or the proposed self regulatory body could contribute to the likely costs of the adjudicator.

APPENDIX I - LETTER FROM PIRRS

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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 3rd 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:

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 Owing 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[1] representatives who will be determined by

[1] Tenant is taken to include tied tenants and lessees throughout

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 3rd 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 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".[2]

    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.

[2] Page 3-4 IFC Version 6

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

APPENDIX II

UTILISING THE PICA-SERVICE – THE PROCEDURE

1.1 The PICA-Service is designed to provide tied tenants and lessees, whose Pub Companies or Breweries are bound by the Pubs' UK Industry Framework Code of Practice (IFC), with a formal dispute resolution system. The PICA-Service provides a mechanism by which a licensed property tenant can deal with issues between himself and his Pub Company or Brewery landlords concerning perceived breaches of the Pub Industry Framework Code of Practice or individual Pub Co/Brewery Codes of Practice or other complaints not particularly covered by such Codes but in the spirit of the same.

1.2 The PICA-Service is a wholly owned subsidiary of the Pubs Independent Rent Review Scheme (PIRRS) which provides a low cost rent review resolution service to tenants/lessees and Pub Companies/Breweries. PIRRS and PICA-Service are provided by five of the industry's leading associations: the Association of Licensed Multiple Retailers (ALMR), the British Beer and Pub Association (BBPA), the British Institute of Innkeeping (BII), the Federation of Licensed victuallers Associations (FLVA) and the Guild of Master Victuallers (GMV).

1.3 PICA-Service, given the date the Pubs' UK Industry Framework Code of Practice (IFC) came into effect, can only deal with alleged breaches taking place subsequent to the 30th June 2010. Complaints made by a tenant must be based therefore on alleged breaches taking place from 30th June 2010 onwards in accordance with the wording of the version of the Industry Framework Code of Practice, or an individual Pub Co/Brewery Code of Practice, accredited subsequent to 30th June 2010, and in place at the date of the alleged breach.

1.4 The process will not, and can not, deal with legal issues nor will it deal with rent review or lease renewal rental Determinations. The latter will continue to be referred through the established PIRRS procedures. The conduct of the parties within rental negotiations, other than concerning modes of calculation and figures contended for which if in dispute should continue to be referred through PIRRS procedures, can nonetheless be referred to PICA-Service.

1.5 The PICA-Service dispute resolution procedure is to be resolved by way of a Panel decision rather than by way of the findings of an individual. Whilst circumstances may arise which necessitate the need for the PICA-Service Administrators to call a Preliminary interim panel meeting, in order to clarify whether a case meets with the necessary criteria or the manner in which a case is to be progressed, the Panel's Award will follow a Hearing, at which the parties may or may not, be present (see in particular paragraphs 1.11 and 5.3 which follow).

1.6 The selection of the Panel to hear each individual case is a matter for the Chairman of the PICA-Service Panel. This will be drawn from the extended panel of individuals selected and approved by the Board, such individuals having undertaken the requisite PICA-Service panel training. Such extended panel will include individuals with experience of the trade and may or may not include a lay member or lay members. The PICA-Service Administrators will diligently, when administering a panel to deal with a specific case, enquire of the panel chair and of panel members whether any are conflicted by way of having in recent times represented, worked for or having had other involvements which place them in a conflict of interest situation. If they have they will