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From:
Sent: 12 June 2013 13:44
To: Pubs Consultation Responses
Subject: Pub companies and tenants - A government consultation - Response
Attachments: Pubco - tenant-consultation-response-form.doc

Ladies & Gentlemen,

Please find attached my response to the above consultation process.

I am a former licensee of a substantial premises in , as a lessee to a private landlord, on a 15 year free of tie lease.

Should you require any further information or clarifications on this response, please do not hesitate to contact me.

Sincerely

(Tel:

Department for Business, Innovation & Skills

Pub companies and tenants - A government consultation

Response form

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

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

This response form can be returned to:

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

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

Please tick one box from a list of options that best describes you as a respondent. This will enable views to be presented by group type.
Representative Organisation
Trade Union
Interest Group
Small to Medium Enterprise
Large Enterprise
Local Government
Central Government
Legal
Academic
Other (please describe): **Former FOT Lessee of a large pub / hotel with 12 letting rooms, 200 pax function room, 50 cover dining, 150 pax bar & beer garden, for 13 years; 1995 - 2008**

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

Consultation questions

Q1. Should there be a statutory Code? Yes

Q2. Do you agree that the Code should be binding on all companies that own more than 500 pubs? If you think this is not the correct threshold, please suggest an alternative, with any supporting evidence. No.

- Beware Pubco's ability to "slice & dice" their estate to below threshold size.
- My Landlord's agents involved with my rent reviews attempted to benchmark the tied model (dry) rent, then factor in a wet rent hypothesis to justify an excessive rental proposal. This equated to an excess of 20% of my turnover, and over 12% return on the landlord's capital. He was a single pub owner.
- Smaller operators will always "look over the fence" to see (and learn) from the larger operators. If the threshold is to remain at 500, there needs to be an acknowledgment and authority for the tenant (if not the landlord) to invoke the COP as a model of accepted business practice – which would have legal primacy in the case of any dispute. This should apply right down to single premises landlords – as was my case.

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?

1. Lease / Tenancy distinction. There is a fundamental distinction between a lessee and tenant; I believe you have considerably under stated this in your proposal to define them all under the title of "tenant". A lessee (with rights to assign) will have made a considerable investment for the Lease:- eg the lease itself together with any premium, goodwill and other premiums which might be asked for – such as private accommodation surcharge; as well as the more normal fixtures & fittings, glassware and stock at valuation (which a "normal tenant or TAW might be expected to pay. A lessee carries a considerably greater financial risk than the tenant or TAW so should be separately recognised.
2. I have insufficient experience to comment on franchises in detail. One general comment: franchises tend to revolve around prominent / strong branding of the product or service being provided – with often a quite aggressive promotion / marketing function included in the Franchisor's remit. Any pubco offering a "franchise" should first be able to demonstrate such "strong branding". Failure to do so would imply a desire to skate around public perceptions or regulations – in which case they (franchises) should be covered by the code.

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

- Prospective & current tenants will have a much clarified "picture" to work with; and provided this subject (COP) is included within (initial) training objectives, they will gain a better perspective of the business and "partnership relationship" they are planning to enter / continue.
- The inclusion of guidelines and pre-conditions for entry into a tied (or fot) agreement are much more transparent.

- Rules of procedures and allowable agendas for discussions / visits between the tenant and landlord / agent (BDM) will be greatly clarified, & hopefully less confrontational.

COSTS:-

- These should be negligible for the tenant – and hopefully less stressful
- The landlord enjoys a "privilege" of being able to exercise the Tie; to which it is only reasonable that a proportionate cost be apportioned. So be it.

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

- Human nature being what it is, people (organisations) in authority / control will always push boundaries / exploit loopholes etc to maximise opportunities. In the economic climate of recent years pressures to sustain / enhance returns and / or growth to the satisfaction of shareholders / bond holders etc remain remorseless. In the Pubco world, Executive Boards have relied upon their ability to sustain their business model by maximising increases in rents and imposing other charges seemingly without consideration to the commercial viability of "the hand that feeds them" Self regulation in such an environment will NEVER succeed.

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

a. ***Principle of Fair and Lawful Dealing*** *ABSOLUTELY YES The word "Lawful" is absolutely key.*

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

Q8. Do you agree that the Government should include the following provisions in the Statutory Code?

i. ***Provide the tenant the right to request an open market rent review if they have not had one in five years, if the pub company significantly increases drink prices or if an event occurs outside the tenant's control.*** Yes. All rental values should by default be assessed on an open market (FOT) basis, from which the "wet" element and other "countervailing benefits" can be factored in to produce a viable and "balanced" tied rent. Surveyor choice is vital in such cases, the tenant should have the right to make this choice with costs awarded against the landlord if the adjudicator finds in the tenants favour.

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. The assessment of "wet" rent must be based upon actual barrelage not projected, or in the case of a vacant premises, an historical barrelage.

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, this should also specifically include a separately identified guest Cider option –(as was the case in the original 1990 Beer Orders) particularly as cider is a growth item within the industry; "micro" craft cider makers are enjoying a resurgence, are increasingly important to the rural economy and would reduce "food miles".

Such cider makers should have the same opportunity as micro-breweries; and tenants should have the same choice.

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; in its current format and definition, such equipment seems to have fallen outside current Trading Standards / weights & measures legislation. There may be a case for re-instatement should the quality, performance and reliability of such equipment meet trading standards criteria (for example be re-classified as being "for use in trade"), and such equipment be mutually beneficial to both tenant and landlord – all be it possibly for differing reasons.

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

1. Dilapidations. (Part 2, para 9.c.(v); and sub para h.) Greater definition is needed to define "dilapidation" particularly where the Lease also carries the clause "tenant will maintain, keep demise in no worse condition than at the commencement of the lease" (or similar, as was the case with me). Whilst re-enforcing the requirement for a detailed schedule of condition – complete with photographic evidence, there is a blurred distinction between when a "repair / maintenance" actually improves the premise's facilities; and so possibly qualify as a tenant's improvement. For example upgrading toilet facilities to include disabled facilities. Whilst this was / is a legal requirement for new build work, it was not in the case for routine upgrade ("repair / maintenance") work.
2. Landlords charges for dilapidations. There is ample evidence to suggest that landlords who succeed in recovering dilapidation costs from outgoing tenants, do not in all cases re-invest those monies back into the premises from which the charge was levied. Not only is this detrimental to the quality of the premises stock, it also raises the accusation that landlords use this revenue as additional income stream. The Code should require landlords to include information on the previous tenant's dilapidation status with confirmation to the effect that such revenue has been re-invested; or if not, suitable adjustment made to the landlords bid %age during the dry rent negotiation to allow for the fact that he (landlord) has already received income from the "lack of condition" so allow & encourage the new tenant to utilise the dry rent reduction to make good possibly in accordance with an agreed statement of work and timescale.
3. Tenants Improvements (Part 2, para 9.i.) Tenants (both prospective and existing) should be actively encouraged to invest in the fabric of their business, and reap the benefit of so doing. Whilst lease provisions cater for this- (such permissions will not be unreasonable withheld") Landlords often ignore tenant's properly constituted formal requests to them for permission to embark on such improvements, possibly because their "bid" on the trading improvements achieved are not normally admissible during rent reviews etc. The code should include a timescale for correspondence to be responded to etc. Additionally, an outline formula for calculating such trading improvements should be included into the code.
4. Return on investment. A landlord will often use this statement as justification to consider alternative use for a licensed property, as well as justifying a rental figure; however no such consideration seems to prevail for the tenant who may have invested their life capital into a business. During my rent reviews, our surveyor ensured that an acceptable figure was included into our rent reviews to

reflect a return on our capital investment into the business ADDITIONAL to the net profit / divisible balance. A figure representing a reasonable return on the tenant's capital investment should be included into the shadow P & L account.

5. Landlord's Bid at rent review. Without prejudice to a personal utter distaste of the principle of a landlord taking rent calculated as a percentage of the tenant's business profit, much greater flexibility is needed to justify any agreed percentage – without recourse to the default 50%. A statement to this effect should be included in the Code highlighting the fact that this percentage is negotiable – depending on the condition of the property and other factors relating to trading potential.
6. Premises for sale. Whenever a premises is offered for sale, the default condition must be that the premises is legally fit for purpose, and all safety and other certificatation is valid and in place - specifically this relates to Gas & electrical safety.

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

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

1. For landlords who have no organic brewing interests I believe the FOT option must be included. I am less easy about those landlords who have grown out of and still retain a strong brewing facility at the core of their business model, and very possibly a high proportion of managed houses.
2. I accept your suggestion that rents may rise to some degree under this option; however attempts by landlords / agents to do this should be strenuously resisted. There is ample evidence that some tied houses' dry rents are already higher than comparable fot (open) rents. Not only must the Adjudicator keep a firm hand on this but there is a case to argue for a mandatory national rent freeze until open market valuations are completed on all tied houses and a national database established. Only then will a level playing field be visible.

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? Yes:-

1. I believe it will all be about quantifying the "countervailing benefits" In this day of demanding or being able to quantify everything, it should be possible for identify values to all these "benefits" which must be unique to being tied; and ideally independently validated. This would enhance transparency and help restore some trust in the landlord.
2. I believe it is also important to establish a (regional) benchmark free trade wholesale price for the tied products ie Bookers / cash & carry price, including any barrelage discounts – bearing in mind these would be "with profits" prices.
3. Whilst respecting landlords' rights to achieve a reasonable return on their investments I believe greater flexibility in the negotiation of the "divisible balance" is essential. For a premises in tip top condition, (as per the schedule of condition) a 50% split is arguably reasonable. The RICS guidelines could easily embody a "demise status" grading system say from 1 to 5, one being "tip top" and 5 being "in need of total refurbishment" where a schedule of work could be agreed against a landlords bid of 10% which would remain in place for an agreed period of (say) 5 years / first rent review. Over time this would considerably improve the quality &

facilities of the tied estate; give an incentive to an incoming tenant to "take it on" and lastly provide a vehicle for the landlord to let dilapidated properties on a "fair risk v reward basis" in the aspiration of improving the asset value of their estate.

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 if other means have been exhausted

ii. ***Carry out investigations into widespread breaches of the Code?*** Absolutely 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. Choice of words are important; history has demonstrated only too well that "recommendations" are in the main ignored. The Adjudicator must spell out exactly what is expected by these "verbal warnings", and how, in law the miscreant will be required to react.

ii. ***Requirements to publish information ('name and shame')*** Yes.

- There is a strong track record of Pubcos gagging tenants via confidentiality agreements particularly when "settling out of court" etc. There is no doubt that had such information been made available, case law (precedent) may have been established, where other tenants - armed and aware of the precedent - could have had a more simple and less expensive route to resolve their own grievance.
- Para 6.12.b refers to the pubco publishing information; why can the Adjudicator not also publish minutes or a record of proceedings and findings. Such information would have much greater credibility. If the Adjudicator won't publish their own record of proceedings, they should at the very least "sign off" the information published by the Pubco.

iii. ***Financial penalties?*** Yes, serious financial penalties (together with adverse publicity) seem to be the only instrument which larger corporations take any notice of. They need to be timely, significant and "final" without the ability to seek appeals etc.

Q16. Do you consider the Government's proposals for reporting and review of the Adjudicator are satisfactory? Yes, a good starting point.

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? Several points:-

- An initial "proportionate to size" industry levy is a good starting point.
- Progression to funding via penalties imposed through breeches would seem appropriate - provided such penalties can be credited to the adjudication account.
- When considering penalties, I believe the hardship (if) incurred by the tenant should be considered and acknowledged when the adjudicator publishes their findings. Suitable damages should be considered and awarded to the tenant.

- I do not see any significant impact for tenants or consumers; for the overall industry the impact has to be seen and accepted as entirely positive. Many other significant industries have nationally imposed levies to fund their "policemen". The important thing is to set up the adjudicator's team with credible impartiality, teeth and the will to re-instate the British Pub as the natural focal point of the Nation's communities by adopting a total intolerance to malpractice & thus encourage quality forward / lateral thinking folk to re-look at this great industry and see a fulfilling career opportunity.

SLA

Duncan Hames MP

Avonbridge House, Bath Road, Chippenham, SN15 2BB
Email: duncan@duncanhames.org.uk Website: www.duncanhames.org.uk
Telephone: 01249 454110 Fax: 01249 454 115

The Rt Hon Vincent Cable MP
Secretary of State, Business, Innovation and Skills
1 Victoria Street
LONDON
SW1H 0ET

Our Ref: P\kai' .P\060613
7 June 2013

Dear Vince,

RE:

I have recently been contacted by my constituent, regarding the *'Pub Companies and Tenants: A Government Consultation'*. I enclose a copy of my constituent's correspondence for your information.

My constituent "wholeheartedly" welcomes the consultation. However, he is concerned that - whilst the Government considers that the Code should include a guest beer option (paragraph twenty-seven of the code) - the Government has not considered that the Code should include a guest cider option.

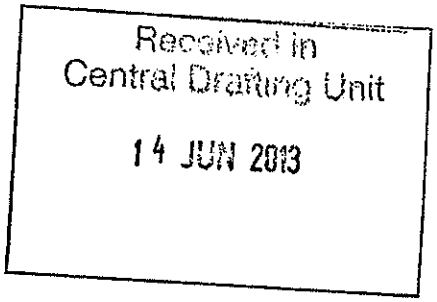
I would be grateful if you could look into my constituent's concerns, and respond with your comments.

Thank you for your assistance with this matter. I look forward to hearing from you.

Yours sincerely,

Duncan Hames

Duncan Hames MP
Member of Parliament for the Chippenham Constituency
Liberal Democrat



Dear Mr Hames,

As one of your constituents and a former licensee (, 1995 - 2008) I am writing to draw your attention to the current consultation by BIS :-
www.gov.uk/government/consultations/pub-companies-and-tenants-consultation

Whilst I have made my own full response to this consultation, I would ask for your support in general – for example support the EDM 57; and also in one area in particular:-

Part of the consultation includes consideration for the compulsory provision of "a guest Ale", where tenants who are otherwise contractually tied to their landlords for the supply (purchase) of all beers, will have the legal right to purchase one (local) "Guest Ale" outside of their contractual tie. This will be a good thing – except, traditionally (ie going back to the oft referred Beer Orders 1989) the opportunity to purchase a Guest Cider was also understood to have been included within this provision. However, during the lobbying around the "beer escalator" debate earlier this year, the same argument was expounded ("for beer, also read cider") – but as we know, only beer was freed from the escalator!

Cider makers – of whom there are many in the region, and also in your constituency - surely deserve to enjoy an equal right to market their (crafted) ciders to tied pubs in the same way as the Consultation is proposing for micro breweries – the worry being however that a "Guest cider provision" will slip through the net (a la "beer escalator" debate) unless it is identified separately and additionally confirmed in the Consultation's proposed Code of Conduct.

I notice there is an All Party Parliamentary Cider Group Linked at;- All-party Parliamentary Cider Group , chaired by Bridgwater MP Ian Liddell-Grainger and would ask / urge that you bring this to their urgent attention; urgent because the closing date for the public responses to the consultation on 14th June.

On the more general subject of the Consultation, I welcome it wholeheartedly and look forward to the restoration of an equitable relationship between Pub Company landlords and their tenants.

Yours sincerely,