



**Brighton & Hove Licensees Association**

# Pub Companies and Tenants: A Government Consultation

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B&HLA represents licensees, both tied and free of tie. Whilst we represent publicans from throughout the country the majority of the venues we represent are based in the Sussex area and the adjoining counties to Sussex.

Currently we represent a turnover in excess of £65m and a seasonal full time equivalent of employees in excess of 2000.

## **The Questions**

### **Pub Companies and Tenants: A Government Consultation Annex C: List of Questions**

#### **Q.1 Should there be a Statutory Code?**

It is the opinion of B&HLA that there is now no choice but to adopt a statutory code. It is our opinion that having tried self regulation it has delivered too little and too late. We are also aware that despite assurances from the BBPA that the current Industry Framework Code does carry a legal weight one of the main pub companies and members of the BBPA, Enterprise Inns, are of a different opinion. As reported in the Publican's Morning Advertiser on 17th April 2013 Enterprise Inns barrister Adam Rosenthal is quoted saying "The Code of Practice doesn't have any binding force (in statute). It is accepted voluntarily by the landlord by the landlord pending legislation top what otherwise is a voluntary code".

It is our opinion that we need to move to a position of certainty. Currently there is little to no sanction should a Pubco either break the code or chose not to voluntarily agree to it. Being asked to leave the BBPA is not a great sanction against a pub company, one of the country's largest brewers, Greene King, have already considered their membership and left voluntarily. If a company is willing to leave voluntarily it is hardly a severe sanction with which to threaten others.

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

The Code should be binding on all pubcos that own more than 500 pubs, however it is not our opinion that the number of pubs one owns is an indicator of good behaviour and we have examples of smaller companies acting in a manner that could cause concern and whose tenants would be genuinely assisted with a more far reaching code. Whilst we accept the requirement to assist small and family brewers it is our view that this can simply be done through an acknowledgement of the difference between a tenancy agreement (not usually full repairing and insuring) and a leasehold contract.

Q.3 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, unless we arrive at a system that includes smaller and family brewers where we would envisage a system based around type of contract, differentiating between leasehold and tenancy agreements

Q.4 How do you consider that franchises should be treated under the Code?

Genuine franchises as recognised by the British Franchise Association can provide a valuable model for those running that business, however we feel that the word "franchise" is all too easily banded around as a substitute for "leasehold" and must not be seen as a means of avoiding any obligation under a statutory code.

Q.5 What is your assessment of the likely costs and benefits of these proposals on pubs and the pubs sector? Please include supporting evidence.

There has been a long established belief that the division of a pubs profits are not fairly or amicably split between the leaseholder of the business and their landlord. It is a widely held opinion that the split of the profits is unfairly split to the advantage of the Pubco at a cost to the leaseholder. This imbalance, whether it be through high rents, high product prices or a combination of the two will hopefully be addressed by an adoption of the prime principle (the tied tenant being no worse off than a free of tie tenant).

Q.6 What are your views on the future of self-regulation within the industry?

The Framework code as published by the BBPA will continue to form a template for codes of most pub companies. As long as this has regard to the statutory code which must have primacy we see no issues.

Q.7 Do you agree that the Code should be based on the following two core and overarching principles?

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

Yes we agree that both principles are fundamental to the success of the statutory code and enshrining them in law is essential

Q.8 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

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or if an event occurs outside the tenant's control.

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.

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

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

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 on all counts

Q.9 Are there any areas where you consider the draft Statutory Code (at Annex A) should be altered?

At present no, but the code should be kept under review.

Q.10 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.

Q.11. Should the Government include a mandatory free of tie option in the Statutory Code?

Yes. It is our belief that this is the best policeman of the industry and will ensure that pub-companies operate a tie properly. We don't believe it amounts to an end of the tie, indeed we believe it will enforce the tie, but ensure it is operated well and not abused.

It is the belief of B&HLA that the free of tie option should be subject to a trigger point and not simply arbitrary. The obvious trigger point should be that the tied tenant should be no worse off than the free of tie tenant. We believe this to not be simply be a financial "worse off" but one also based on terms. Should the leaseholder believe they are worse off then they can action the trigger after making justification for sop doing. Should the Pubco disagree they have recourse to the same arbitration services, PICAS or ombudsman as available to the lessee, or could match terms.

The benefit of the trigger option is that it serves to ensure fairness to both parties and should still police the prime principle.

Q.12 Other than (a) a mandatory free-of-tie option or (b) mandating that higher beer prices must be compensated for by lower rents, do you have any other suggestions as to how the Government could ensure that tied tenants were no worse off than free-of-tie tenants?

Much is made of this issue, but considering that currently an assessment has to be made under the FMT principle we don't consider an assessment made under a principle of free of tie to be onerous. We support the prime principle.

Q.13 Should the Government appoint an independent Adjudicator to enforce the new Statutory Code?

Yes, failure to do so will leave an imbalance of power from which the leaseholder will find difficult to gain recourse.

Q.14 Do you agree that the Adjudicator should be able to:

- i. Arbitrate individual disputes?
- ii. Carry out investigations in to widespread breaches of the Code?

Yes on both counts

Q.15 Do you agree that the Adjudicator should be able to impose a range of sanctions on pub companies that have breached the Code, including:

- i. Recommendations?
- ii. Requirements to publish information ('name and shame')
- iii. Financial penalties?

Yes, sanction needs to be in place and the fear of sanction genuine if there is to be genuine advance within the sector. For far too long sanction has been light and ineffective. We would also consider out free of tie trigger to be a sanction, and one that will ensure genuine policing of the sector.

Q.16 Do you consider the Government's proposals for reporting and review of the Adjudicator are satisfactory?

Yes. The option of review will also ensure the role remains relevant.

Q.17 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, it seems on right and proper that the Adjudicator be paid for through an industry levy. Those companies who breach the code most should pay a greater proportion under the principle of polluter pay.