House of Commons

Business, Innovation and Skills Committee

Pub companies: follow–up

Fifth Report of Session 2009–10

Report, together with formal minutes, oral and written evidence

Ordered by the House of Commons
to be printed 23 February 2010

HC 138
Published on 4 March 2010
by authority of the House of Commons
London: The Stationery Office Limited
£0.00

The Business, Innovation and Skills Committee

The Business, Innovation and Skills Committee is appointed by the House of Commons to examine the expenditure, administration, and policy of the Department for Business, Innovation and Skills. On 5 June 2009, the Department for Business, Enterprise and Regulatory Reform and the Department for Innovation, Universities and Skills become the Department for Business, Innovation and Skills. On 1 October 2009 the Business and Enterprise Committee was renamed the Business, Innovation and Skills Committee to reflect that change. The Committee retained the same membership as the Business and Enterprise Committee.

Current membership

Peter Luff MP (*Conservative, Mid Worcestershire*) (Chairman)
Roger Berry MP (*Labour, Kingswood*)
Mr Brian Binley MP (*Conservative, Northampton South*)
Mr Michael Clapham MP (*Labour, Barnsley West and Penistone*)
Mr Lindsay Hoyle MP (*Labour, Chorley*)
Miss Julie Kirkbride MP (*Conservative, Bromsgrove*)
Anne Moffat MP (*Labour, East Lothian*)
Mr Mark Oaten MP *(Liberal Democrat, Winchester)*
Lembit Öpik MP (*Liberal Democrat, Montgomeryshire*)
Ian Stewart MP *(Labour, Eccles)*
Mr Anthony Wright MP (*Labour, Great Yarmouth*)

Powers

The Committee is one of the departmental select committees, the powers of which are set out in House of Commons Standing Orders, principally in SO No 152. These are available on the Internet via http://www.parliament.uk/parliamentary_committees/parliamentary_committees

Publications

The Reports and evidence of the Committee are published by The Stationery Office by Order of the House. All publications of the Committee (including press notices) are on the Internet at http://www.parliament.uk/parliamentary_committees/bis.cfm

Committee staff

The current staff of the Committee are: James Davies (Clerk), Ben Williams (Second Clerk), Aruni Muthumala (Economist) Louise Whitley (Inquiry Manager), Anita Fuki (Senior Committee Assistant), Eleanor Scarnell (Committee Assistant), Jim Hudson (Committee Support Assistant) and Laura Humble (Media Officer).

Contacts

All correspondence should be addressed to the Clerks of the Business, Innovation and Skills Committee, House of Commons, 7 Millbank, London SW1P 3JA. The telephone number for general enquiries is 020 7219 5777; the Committee's email address is biscom@parliament.uk

Contents

Report

Summary

In May 2009 we published our Report on Pub Companies. That Report revisited a number of the issues raised in the then Trade and Industry Committee's Report of 2004, in particular the unhealthy and unbalanced relationship between pub companies and their lessees. Our 2009 Report concluded that little, if any, meaningful reform was made by industry.

We stand fully behind all the recommendations in the 2009 Report. We still believe that a Competition Commission reference may be necessary, but we acknowledge the real possibility that the developments prompted by our report may, taken together, correct the serious imbalance of power in the commercial relationship between pub companies and lessees. We would be more confident of such an outcome if the record of the pub companies in addressing issues of legitimate concern was better than it is. All the recommendations and conclusions in this new report should be set against this general background. We have grave doubts about the industry's willingness to do enough voluntarily to prevent statutory or regulatory intervention. We urge all the players to work together constructively to achieve this outcome. Our consideration of the industry's latest proposals—a new BBPA Framework Code of Practice, revised guidance from RICS and a number of other related developments—should be seen in that context.

Previous BBPA and pub company Codes of Practice were not sufficiently robust, and in 2009 we did not believe that pub companies properly complied with them. The BBPA's new Framework Code of Practice has made modest progress in addressing some of these shortcomings, for example on the provision of information in respect of the assignment of leases, and in the areas of training and financial advice for newcomers to the industry.

The Framework Code also goes some way to reconciling problems with flow monitoring equipment by the inclusion of a requirement for additional evidence above and beyond the data from flow monitoring equipment in any accusation of buying outside of the tie. That said, we believe that additional evidence must be physical and not just a signed confession from the lessee. We also recommend that flow monitoring equipment should be included under the Weights and Measures Act 1985 for calibration and verification purposes. This would remove unnecessary disagreements over the accuracy of the equipment.

The Framework Code does not put an end to concerns about Upward Only Rent Reviews. We recommend that, where such clauses are in existing contracts, they be removed by a deed of variation, the cost of which should be borne by the pub companies. Neither does it address existing problems with the AWP tie.

We conclude that major pub companies will have to treat the Framework Code as an absolute de-minimus requirement and significantly build on it with their own Codes .

The successful policing of the Codes will be vital to the success of these reforms. We give a cautious welcome to the BII's role in policing the Codes of Practice. The BII must act as an impartial arbiter in this area and is in the best position to administer accreditation for codes and to oversee and monitor compliance. However, we clearly state the need for the BII to demonstrate the necessary authority and impartiality to be effective as a policeman

for the industry. The success of all of the reforms proposed by the industry hinges on the credibility and effectiveness of the BII.

We welcome RICS' new guidance on valuation but conclude that the acid test of its success will be the extent to which it provides clarity on valuations and the principle that a tied tenant would be no worse off than a free of tie tenant.

We also welcome both the ALMR's decision to open up its benchmarking survey to the whole of the pub sector and RICS' undertaking to pursue the objective of a more open and transparent method of comparing and assessing rents. Both initiatives are again steps in the right direction. We therefore deprecate the lack of engagement by the BBPA in this area.

In considering the tie, we remain of the view 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. We are fully aware that tie is a highly emotive issue in the pub industry and many organisations campaign for its removal, but we advise against lessees deliberately breaking their tie contracts as part of a campaign for its removal.

Past Committee inquiries into these issues have proved that proposals for reform mean nothing if they are not carried through. This Report makes clear that this is the industry's last opportunity for self-regulated reform. If it does not deliver on its reforms by June 2011, then government intervention will be necessary. We do not advocate such intervention at this stage, but remain committed to a resolution to all the problems discussed in this Report and those of the 2004 and 2009 Reports.

We conclude that, if real reform is not delivered, legislation to provide statutory regulation should be recommended. Furthermore, we remain of the view that a reference to the Competition Commission may yet be necessary to resolve these long-standing issues.

The pub industry has been found wanting now on two occasions by committees of the House of Commons. If it fails to deliver on its promises by June 2011, it should be in no doubt what the reaction will be.

1 Introduction

Developments since publication of our last Report

1. On 13 May 2009 we published our Report on Pub Companies (the 2009 Report).[1] This Report revisited a number of the issues raised in the then Trade and Industry Committee's Report of 2004 (the 2004 Report).[2] The main thrust of the 2009 Report was that the relationship between pub companies and their lessees was both unhealthy and unbalanced. Some of the reaction to our Report confirmed the impression we gained that the pub companies had failed to engage in meaningful efforts to reform that relationship, and that both sides were caught up in a vicious cycle of distrust and confrontation.

2. In the light of the strong reaction to the 2009 Report, continued interest in its recommendations and a number of subsequent developments, which are set out below, we decided to hold a follow-up evidence session with the Royal Institution of Chartered Surveyors (RICS),[3] British Beer and Pub Association (BBPA)[4] and Independent Pub Confederation (IPC)[5] to test responses to the recommendations contained in our 2009 Report. Witnesses were invited to submit evidence on the following points:

i. RICS' Pub Industry Forum Report and Recommendations;

ii. BBPA's agreement with BII[6] and FLVA[7] to revise its Framework Code of Practice on the Granting of Tenancies and Leases;

iii. The Pubs Independent Rent Review Scheme (PIRRS); and

iv. The formation of the Independent Pub Confederation (IPC).

3. This has not been a straightforward Committee inquiry. The issue of the relationship between lessees and pub companies has a very active and committed audience. Press notices, new announcements and statements are issued on an almost daily basis by both sides. Therefore our inquiries have been conducted in the context of a fluid and complex environment. Of necessity many of our recommendations are directed mainly at the industry but our purpose in doing so is to direct Government policy towards the sector.

[1] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I

[2] Trade and Industry Committee, Second Report of Session 2004–04, *Pub Companies*, HC128

[3] RICS is the world's leading professional body for qualifications and standards in land, property and construction.

[4] BBPA is a membership organisation made up of major pub operators; vertically integrated brewers and pub operators; and minor pub operators

[5] The IPC was formed in the Autumn of 2009 and is an umbrella organisation made up from Association of Licensed Multiple Retailers, Fair Pint Campaign, Federation of Small Businesses, Guild of Master Victuallers, Justice for Licensees, CAMRA, Society of Independent Brewers and Unite the Union. The IPC is also supported and endorsed by BII and FLVA.

[6] BII (British Institute of Innkeeping) is the professional body for the licensed retail sector and the industry's leading membership organisation reflecting the views of 1000s of individual members across the UK

[7] FLVA (Federation of Licensed Victuallers Associations) is a members' organisation looking after the business interests of self-employed licensees in the licensed trade.

4. We sought to conduct our work in a considered and accommodating manner. With our encouragement and agreement the Government did not respond to the 2009 Report to allow us to receive a response from industry first. For this follow-up inquiry we introduced a delay between the evidence session and the publication of the Report to allow the key players time to address the concerns raised and for publication of the final text of the BBPA's Framework Code of Practice. While this meant that the publication of this Report has taken longer than expected, it is clear that it has enabled the various sides to consider their positions and react accordingly.

5. We wish to make it absolutely clear that, while we deprecate many of the actions of the pub companies in recent years, many of the problems the sector faces are completely unrelated to the tie. In particular, we acknowledge that changes in society and the economy do mean that there may be too many pubs in certain locations and that some closures are inevitable, whether or not the industry embraces the changes it has undertaken to make, which we analyse in this Report.

6. However, we reiterate our concern in the 2009 Report that such closures should be determined by the market and not by the imposition of restrictive covenants on particular pub properties. The pub companies may need to close some pubs, but they should not determine the fate of individual premises.

7. We also wish to emphasise that not all the complaints made in public about pub companies will be well-founded. There are lessees whose poor stewardship of their pub is the primary cause of their problems. Of course, this will often prompt the question as to why the pub companies allowed such lessees to take over the lease in the first place, or why they have not intervened to assist the failing lessees, but we acknowledge this will often, in practice, be difficult. We also emphasise that our 2009 Report was not based on anecdotes from individual lessees but on solid quantitative research which demonstrated systemic problems in the relationship between pub companies and lessees.

8. So we stand fully behind all the recommendations in the 2009 Report. We still believe that a Competition Commission reference may be necessary, but we acknowledge the real possibility that the developments prompted by our Report may, taken together, correct the serious imbalance of power in the commercial relationship between pub companies and lessees. We would be more confident of such an outcome if the record of the pub companies in addressing issues of legitimate concern was better than it is. All the recommendations and conclusions in this new Report should be set against this general background. **We have grave doubts about the industry's willingness to do enough voluntarily to prevent statutory or regulatory intervention. We urge all the players to work together constructively to achieve this outcome.**

9. The BBPA told us that it worked successfully in co-operation with a variety of industry bodies and that it would continue to do so wherever possible. However, this co-operation has not been extended to the IPC. The BBPA asserted that "the wide ranging and fixed positions held by members of the IPC makes it difficult to reach further agreement on

issues that would damage the economic success of our members and, in our view, the business of many tenants and lessees".[8]

10. The IPC told us that it was more than willing to have a dialogue with the BBPA but that the BBPA had refused to enter into discussions. The ALMR told us that while the BBPA had expressed its willingness to meet with the ALMR, it was "disinclined" to meet the IPC.[9] Mrs Nicholls confirmed that there was "no dialogue at all between the BBPA and IPC."[10]

11. **We deprecate the fact that the BBPA refuses to enter into dialogue with the IPC. The BBPA needs to work with the lessee groups and representatives towards a consensus on the issues raised in both this Report and the 2009 Report. We expect the BBPA to engage with the IPC as a matter of urgency.**

Mediation talks

12. On 10 June, the Association of Licensed Multiple Retailers (ALMR) told us of its intention to instigate mediation with a wide range of industry organisations, associations and pressure groups comprising the ALMR, British Beer and Pub Association (BBPA), British Institute of Innkeeping (BII), Campaign for Real Ale (CAMRA), Fair Pint Campaign, Federation of Licensed Victuallers Association (FLVA), Guild of Master Victuallers, Justice for Licensees, Federation of Small Businesses (FSB), Punch Taverns Plc, Society of Independent Brewers (SIBA) and Unite the Union. The ALMR employed a professional mediator to facilitate the meetings. The *Morning Advertiser*[11] reported that the mediator's role would be:

> to find common ground and, hopefully, reach an agreement about an achievable outcome for reform. It's intended that a negotiated agreement - or, to borrow the language of international diplomacy, a road map - should be reached by October 2009. […] The hope is that [Peter] Luff and Business Secretary Peter Mandelson will recognise the industry has a concrete plan for self-reform, so there is no need for a Competition Commission investigation.[12]

13. However, on 14 October 2009 it was announced that the mediation had "not resulted in an agreement between all the parties and, therefore, under the provisions of the Mediation Agreement, the Mediators have terminated the mediation".[13] CAMRA argued that "pub owning companies did not enter mediation with any intention of agreeing meaningful substantive change"[14] while the BBPA believed mediation failed because of the "wide disparity of interests held by various other parties involved."[15] BBPA pointed out that

---

[8] Ev 38

[9] Ev 29

[10] Q 219

[11] A pub industry trade journal

[12] "Meet the man who can help us help ourselves", *Morning Advertiser,* 17 July 2009

[13] Leased Pub Industry Mediation Press Release, Lester Aldridge LLP, 14 October 2009

[14] Ev 57

[15] Ev 33

the mediation process was largely funded by them at a cost to the Association of £142,000.[16]

14. Despite the failure of the mediation talks to deliver reform, it proved to be the catalyst for a number of positive developments, all of which we welcome and are confident would not have occurred had we not published our 2009 Report.

15. Firstly, following mediation the BBPA, FLVA and BII published a binding agreement of commitments relating to the operation of leased and tenanted pub agreements.[17] Brigid Simmonds, Chief Executive of the BBPA, described these commitments as providing "a solid foundation for both licensees and pub owning companies to move forward on a positive agenda of improved understanding about the expectations, roles and responsibilities within their business relationship".[18]

16. Secondly, the BBPA published its new *Framework Code of Practice on the Granting of Tenancies and Leases* in January 2010. Members of the BBPA have until June to revise their company Codes of Practice in line with the new Framework Code. We consider the new Code in Chapter 2 of this Report.

17. A third development to come out of the mediation talks was formation of the Independent Pub Confederation (IPC) which comprises the Association of Licensed Multiple Retailers (ALMR), Fair Pint Campaign, Federation of Small Businesses (FSB), Guild of Master Victuallers, Justice for Licensees, CAMRA, Society of Independent Brewers (SIBA) and Unite the Union. The IPC is also supported and endorsed by BII and FLVA.[19] The Confederation acts as an umbrella organisation representing the interests of the lessees, consumers and others; interests which too often in the past, have spoken with a discordant voice.

18. Another development, though not related to the mediation talks, was the establishment of a forum by the Royal Institution of Chartered Surveyors (RICS) to review RICS guidance on pub rental valuations in light of the criticisms made in our 2009 Report. We consider the Forum's report and recommendations in Chapter 4 of this Report.

Super-complaint by CAMRA

19. In addition to these developments, in July 2009 CAMRA submitted a super-complaint[20] to the Office of Fair Trading (OFT) in relation to the uncompetitive behaviour of pub companies. On 22 October the complaint was dismissed. The OFT found that:

---

[16] Ev 33

[17] Agreement on the operation of leased and tenanted pub agreements containing purchase obligations (i.e. tied pubs) BBPA, BII and FLVA, October 2009

[18] "BBPA announces agreement on BEC and Code of Practice", BBPA press notice 14 October 2009

[19] Ev 100

[20] A super-complaint is defined under section 11(1) of the Enterprise Act 2002, as a complaint submitted by a designated consumer body that 'any feature, or combination of features, of a market in the United Kingdom for goods or services is or appears to be significantly harming the interests of consumers'. CAMRA is a designated consumer body.

> there is generally effective competition between pubs and [the OFT] does not consider that supply ties are resulting in competition problems that are having an adverse impact on consumers.[21]

20. CAMRA has since appealed to the Competition Appeals Tribunal and the OFT have agreed to re-open their investigations. Given that this case is ongoing we do not comment on it in this Report.

[21] "OFT publishes response to CAMRA super-complaint", OFT Press Release 22 Oct 2009

2 BBPA Framework Code of Practice

Introduction

21. One of the principal recommendations in the 2004 Report was that BBPA's Framework Code of Practice "should be revised as a matter of urgency".[22] In evidence to our 2009 inquiry the BBPA told us that it believed that its revised code had fulfilled "most of the requirements of the 2004 Report."[23] The BBPA further asserted that all member companies were subsequently invited to review their codes and revise them as appropriate in line with the BBPA's new Framework Code.[24]

22. Our 2009 Report tested these assertions and found that, contrary to the view of the BBPA, the recommendations of the Trade and Industry Committee had not been met and that further work was necessary to solve the problems of the "inequality in bargaining power and inadequate means to resolve disputes".[25]

23. The BBPA's submission to this inquiry stated that:

> The BBPA (in conjunction with the BII and FLVA) is developing a new industry Code of Practice that will bring real tangible benefits to both those entering into new agreements and existing licensees. The revised Code will […] include improved transparency, better and more complete information, better protection for prospective tied pub operators and a more open rent review process with inexpensive and accessible redress in case of dispute.[26]

A key aspect of this inquiry was to test whether this new code would deliver these 'real tangible benefits' to new and existing lessees. Simon Clarke, representing the IPC, argued that this statement was nothing new:

> It is almost as if there was never any code before and this will now be the code. […] there was a code before the [Trade and Industry Committee Report] in 2004 and a code before the [Business and Enterprise Committee Inquiry] in 2008 and one after the [Business and Enterprise Committee Report] in 2009. This one really cannot be any different in that it is not mandatory, not regulated and independent.[27]

24. Mr Alistair Darby, representing the BBPA, tried to reassure us that the industry was now committed to real change. He explained that the working party set up by the BBPA to rewrite the framework code was made up of people "who recognise that some very serious concerns are raised by the [2009] Report and they have to do a substantially better job this time than it did post the [2004] Report."[28] He was at pains to point out that the BBPA was

[22] Trade and Industry Committee, Second Report of Session 2004–04, *Pub Companies*, HC128, para 203

[23] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-II, Ev 187

[24] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-II, Ev 187

[25] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 156

[26] Ev 33

[27] Q 169

[28] Q 59?

"determined to ensure that the new code is established and properly conducted in the trade, not least because fundamentally that is good for business."[29]

25. Brigid Simmonds, representing the BBPA, explained that once the new BBPA Framework Code of Practice had been approved, the BBPA would then go through the process of:

> "bringing all the individual company codes into alignment with the overarching industry code. All of those codes will have to be implemented".[30]

The new Framework Code states that "all pub companies operating tenanted or leased pubs should produce a Code of Practice based on the principles set out in this Code", and that "this is a requirement for membership of the British Beer & Pub Association (BBPA)".[31]

26. **We do not believe previous BBPA and pub company Codes of Practice have been sufficiently robust. Nor do we believe the pub companies have properly complied with them. This history of evasiveness and the demonstrable consequences for lessees inevitably requires a critical response to the new Framework Code.**

Does the Framework go far enough?

27. Lessee groups have expressed disappointment with the new Framework Code. The IPC believed that the Framework "does not address the specific needs and concerns of lessees" and that it represented a "codification and formalisation of existing good practice".[32] It also said that the code "does not deliver anything particularly new or substantive. Crucially, it leaves the fundamental nature of the commercial relationship between landlord and lessee—which is at the heart of the Committee's deliberations—untouched."[33]

28. The IPC argued that any revised Framework Code had to be "independent of the companies being regulated; capable of being rigorously enforced and upheld; and carrying significant and effective sanctions for any breach of its provisions".[34] It concluded that the published Framework Code of Practice:

> fails those tests and we continue to believe that the only effective remedy will be a mandatory Code of Practice with access to independent redress. The estate agency and now the grocery market provide effective models for this type of government intervention.[35]

29. The Fair Pint Campaign stated that the BBPA code was:

---

[29] Q 59

[30] Q 58

[31] BBPA, *Framework Code of Practice on the Granting of Tenancies and Leases,* January 2010, p 5

[32] Ev 105

[33] Ev 105

[34] Ev 106

[35] Ev 107

> a wholly inadequate response to the criticisms of the sector made by the Select Committee given that it totally ignores the key areas of the Committees' concern. The fact that the BBPA has chosen to respond to the Select Committee with a set of proposals which would more or less leave the status quo untouched shows that the BBPA's biggest pubco members are totally unwilling to consider any meaningful change in the structure of the industry. Their primary concern appears to remain their ability to extract short-term income from their pub estates in order to meet their debt obligations.[36]

30. Mr Simon Clarke, a representative from the IPC, told us that

> In total there were 25 [Business and Enterprise Committee] recommendations. If we consider the entire industry response to the report, 18 recommendations remain untouched in any shape or form. In reality the pubcos and BBPA have fully addressed none of the issues raised in the Report. Instead, once again, the pubcos have merely given the impression that the industry is capable of self regulation by 'promising' to partially address the less substantial recommendations.[37]

He referred to it as "lipstick on a monster"[38] and that the bad guys "stay rich and the good guys stay scared".[39]

31. The ALMR noted that it had taken the BBPA eight months to produce the Framework Code and that this was "in stark contrast" to the work undertaken by RICS to revise its guidance over the same period.[40] The IPC and Fair Pint also questioned the reason for the delay claiming that the Framework Code:

> differs little from the Heads of Terms reached by BBPA, BII and FLVA in September 2009. We are at a loss to understand why it has therefore taken so long to publish and, more importantly why it was not available ahead of the Committee's evidence session in December. This appears to be simply a delaying tactic rather than an attempt to address the Committee's genuine concerns.[41]

32. **We are disappointed that it took until the end of January 2010 to publish the new BBPA Framework Code of Practice. We were given sight of a draft Code ahead of the evidence session in December 2009 and the difference between the draft and the published Codes appears to be minimal. This delay put back publication of our Report as it was only fair to let other groups respond to it.**

The Framework Code of Practice

33. In this section we offer an initial assessment of the new Framework Code of Practice and the changes it has made to the assignment of leases, the provision of training and

---

[36] Ev 82

[37] Ev 137

[38] "FSB to urge MPs to break the beer tie"*Morning Advertiser,* 10 December 2009

[39] "FSB to urge MPs to break the beer tie"*Morning Advertiser,* 10 December 2009

[40] Ev 30

[41] Ev 105

professional advice for new and existing lessees, the impact on local and regional brewers, upward only rent reviews (UORRs) and Amusement with Prizes (AWP) machines. An analysis of the differences between the existing Framework Code and the new Framework Code can be found in the Annex to this Report. We also consider the issue of flow-monitoring equipment. In the next section of the Report we consider the enforceability of the Code.

Assignment of leases

34. In 2004 the then Trade and Industry Committee made the following recommendation:

> We are aware that pubcos, as landlords, do not have the right to unreasonably withhold consent to assignment by tenants and can only offer advice to these prospective tenants. Pubcos should insist that tenants assigning leases provide prospective tenants with the same level of information that their pubco would provide.
>
> Prospective tenants entering the trade through lease assignment should not sign agreements until they are fully aware of an incumbent's annual profit and loss accounts for the business they are purchasing. They should also contact the pubco for information they believe is not forthcoming from their assignor. [42]

35. Our 2009 Report returned to this matter and noted the perceived problem that assignments from outgoing lessees, as opposed to leases direct from a pub company, were a cause of disputes. Our Report concluded that greater levels of information needed to be provided by both sides:

> We accept that in many cases pubcos do not have access to their lessees' books. However, they have access to a substantial amount of information about the business of a particular pub, and are likely to have extensive information if a business is in difficulties. Pubcos entering a commercial relationship with a new lessee should be required to share all their information on a pub's trading history with them.[43]

36. The new Framework Code states that:

> The assignment of leases places obligations on both the pub company and the lessee wishing to assign his lease (assignor). This is to ensure that the potential purchaser of the lease (assignee) is supplied with the same information as would be supplied by the landlord at the commencement of a lease and is able to take his own proper business decisions about the business being offered.[44]

37. Lessee groups believe that the new Code places significant obligations on lessees. The Fair Pint Campaign said:

> By restricting the freedom of lessees to sell their interests, the framework seeks to impose new onerous conditions on lessees. In return the lessee gets nothing from the

[42] Trade and Industry Committee, Second Report of Session 2004–04, *Pub Companies*, HC128,para 105-106

[43] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 54

[44] BBPA, *Framework Code of Practice on the Granting of Tenancies and Leases,* January 2010, para 26

> landlord apart from the promise to fulfil obligations which they should be doing anyway.[45]

The IPC also argued that there was a risk that signing a Code based on the Framework Document had the potential to undermine a lessee's existing legal rights and remedies. It believed that "professional advisers would advise clients not to sign such an agreement."[46]

38. Pub companies and lessees have a responsibility to assess the ability of a new entrant's ability to run a pub, and to provide them with the necessary information to make an informed decision. However, in doing so, the new Code should not undermine the existing rights of the lessee. On the other hand, many of the worst problems seem to arise from inappropriate assignments and such assignments are bad for the industry, for the pub companies and, crucially, for the new lessees.

39. **The clauses in the Framework Code of Practice regarding the assignment of leases are an attempt to address our and our predecessor Committee's concerns. We note the concerns expressed by lessees about the obligations it would place upon them but we believe that the new Code represents a step in the right direction. However, lessees' existing right to assign their leases needs to be treated with the upmost consideration.**

40. **The BBPA and the lessee organisations need to work together to develop processes in a way which are mutually beneficial. Both sides must ensure that the history of lack of trust and intimidating behaviour by pub companies does not magnify disagreements on this issue and undermine the Framework Code.**

Training and professional advice

41. The new Framework Code of Practice sets out the minimum level of training and professional advice which will be required by a lessee before he or she can take over a pub. The Code includes the following requirements to be met by a new lessee:

> Obtain accredited pre-entry training to enable them to evaluate and understand the contract they are seeking to enter into;
>
> Demonstrate they have taken proper independent professional advice prior to accepting a tenancy/lease (and during the operation of the tenancy/lease whenever the need arises); and
>
> Take professional legal and business advice which should be used to prepare an appropriate business plan.[47]

42. The British Institute of Innkeeping (BII) told us that it is currently working with industry to develop a training course to ensure prospective lessees fully consider their legal and operational responsibilities before they enter into a lease. The BII's hope is that this

[45] Ev 84

[46] Ev 106

[47] BBPA, *Framework Code of Practice on the Granting of Tenancies and Leases,* January 2010, p 6

"will give newcomers the chance to take on a tenancy or lease fully aware of what they are signing up to."[48]

43. Fair Pint recognised that training was important:

> We agree that people should only enter any business agreements once they have attained a good understanding of what is required to run that business and a full understanding of what they are committing themselves to.[49]

However, its members were concerned by a waiver in the Code that allows for some lessees not to attend training and concluded:

> The requirements on pre-entry training are of little value because the requirements can be waived at the company's discretion. The criteria set down for waiving […] seems broad enough to potentially include most new entrants into the market.[50]

In response to that concern the BII stated that:

> We recognise that in this industry there is a good deal of movement of licensees between pubs and pub companies. We feel it is entirely reasonable that [...] a new lessee/tenant of a pub company who has current experience of running a lease or tenancy may attract a waiver to such training.[51]

44. The introduction of a waiver represents a pragmatic approach to dealing with existing lessees who have a proven track record. It should not be used widely and liberally for idle convenience. A high threshold must be met before a waiver is issued, the criteria for which should be clear and publically available.

45. **We welcome the inclusion of the clauses on training and professional advice in the Framework Code which will greatly assist newcomers to the industry. We also agree that experienced publicans should not have to undertake basic training when taking on a new lease. We therefore understand why a waiver has been included in the training clause of the Framework Code of Practice. It is vital that both of these clauses are applied rigourasly. We will expect the BBPA to introduce a system to monitor use of the waiver and publish clear guidelines on its use by the end of August 2010.**

Regional and family brewers

46. We have received no evidence to suggest that the tie is a cause of controversy or dispute between smaller regional and family brewers and those who operate their tied estate. That said, we have heard concerns from regional and family brewers about compliance costs for the new Code.[52] Bridgid Simmonds told us that the BBPA would be taking this into account.[53] In addition, the BII said that it would be giving initial assistance to all applicants

[48] Ev 44

[49] Ev 84

[50] Ev 85

[51] Ev 47

[52] Ev 91

[53] Q 59

to the Code and that a permanent member of BII staff would be visiting each company or brewery to discuss the production of their Code and to explain how the scheme worked. It also told us that BIIAB (the BII's accreditation board) would ensure codes were in an appropriate state before submitting to its Benchmarking Committee for accreditation.[54]

47. **We welcome the fact that the BII will work to help and advise smaller pub companies and family brewers on the new Framework Code and the subsequent accreditation process. We recommend that the BII monitor closely compliance costs for regional and family brewers to ensure that these costs remain reasonable.**

Upward only rent reviews

48. Both the 2004 Report and the 2009 Report deprecated the use of upward only rent reviews (UORRs). The industry has insisted that UORRs "have been a thing of the past since 2005."[55] Although UORR clauses are a 'thing of the past' as far as new leases are concerned the problem is that they still exist in old leases. During the 2009 inquiry the pub companies told us that they would not enforce these clauses and would provide 'comfort' letters confirming this to their lessees. The BBPA asserted that such letters were "legally binding."[56] Pub companies have also offered lessees a deed of variation on their leases to remove any UORR clauses although there was a legal fee for this. However we continue to receive submissions arguing that UORR clauses are being enforced.[57]

49. The BBPA argue that the new Code would put an end to this matter:

> Comfort letters will not now be necessary since, as DLA Piper [BBPA's legal advisers] point out, company codes will state categorically that any upward only enforcement clauses remaining in leases will not be enforced.[58]

50. **We recommend that where leases have upward-only rent review clauses they should be removed by a deed of variation, the cost of which should be borne by the pub companies. This would also have the benefit of being binding on a pub company's successor in title.**

AWP machines

51. Both the 2004 Report and the 2009 Report recommended that the Amusement with Prizes (AWP)[59] tie should be removed:

> In 2004 the Trade and Industry Committee concluded that "In our opinion, pubcos do not add sufficient extra value from their deals to justify their claims to 50% of the takings from AWP machines. We remain unconvinced that the benefits of the AWP

[54] Ev 46

[55] Q 91

[56] Q 90

[57] Ev 69

[58] Ev 40

[59] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 103, Trade and Industry Committee, Second Report of Session 2004–04, *Pub Companies*, HC 128, para 129

> machine tie outweigh the income tenants forgo and we recommend that the AWP machine tie be removed." That conclusion remains valid.[60]

52. These recommendations were resisted by industry which argued that both the pub company and the lessee make more money when an AWP machine is tied. Mr Darby, the Managing Director of Marston's Brewery, told us that a trial carried out for Marston's demonstrated this to be the case. He argued that with non-tied AWP machines:

> AWP income rapidly diminishes because the tenant seeks to reduce the rent on the machines in his pub by selecting lower quality machines or opting for lesser levels of service from the machine supplier.[61]

Mr Mallen, a member of the IPC, was not convinced and commented that the BBPA appeared to suggest that "the lessee can operate his business but he is not capable of managing his own machines".[62] He argued that the pub companies were only interested in maximising their own profit:

> For years they have taken upfront access payments; they have refused to allow machine operators onto their list unless they pay their weekly rents; they have taken a disproportionate amount of the machine income over four years. I do not believe we can leave the BBPA to manage these machines on our behalf.[63]

53. Although the AWP tie issue remains unresolved, the new BBPA Framework Code contains a minor improvement to the current position:

> It will be made clear in the process of profit assessment that where machines are tied machine income will not be included in the "divisible balance".[64]

According to the BBPA this would result in a net gain to a lessee with a £2,500 AWP income of £1,250.[65]

54. **Removal of the AWP income from the divisible balance is a belated step in the right direction. It should never have been included in the divisible balance in the first place. To take 50% of profit as part of the machine tie and then 50% of the remaining profit as part of the divisible balance is totally unacceptable.**

55. However, the Framework Code does not address the issue of royalty payments to pub companies by AWP machine tie suppliers, an issue which was considered in the 2004 Report.[66] And it does not seriously tackle the question of whether the tie itself should be abolished. Mrs Nicholls of the IPC told us:

---

[60] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I,para 103

[61] Ev 40

[62] Q 209

[63] Q 209

[64] BBPA, *Framework Code of Practice on the Granting of Tenancies and Leases,* January 2010, para 11

[65] Ev 41

[66] Trade and Industry Committee, Second Report of Session 2004–04, *Pub Companies*, HC128, para 132

> The Select Committee's recommendation in 2004 was very clear. The benefits of the tie are not outweighed by the restrictions imposed as a result of it. The BBPA suggestion does not go far enough because it does not meet the fundamental recommendation that the AWP tie should go.[67]

Fair Pint said that:

> The fact that BBPA member companies have not even been willing to consider getting rid of the AWP tie, which can't be justified for any other reason other than it affords pub owning companies the opportunity to extract more income from their estates, is disappointing. It shows that pub companies are unwilling to even make the smallest changes to the relationships with their tenants which could in any way improve the fairness of the division of pub profits.[68]

The Office of Fair Trading in its report following CAMRA's super-complaint found that lessees were between £2,000 to £3,000 a year worse off as a result of the AWP tie.[69]

56. Karl Harrison from the IPC believed that choice should be at the heart of any solution:

> Why can we not be offered a range of choices? Some publicans will feel more comfortable perhaps with that arrangement [an AWP tie]; others will want to manage their own machines because they are very good at it, but at the moment the choice is not there.[70]

57. **It is unacceptable that pub companies have again failed to address the AWP tie or to seriously offer free of tie options. If the AWP tie offers the benefits claimed for it, offering such a choice on an informed basis would demonstrate goodwill at little if any cost to the pub companies as lessees will freely chose to retain the tied machines.**

Flow monitoring equipment

58. An issue of deep concern and anger during our 2009 inquiry was the use of flow monitoring equipment (FME) supplied by a company called Brulines to 'police' tied pubs. Flow monitoring equipment is designed to monitor how many pints pass through a pub's pipes. The pub company can use this data to compare the amount of beer it has delivered to a pub against the amount which has passed through the pumps. A difference can indicate the possibility that additional beer, not bought through the tie, is being dispensed.

59. Our 2009 Report found that the equipment was not calibrated and that there was no external verification. It concluded that "pubcos should not be allowed to rely on data from Brulines equipment to enforce claims against lessees accused of buying outside of the tie".[71] This was compounded by reports of fines being direct-debited from lessees' accounts before they had had an opportunity to query the charges. Mr Harrison from the IPC

---

[67] Q 209

[68] Ev 84

[69] Office of Fair Trading, *Response to CAMRA's super-complaint*, October 2009, para 5.52.

[70] Q 211

[71] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I,para 98

believed that flow monitoring equipment was "inaccurate;" "possibly unlawful" and "used for intimidation."[72]

60. In respect of direct debits, the BBPA told us:

> We are assured by our members that direct debits are not applied where transgressions against buying-out are concerned without the consent of the tenant or lessee concerned.[73]

This is a bold statement and one which we, and our successor Committee, will continue to monitor in great detail.

61. The new Framework Code of Practice has, in part, addressed our concerns. It includes a suggested protocol which sets out "the terms under which flow monitoring equipment may be installed and any further *prima facie* evidence available."[74] Annex A of the Code offers a list of what might be included in a company's protocol:

- Details of data to be shared with tenant/lessee and frequency;
- Calibration/allowances and parameters for review;
- Evidence of buying-out, supported by the flow-monitoring equipment;
- Procedures to be followed by the company in establishing with the tenant/lessee that a breach has occurred;
- Penalties/sanctions to be applied in lieu of forfeiture of lease in the event that a breach is determined;
- How any charges will be applied;
- Authorisation of FME personnel to be given access to the premises and circumstances in which such access may be denied;
- Tampering with equipment.[75]

BBPA Chief Executive, Brigid Simmonds, told us that it would be for individual pub companies to write up their own protocol, but that any protocol would have to be accredited by the BII. Furthermore, she asserted that it had to be "transparent and above board."[76]

62. The BBPA has stated that it did not want to "anticipate" what evidence of buying out of the tie should be but suggested it could include the presence of products which were not supplied under the tie agreement, purchase evidence, third party evidence and pump

---

[72] Q196

[73] Ev 40

[74] BBPA, *Framework Code of Practice on the Granting of Tenancies and Leases,* January 2010, para 5

[75] BBPA, *Framework Code of Practice on the Granting of Tenancies and Leases,* January 2010, Annex A

[76] Q 125

clips/keg caps from non-supplied products.[77] The BBPA also suggested that "covert intelligence, for example CCTV, would be acceptable."[78]

63. The IPC claim that 'confessions' have been used as additional evidence to Brulines data. It suggested that these 'confessions' had been obtained under duress because "a nominal fine and confession would probably be better than the forfeiture of the lease which is what [the lessee] is being threatened with".[79] Mr Simon Clarke, representing the IPC, set out how he believed such 'confessions' were collected:

> The accusation is often conducted in an aggressive way using electronically enhanced information from Brulines plc. to threaten the tenant with legal action unless a "fine" (usually of an arbitrary quantum) and an administrative charge are paid, and a "confession" signed. The landlord will often present the evidence obtained from Brulines as compelling evidence against the tenant that will persuade a Court of the tenant's breach rendering it hopeless for the tenant to offer a defence or to go to the cost of doing so. The letters and draft "confessions" from pub owning companies are worded in such a way as to imply that remedies against the tenant, such as judgement in the courts or forfeiture of the lease are mere formalities when of course the landlord would need to properly make out their case in the court in the usual way.[80]

64. Brulines stated that it is "significantly more cautious when reviewing and assessing negative variances[81] on cask products."[82] Based on Brulines data from the previous three months "a total of 6,259 customers' premises were visited by Brulines Customer Account Managers as a result of having a negative variance or other data trends requiring review. Of these, 2,368 (37%) were assessed as having a negative variance requiring further investigation which resulted in 1,381 (22%) admissions of buying outside the tie."[83] Brulines has provided us with the following table to demonstrate the cases of negative variance that it has dealt with in the three months and other evidence that was present to support claims that lessees had bought 'out-of-tie':

[77] Ev 43

[78] Ev 43

[79] Q 198

[80] Ev 65

[81] Negative variance is where flow monitoring data implies that more beer has been dispensed through a pub's beer lines than has been bought by the lessee from their pub company.

[82] Ev 53

[83] Ev 53

Product Type or other reason	Number of liquidated damages claims	%	Brulines system accuracy used in assessment	Other evidence used to support the claim
Draught Keg and Cask Beer	1,251	90.5	Yes	Product order history Stock count Foreign stock in Cellar Best before and racking dates Photographic evidence
Packaged Products	441	31.9	No	Product order history Stock count Foreign stock in cellar or fridge Best before dates
Tampering with the system	52	3.7	No	Photographic evidence Flow-meter bypasses Secondary cellars Unauthorised dispense equipment

Brulines

To assist understanding of the data in this table, one full admission of buying out by a lessee may consist of draught cask, keg and packaged product. This explains why claims by product type do not reconcile to 100%.

In addition, Brulines informed us that:

> The statistical evidence demonstrates that of the 6,259 sites visited by Brulines […], only 1 in 5 Licensees (22%) signed an admission of buying outside tie and that in these cases further evidence of buying out was gathered to corroborate the data. Of the 987 who did not sign, the data and supporting evidence was passed to the Pub Company for review and action where appropriate. 31.9% of buying out admissions did not even rely on Brulines data or its accuracy as these comprised packaged products which can only be evidenced by foreign stock found on the premises.[84]

65. **We welcome the inclusion in the Framework Code of the need for additional evidence above and beyond the data from flow monitoring equipment in any accusation of buying outside of the tie. However, such evidence must be physical evidence and not merely a signed 'confession' by the lessee. In relation to fines being taken by direct debit, without the authorisation of lessees, the BBPA must give public and unambiguous direction to its members that such a practice is incompatible with BBPA membership.**

Accuracy of data

66. The IPC reported that it had commissioned a study by SGS[85] on Brulines' flow monitoring equipment which found that the system was "not fit for purpose, inaccurate and ought not to be put to the use that it is being put".[86] However, Brulines have responded

[84] Ev 54

[85] Société Générale de Surveillance is a publicly listed company providing verification, testing and certification services.

[86] Q 195

that Titan Enterprises (the manufacturer of the flow-meter), "completely refutes both the SGS evaluation and methodology"[87] and described the SGS report as being based on "assumptions and poor science."[88]

67. Given the ongoing dispute about flow monitoring equipment, and the importance placed on the information it produces, regulation is crucial. Brulines told us:

> Following a comprehensive assessment by Trading Standards and LACORS[89] which required Brulines to submit all its operating procedures and equipment, Brulines was informed on 30th September 2009 that its equipment is not prescribed under section 11 of the Weights and Measures Act 1985 thus is not required to be passed as fit for use in trade.

But:

> this does not mean that Brulines is unregulated. Under section 17 of the Act there is an obligation on Brulines to ensure that the equipment being used is neither "false nor unjust.[90]

68. However, it seems that Trading Standards officers in different areas are adopting entirely different approaches from that outlined above. We received correspondence from Derbyshire Trading Standards which suggested that beer flow monitoring equipment does fall within the definition of 'use for trade'. It recommended that there should be an agreed performance criteria against which beer dispense systems could be evaluated.[91] We also received a letter from a Trading Standards Officer in Rotherham saying:

> I am able to say that the equipment shown to me is definitely not legal for trade use. […] since about 2003 following initial verification no further testing of the equipment has taken place. I have 40 years' experience as a weights and measures inspector and in my opinion such a long period of use without testing or verification of equipment is unacceptable to claim confidence in its accuracy.[92]

LACORS have not made the issue any clearer. In correspondence to Mr Clarke, one of our witnesses, LACORS stated that:

> It is our view that this type of equipment may be in use for trade, depending upon the exact nature of the contractual relationship between the brewery and the landlord. This could only be determined on a case by case basis as the legislation is dependent on the individual circumstances in each case. If it could be determined that the equipment was in use for trade, it would be caught by S17 of the Act, and as such if a Trading Standards Department could prove beyond all reasonable doubt, that the equipment was false and unjust, they could take enforcement action. It must

---

[87] Ev 51

[88] Ev 48

[89] Local Authorities Coordinators of Regulatory Services

[90] Ev 48

[91] Not Printed

[92] Q128

be stressed however that any enforcement actions are the responsibility of individual local authorities who have to take into account a whole range of factors in determining the appropriate course of action.[93]

69. **The accuracy of data from flow monitoring equipment and the analysis of that data are highly contentious issues. Flow monitoring equipment could be a helpful tool, for both pub companies and lessees but only if it is reliable and has the confidence of both sides. Clearly this is not the case at the moment. We recommend that the Government, through the National Measurement Office, urgently clarifies the position of beer flow monitoring equipment in relation to the Weights and Measures Act 1985. Such equipment must be included under the Act for calibration and verification purposes.**

Conclusion

70. **The new Framework Code of Practice appears to be a modest step in the right direction. Of necessity it provides a framework for companies of all sizes. We expect the major pub companies to treat it as an absolute de-minimus requirement and to significantly build on it with their own Codes. Only by doing so will pub companies be able to demonstrate that they are committed to reform. We recommend that our successor committee, at an early opportunity in the next Parliament, assess the extent to which pub companies have built on what is a bare minimum of a Framework Code; and evaluate how effective the new Code has been in improving the relationship between lessees and pub companies. Previous codes have been weaker and not fully observed by the pub companies. We will need to see compelling and continuing evidence by June 2011 that the new codes are being observed and enforced if our successor committee is not to recommend statutory intervention.**

[93] Ev 134

3 Policing of the Codes

The role of the BII

71. The BII is the professional body for the licensed retail sector, which has charitable status and a remit to raise professional standards. The BII describes itself as the industry's leading membership organisation reflecting the views of thousands of individual members across the UK.[94] Its Benchmarking and Accreditation Service (BIIBAS) accredits pub companies' Codes of Practice to ensure they comply with the Framework Code. Brigid Simmonds told us that BII involvement had given the voluntary system "real teeth".[95]

Accreditation of the Company Codes of Practice

72. The BII told us that membership of its Benchmarking Committee—which has the responsibility of accrediting the individual codes—is being increased from 11 to 20. It will also now contain a wider mix of licensees, pub company personnel and industry representatives. The membership of the Committee will be:

- James Brewster (Chief Executive of The Licensed Trade Charity) (Independent Chair)
- Bernard Brindley (Vice Chair)
- Seven lessees/tenants
- Seven Industry representatives
- Four Pub Company representatives

Karl Harrison, a founder member of the Fair Pint Campaign, will be one of the lessee representatives.[96]

Dealing with breaches and sanctions

73. The new Framework Code of Practice states that if a lessee believes that a pub company has not properly followed the procedures set out in its Code the lessee or his representative will be able to:

> send the BII a brief description of the circumstances with an explanation why the lessee believes the code has not been properly followed. The BII or FLVA will pass on this information to the company concerned and use its good offices to ensure, as far as possible, that there are no misunderstandings, or personality issues, that are

[94] BII website: http://www.bii.org/home

[95] Q 80

[96] Ev 46

> standing in the way of a more fruitful dialogue between the company and the lessee or his representative.[97]

Brigid Simmonds explained that in the event that a pub company breaks its Code the BII would register any resultant complaint. Complainants would remain confidential but a summary of the information would be reported to the individual pub company and feedback would be given. Persistent code breaches would result in the removal of BII accreditation.[98] She described a 'persistent code breach' in terms of "repetition of a particular non-compliant practice or a cumulative picture".[99]

74. The BII told us that it was creating a website specifically on pub company Codes of Practice where all accredited Codes would be available online. In addition the BII will be facilitating an online and telephone process for registering complaints about breaches of the Codes. All allegations against each accredited company code, alongside details of which cases were resolved and which ones were not, will be published on the site.[100] The BII said that it was also considering a section on the website where pub companies could receive credit for positive innovations in their Codes.[101]

75. The BII told us that each major unresolved breach of code would count towards the withdrawal of BII accredited status. The following table produced by the BII indicates the number of major unresolved breaches in any one calendar year which would trigger the withdrawal of a company's accreditation:

Number of Pubs owned by the pub company	Number of Breaches
Up to 100	3
101 – 250	5
251 – 500	10
501 to 1,000	15
1,001 to 2,000	20
Above 2,000	25

BII, Ev 46

76. The BII informed us that this had been benchmarked against other industries which suggested the cumulative picture should not exceed an agreed ratio of between 2–5%.[102]

77. Once a pub company has lost its accreditation, the assumption is that it would also lose its membership of the BBPA. It would then have to reapply for accreditation with the BII.

---

[97] BBPA, *Framework Code of Practice on the Granting of Tenancies and Leases,* January 2010, para 39

[98] Q 68

[99] Q 69

[100] Ev 45

[101] Ev 45

[102] Ev 45

At that point the Benchmarking Committee would need to see evidence of improvements to the pub company's systems and Code before reaccreditation would be permitted.

78. The BII informed us that in 2009 it dealt with eight formal allegations of breaches of accredited Codes of Practice, of which four were upheld as breaches. Two of these were resolved to the satisfaction of BIIAB and the lessees. Two others are the subject of ongoing dialogue with the relevant pub company.

79. The authority of the BII and its ability to enforce decisions have been questioned. One lessee, whose case is the subject of 'ongoing dialogue', told us that in their case "the BII have done all they can, and they are unable to force [the pubco] to act".[103] Ms Nicholls from the IPC said "The evidence is that this year alone there have been 100 cases in which code complaints have arisen. I have not seen anybody's accreditation being removed or anybody leaving the BBPA."[104]

80. It has also been argued that being evicted from the BBPA was not a sufficient sanction as some big pub companies, for example J.D. Wetherspoon, survives perfectly well outside of the Association while Greene King had recently decided to leave voluntarily.[105] Mr Darby did not accept this argument. He argued that prospective tenants and lessees now investigate in more detail which pub company they want to take a lease out with:

> to be a successful pub company that attracts the best tenants and lessees one will have to pass muster with those individuals. If Marston's Pub Company or any other does not have a competitive, fair and transparent code of practice I am convinced that as time goes on it will be at a commercial disadvantage. Why would [a prospective lessee] go to a pub company that did not have an accredited code of practice and therefore certainty of protection?[106]

81. A cursory look at the BBPA website shows that there is no advice to lessees of any substance on buying a pub or even a link on the 'links' page to the websites that do give advice such as startingapub.com or buyingapub.com. This is in direct comparison to other trade associations such as the British Franchise Association (BFA) whose website[107] has information such as "Why choose a BFA member?" "Thinking of Buying a Franchise?" "How to buy a franchise". **The BBPA must do more to highlight the importance to prospective lessees of choosing a pub company with BBPA membership and a BII accredited Code of Practice.**

The independence of the BII and alternative options

82. The IPC and its member organisations have long doubted the independence of the BII. Karl Harrison was not convinced that the BII could be genuinely independent because of the "financial connections between pub-owning companies and the BII."[108] The BII told us

[103] Unpublished

[104] Q 184

[105] Ev 80

[106] Q 81

[107] British Franchise Association website: www.thebfa.org

[108] Q 184

that around 4% of its income came from corporate members, which includes the pub companies "plus some additional sponsorship for specific events from time to time."[109] Mr Neil Robertson, Chief Executive of BII, told us that "whilst by its makeup, constitution, and work programme, BII is not fully independent" he believed that its judgements were "impartial, balanced and sophisticated."[110]

83. Mrs Nicholls suggested that there was a need for "an entirely independent, separate board nominated by public interest bodies and consumer representatives" to deal with the issues of compliance. She concluded that the "industry cannot sit in judgment on itself."[111]

84. The ALMR offered the example of the Domestic Property Regulatory Structure which has a Property Codes Compliance Board (PCCB) as a potential model which could be replicated by the pub industry. The PCCB monitors the compliance of the property industry's Codes of Practice. The Board is independent and funded by a subscription on companies wishing to exploit the code logo which acted as a kite mark of quality and standard. The PCCB carries out pre-registration assessment of terms and conditions, practice and procedure as well as full compliance inspections and spot enforcement checks. Any breaches of the Codes are referred to a Compliance Committee and could result in removal of subscription. The ALMR informed us that this had "a very real financial penalty"[112] as providers were required to only use Code subscribers. Conveyancers, lawyers estate agents and end users were also recommended to only use Code subscribers. In addition to a Compliance Board, complaints about subscribers or operation of the Code could be referred to the Property Ombudsman. The ALMR concluded that the key differences between the Domestic Property Regulatory Structure and the BBPA's suggestion was:

i. the independence of the regulatory structure and 'regulator' itself: "the PCCB has only two industry representatives on it out of eight members. Public interest and consumer groups dominate and exclusively make up the Compliance Committee."[113]

ii. the existence of a separate means of independent redress: the Property Ombudsman.[114]

85. There are many similarities between what is proposed by the BII and the Domestic Property Regulatory Structure. The BII is trying to fill the role of an independent regulator and has appointed to its accreditation board lessees as well as pub company representatives. In addition the BII is funded mostly from training courses, although even this has been questioned as pub company lessees are the main subscribers to such

[109] Ev 47

[110] Ev 45

[111] Q 184

[112] Ev 30

[113] Ev 30

[114] Ev 30

courses.[115] The fundamental difference is that the pub industry has no separate means of independent redress in the form of an Ombudsman.

86. We note that the Government has recently announced the need for a monitoring and enforcement body to oversee the Groceries Supply Code of Practice.[116] This is something to be considered if the BII fails to monitor, effectively, pub companies' Codes of Practice. The Government remains open-minded about the creation of an Ombudsman for the pub industry saying that it was "too early to take a decision on whether Government needs to intervene."[117]

87. **We believe that real impartiality rather than notional independence is the essential quality required of the BII. Any body set up to administer the accreditation of Codes or monitor compliance would be bound to be partially funded by pub companies as they own so many pubs. Furthermore, we do not believe the complaints procedure should be funded by the taxpayer. The BII must act impartially and be seen to do so. They are in the best position to administer accreditation of codes and to oversee and monitor compliance. The success of all of the reforms proposed by the industry hinges on the credibility and effectiveness of the BII.**

88. **We therefore give a cautious welcome to the BII's role in policing the Codes of Practice and its intention to publicise complaints and breaches on its website. We encourage the BII to do all in its power to publicise breaches widely. Although the sanctions available to the BII are limited and it has no power to fine, we have been told that the impact on a pub company of a decision by the BII to withdraw accreditation of a code would be extremely serious for that company.**

89. **We need to see clear evidence by June 2011 that, in practice, the BII has the necessary authority and impartiality to be effective as a policeman for the industry. If it fails to demonstrate such qualities, the case for regulatory intervention by the Government, for example the establishment of an Ombudsman or intervention by the competition authorities, will be very strong.**

Enforceability of the Code

Role of the courts

90. Even if the BBPA Framework Code addresses some of our concerns, doubts remain over its enforceability. Brigid Simmonds, Chief Executive of the BBPA, explained that:

> As far as we are concerned in any dispute it is absolutely essential that a breach of the code is taken into account by a court of law.[118]

---

[115] Ev 80, Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-II, Ev 265

[116] Department for Business, Innovation and Skills, *Taking forward the establishment of a body to monitor and enforce compliance with the groceries supply code of practice*, February 2010

[117] Ev 138

[118] Q 70

She believed that the fact that agreements existed and had been signed by both the landlord and the lessee would be "clearly taken into account by any court of law or arbitration panel."[119] To support that position, the BBPA provided us with legal advice given to them:

> In view of the fact that company codes will include obligations on the part of the tenant or lessee, the codes will constitute a legal contract between the parties, […]enforceable in the way that such arrangements are usually enforceable.[120]

91. However, this situation is very different for the existing Code. We have been provided with examples of pub companies describing their Code of Practice as "non-contractual" and that "deals done" under a Code were "concessionary and wholly discretionary."[121] Karl Harrison, representing the IPC, also highlighted a recent court case in which a pub company argued that a Code was not legally enforceable.[122] The transcript from the court case on 17 November 2009 quotes the pub company's lawyer as stating that:

> there is a document described as the Punch Retail Charter, which is a document which sets out the standards that Punch applies in relation to its business, as it were: it is a business-wide charter. It is not a document which has contractual effect. It is not, as alleged […] a document which amends the terms of the lease. The provisions for rent review that apply in this case are the provisions of the lease.[123]
>
> It is a […] a consumer friendly document, which is intended to set out what each party should expect of the other in their dealings with the other, but as I say, it does not have contractual effect and it cannot vary or amend the terms of any specific lease that applies to any specific tenant and it did not amend the terms of this lease.[124]

92. The BBPA responded:

> our understanding is that this was a statement made by a lawyer without instruction from the company concerned who would not have wished to see their Code put in this light since whilst it may not be legally binding under the current circumstances, the company would certainly have regarded it as an obligation. However, this situation will not apply to company codes in the future compiled as they will be under the new pub industry Code and as such binding on both parties.[125]

93. Both examples led lessee groups to conclude that even with a new code the lease was still the primary document and the only one which was enforceable in court. Certainly there is a fundamental difference between an 'obligation' and a legally binding document. Fair Pint expanded on this:

---

[119] Q 84

[120] Ev 41

[121] Ev 30

[122] Q 165 and Q 166

[123] PUNCH TAVERNS (PTL) LIMITED v MR GEORGE IAN SCOTT in the Northampton County Court pg 14

[124] PUNCH TAVERNS (PTL) LIMITED v MR GEORGE IAN SCOTT in the Northampton County Court pg 14

[125] Ev 41

> The BBPA document states that because the Code of Practice will be agreed by both lessee and landlord the code will be binding and may be used in evidence in court. We are concerned about the lack of clarity on this point. Rights and obligations between lessees and their landlords are set out in the lease, which will remain the primary agreement. We therefore believe that any change to the legal obligations of either party should be enforced by a deed of variation to the lease.[126]

We are concerned that at least one major pub company is telling its lessees that its leases "will always take precedence" over the Code.[127] This is unacceptable.

94. The IPC believed that the Codes could only be legally binding if there was a "legal obligation to produce a Code and abide by its provisions i.e. a mandatory code or if the Framework Document was translated into the clauses of the lease itself."[128] In addition the IPC said that:

> The Code or Framework could only be relied upon in Court if a breach of the agreement or a failure to abide by the Code could be shown to result in detriment to the lease. This in itself is an inherent weakness of the self-regulatory regime: it relies upon an individual lessee taking direct action to enforce their rights. A company could be persistently in breach of the Code or continuing to act in an unfair manner, but unless or until an action is taken against them in court, there is no restraint on their behaviour.[129]

95. Mrs Nicholls reminded the Committee that enforceability lay at the heart of the Monopolies and Mergers Commission (MMC) inquiry in 1989:

> I take you back […] to 1989 and the MMC which said that the lack of an enforceable - they underlined that word - code of practice meant that brewers could limit the economic independence of tenants and reinforce their position of economic strength. If you substitute "pub companies" for "brewers" you are in exactly the same situation. We have not moved forward since 1989; we have no enforceable code of practice in this industry.[130]

It is over twenty years since the MMC Report and yet the situation remains remarkably similar. We set out below the relevant extract from that report:

> At present, the brewers, under arrangements negotiated between The Brewers' Society and the NLVA, consider that The Brewers' Society Code of Practice provides their tenants with a sufficient degree of security. This may be so in some respects, but inadequately in the light of present circumstances. It is drafted in the form of general principles, and does not impose binding commitments on the brewer/landlord, and it can be and is disregarded in certain circumstances. We therefore recommend that brewers should be required to incorporate in their tenancy agreements and leases

---

[126] Ev 84

[127] Ev 75

[128] Ev 106

[129] Ev 106

[130] Q 184

> which contain any form of tie in respect of beer, provisions binding on both parties, as set out in what we recommend should be a revised Code of Practice. This Code of Practice should initially be negotiated by the Director General of Fair Trading with all interested parties.[131]

However, when we put it to Brigid Simmonds that a mandatory code would provide greater clarity she responded:

> I have never been in favour of a statutory versus voluntary code. I think you will find that a statutory code provides less information and a lower standard than a voluntary one.[132]

96. While it may be the case that a Statutory Code would be more limited, this argument cannot hide the fact that the level of mistrust over enforceability is a serious impediment to progress on reform. The BBPA, as a matter of urgency, need to do far more to convince us and lessees that Codes of Practice are legally enforceable.

97. **The BBPA's assertion that Company Codes of Practice will be legally enforceable has yet to be proved and we are not in a position to reach a view on this issue; case law will determine this. Unless the BBPA can prove beyond doubt that the Codes of Practice are legally binding, incorporating the Code into the lease would be the only remaining option. We urge our successor committee to keep this issue under review and to return to it if evidence emerges of the unenforceability of the Codes.**

Timings for change

98. The BBPA said it hoped that all company codes could be brought into line with the industry Framework Code by June 2010 and that it hoped to have the "full system in force next year [2010]."[133]

99. The BII said that:

> The BIIBAS Steering Committee felt that we should allow the new processes and policies of the BIIBAS scheme to become established during 2010 and that in the second half of the year we would undertake an independent lessee/tenant survey which would determine how well the pub companies were abiding by their codes of practice. The results of such a survey would be published on the BIIBAS website.[134]

100. The IPC noted that:

> there is no clear timetable for implementation at an individual company level. The Framework sets an indicative timetable for companies to develop their own codes of practice and have them accredited but this is not set in stone and extensions are already being talked about for smaller companies including the regional brewers operators. Crucially, no timeline is set for the individual company Codes to be in

---

[131] MMC, The Supply of Beer, Cm 651, 1989, paras 12.145-12.146

[132] Q 80

[133] Q 156

[134] Ev 47

place and in force, nor is it made clear how and when the Codes will be applied to existing leases.[135]

101. **The Codes of Practice are moving in the right direction, but they are not yet in place. We will hold the BBPA to its timetable for implementation for the larger pub companies. Any delay beyond June 2010 which is not accompanied with a justifiable reason, will not be acceptable. Furthermore, after the assurances it has given to the Committee, the BBPA not individual pub companies will be held responsible if delays and slippages occur.**

102. **We recommend that the industry produces a project plan for change with key stages at which it can be marked against achievement. This would make it easier for the industry to see how it is progressing and for our Committee, our successor Committee and the Government to be confident that real change is happening. If slippage in the project plan occurs the Committee and Government must be provided with explanations and industry plans for action to get the timetable back on course.**

[135] Ev 106

4 RICS guidance on pub rental valuations

Pub Industry Forum Report and Recommendations

103. RICS' primary involvement in the pub industry is in relation to property and rent valuations. Our 2009 Report concluded that:

- Given the inherent subjectivity of the rental valuation method, it is very important that there is transparency about the assumptions on which it has been calculated. We note that there is disagreement between lessee representatives and pubcos over whether the Trade and Industry Committee's recommendation that "Pubcos should provide their tenants with a comprehensive breakdown of how their rent was calculated" has been implemented. The evidence that this recommendation has not been fully implemented is confirmed by our survey results which show that 44% of lessees had not been shown a breakdown of how their rent was calculated. This is unacceptable.[136]

- We note that, without transparency, rental calculations are open to manipulation by the pubcos, in particular by systematically underestimating the costs for a lessee of running their pub. We recommend that there should be industry guidelines on the average costs of running a pub such as those in the ALMR benchmarking survey. These can be used by lessees as comparators against the rental assessments put forward by their pubco.[137]

104. In the summer of 2009 RICS appointed a Forum headed up by two chartered surveyors and an independent chairman to respond to our findings. The Forum was given the task "to fully understand the issues that exist within the industry and how they can be best resolved."[138] The Forum included a broad cross-section of representatives, pub companies, regional brewers, trade bodies, special interest groups, surveyors and individual licensees. It examined "how rents are set in the pub sector and how the rent review dispute resolution mechanism works in practice".[139] Particular emphasis was placed on the relationship between pub companies and their tenants.[140]

105. On 16 October, the Forum published its report *Pub Industry Forum Report and Recommendations*. Its recommendations included:

- there was a need for enhanced guidance for RICS members on pub rent valuations;

- RICS should work with other interested parties to create a new benchmarking scheme; and

[136] RICS, *Pub Industry Forum Report and Recommendations*, October 2009, para 45

[137] RICS, *Pub Industry Forum Report and Recommendations*, October 2009, para 47

[138] RICS, *Briefing Note: Summary of the Pub Industry Forum Report*, October 2009

[139] RICS, *Briefing Note: Summary of the Pub Industry Forum Report*, October 2009

[140] RICS, *Briefing Note: Summary of the Pub Industry Forum Report*, October 2009

- RICS should create a Code of Practice for landlord and tenants at rent review and lease renewal.[141]

106. Kate Nicholls, Secretary to the IPC, said that it very much welcomed the Forum Report and that the IPC:

> entirely concurs with the analysis and some of the recommendations of this Committee. It is a welcome recognition by an independent third party of the problems that face the industry and our members.[142]

However, the IPC remained concerned "whether, when and how its recommendations will be adopted and implemented."[143]

107. Mr Rusholme, Director, RICS Valuation Professional Group, confirmed that "all the recommendations that have been made in the Forum Report have been endorsed by RICS and will be acted upon."[144]

Valuation guidance

108. RICS is in the process of updating its valuation guidance for surveyors.[145] A first meeting of the working group tasked with producing the revised valuation guidance was held in January with a second meeting in February.[146] RICS asked members of the Trade Related Valuation Group (TRVG) to take the specific recommendations from the Forum and to start work on producing a working draft of guidance. When asked about the involvement of representatives of lessees, Mr Rusholme confirmed that it was "crucial that that takes place".[147] We understand that previous witnesses to our Committee—Simon Clarke, Garry Mallen and David Morgan—have been included in the working group. **We welcome the fact that RICS has invited lessee representatives onto its working group to consider the revised RICS guidance. We expect their input to be as valued by RICS as that of industry representatives.**

109. Mr Simon Clarke, a publican, member of the IPC and one of the individuals on the RICS working group, warned that the revised guidance would need far greater clarity for it to be successful. He argued:

> RICS would be the first to admit that the misinterpretation of the guidance has been used to the benefit of some surveyors. We must ensure that there is now no muddying of the water.[148]

---

[141] RICS, *Briefing Note: Summary of the Pub Industry Forum Report*, October 2009

[142] Q 171

[143] Ev 101

[144] Q 1

[145] RICS *Valuation Information Paper 2: The Capital and Rental Valuation of Restaurants, Bars, Public Houses and Nightclubs in England, Wales and Scotland,* 2007

[146] Ev 124

[147] Q 4

[148] Q 176

In particular, he highlighted the issue of the valuation of the benefits of a tied relationship:

> As to the issue of advantages and disadvantages being valued I believe that is a perfectly valid comment. If those benefits or onerous terms are contractual and are in the terms of the lease they should be included in the valuation. If they are discretionary - some would describe them as onerous - there is no way that effectively they should be quantified and included in the rental valuation.[149]

110. The argument centres around the countervailing benefits pub companies claim they provide to their tied lessees, which are not available to free of tie lessees. This was discussed in the 2004 Report which found that:

> On the basis of the evidence presented to us we feel that the immediately quantifiable cost of the tie is usually balanced by the benefits available to tenants.[150]

However, this did not reflect the evidence in our 2009 Report, which concluded:

> From the evidence we have received, we are not so convinced. We are particularly struck by the results of our survey which found that 63% of lessees did not think their pubco added any value. The pubcos offer little support that cannot be found by normal market methods.[151]

111. The RICS Forum Report recommended that a correct interpretation of RICS guidance would follow the principle that a tied tenant should be no worse off than a free of tie tenant.[152] This was endorsed by Mr Rusholme who confirmed that the recommendation was "a statement with which we agree wholeheartedly".[153] He was aware of the controversy surrounding this part of RICS guidance and confirmed RICS needed to be "clearer in identifying and making it absolutely transparent when we publish an update of our information paper."[154]

112. For its part, the BBPA said that it would "completely abide" by the RICS guidance when it came out.[155] Mr Alistair Darby from the BBPA added that:

> The BBPA code makes very clear that in terms of rent-setting it will abide by the guidelines set by the independent organisation which at the moment is RICS. Therefore, if RICS in its latest guidelines in the industry Forum next year comes up with a methodology for the calculation of tied versus non-tied benefit, which is a complex issue, we will be bound by the code to follow those guidelines.[156]

---

[149] Q 176

[150] Trade and Industry Committee, Second Report of Session 2004–05, *Pub Companies*, HC128-I para 188

[151] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I,para 129

[152] RICS, *Pub Industry Forum Report and Recommendations*, October 2009, para 4

[153] Q 5

[154] Q 6

[155] Q 95

[156] Q 96

Simon Clarke argued that if the benefits were not contractual, they should not be in the lease and therefore would not be a matter for rent review.[157] He also brought to our attention that countervailing benefits could be being double counted:

> On the one hand we are told [in the pubco evidence] that tied rents are similar to free of tie rents because of countervailing benefits counterbalancing detriment of tie, then we are told that a lower tied rent is a countervailing benefit and last but probably not least we are told that tied product prices are higher than those available to free of tie to counterbalance countervailing benefits. Basically, it looks like double/treble counting of 'countervailing benefits' if indeed any exist at all. [158]

113. **We welcome the progress being made by RICS to address the shortcomings of its existing guidance, and we expect the BBPA to deliver on its undertaking to "completely abide" by the new guidance when it is published. However, the acid test of its 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. This should facilitate clearer discussion on what constitutes a countervailing benefit. If it does, then the guidance will represent a significant step forward in resolving a number of our concerns.**

The Brooker case

114. In its submission to our 2009 inquiry, the ALMR stated that in the division of profits "The assumption is that lessee and landlord each take a 50% share of divisible profits".[159] However, this assumption was recently challenged in court. The High Court Judge in the (1) Charles Brooker (2) Leslie Brooker and Unique Pub Properties Ltd case found a 35:65 division between the landlord and lessee represented a fairer reflection of risk for the parties.[160] Mr Rusholme, from RICS, was aware of the case and offered the following assessment:

> What I like about the Brooker case is that it has helped to dispel the myth that RICS or any other body sets in stone that there should be any particular split of divisible balance, be it 50-50 or whatever. Within Brooker there is a lot of discussion about risk and how one encapsulates it ultimately in the amount of money the tenant will pay. That is a very healthy discussion to have and an area where our guidance will provide a lot more support in terms of exactly where risks and rewards are taken into account.[161]

115. **We await with interest how RICS guidance will assess risks and rewards in light of the recent court ruling on the divisible balance.**

---

[157] Ev 69

[158] Ev 69

[159] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-II, Ev 84

[160] (1) Charles Brooker (2) Leslie Brooker v Unique Pub Properties Ltd, High Court of Justice, Winchester, 7 September 2009

[161] Q 23

Benchmarking scheme

116. The 2004 Report recommended that there should be a national register of rents.[162] Our 2009 Report returned to this issue, and we made the following recommendations:

> A system must be put in place to allow lessees to assess whether their rent is fair and in line with similar businesses. Our predecessor's recommendation to create a register of rent reviews would have increased transparency. We note it has been disregarded, and neither the pubcos nor RICS have taken any serious action to make sure the rental system is not unfairly biased against the lessee.[163]
>
> The rental valuation method for pubs appears to be the product of history and tradition. If it is to be fair, there must be far greater transparency about how rents are calculated to ensure equality between the parties to the negotiations. If this is not improved as a matter of urgency, there are compelling arguments for abandoning the method entirely.[164]

117. A national register of rents was seen as a way of introducing transparency into the system as it would allow a lessee to compare their rent with those of other pubs.

118. David Rusholme recognised that "for a long time there have been calls for a national register of rents", but concluded that there were "lots of difficulties related to data protection issues and gaining the co-operation of the industry to make that happen".[165] Furthermore, RICS was concerned that such a register had the potential to be misleading unless all of the terms of the lease were included.[166]

119. Instead, Mr Rusholme highlighted the fact that the RICS Forum Report proposed the idea of a national database of trading information, in line with the ALMR benchmarking survey:

> We looked at a number of other industries which had a trading element, for example hotels. There is a good deal of benchmarking information provided in that industry which is very helpful in getting the parties to come together in negotiations. That is one part of it. The other part is that chartered surveyors who act in that sector have their own databases of information and it is part of their skill and job to put together that information. One needs a whole range of information sources to make the process easier. We believe that benchmarking will do that job and that is achievable because there is an averaging of data from different sources; it is not just identifiable to one particular public house, for example. By averaging and making trading information slightly more discrete one is better able to get the whole industry to start to make more of that data available. We believe there is a lot of mileage in pursuing a

---

[162] Trade and Industry Committee, Second Report of Session 2004–04, *Pub Companies*, HC128,para 157

[163] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 58

[164] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 60

[165] Q 24

[166] RICS, *Pub Industry Forum Report and Recommendations*, October 2009, para 2

> benchmarking scheme and at the moment our efforts are devoted to trying to make that happen.[167]

Our 2009 Report recognised that this could be of great potential to the industry.[168]

120. RICS stated that it actively supported the creation of a "database of trading information used to estimate fair maintainable trade and the divisible balance by advising on the correct criteria for data selection",[169] and that it was having a "healthy dialogue"[170] with the Association of Licensed Multiple Retailers (ALMR)[171] as to whether its benchmarking survey was something they would wish to build upon. In addition to those conversations, RICS was also considering using either commercial providers of databases or whether it had the capacity to manage an in-house database.[172] RICS subsequently told us that it had scheduled meetings with "several parties who believe that they may have an answer to the benchmarking topic".[173]

121. That said, RICS acknowledged that for any scheme to be successful it would need both landlord and lessee input:

> The scheme can only be successful if both landlords and tenants are prepared to cooperate fully and submit sufficient accurate data, so that a critical mass can be achieved.[174]

122. The ALMR benchmarking survey was originally confined to ALMR members but this year it was extended to "non-ALMR members and individual lessees".[175] In other changes to the scheme the ALMR also pledged to establish a cross-industry 'editorial board', chaired by RICS, to analyse the findings and it has commissioned an independent research company to collate the data. The deadline for the latest survey was extended to encourage participation.[176]

123. However, despite these changes, we learned that a number of BBPA members had pulled out of the benchmarking survey and "no additional companies have confirmed their participation to date".[177] When asked why BBPA members had pulled out, Mrs Nicholls gave the following response:

> I have been told that it is because of ALMR's participation in the IPC.[178]

---

[167] Q 24

[168] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 47

[169] RICS, *Briefing Note: Summary of the Pub Industry Forum Report*, October 2009

[170] Q 25

[171] The ALMR describes itself as a "network of entrepreneurial retailers and industry suppliers that champions the smaller independent companies that own and operate pubs, bars and restaurants in UK".

[172] Q 29

[173] Ev 124

[174] RICS, *Briefing Note: Summary of the Pub Industry Forum Report*, October 2009

[175] Ev 29

[176] Ev 29

[177] Ev 29

[178] Q 172 and 173

The ALMR has since announced that it would:

> relinquish ownership of the survey and results and 'gift' it to the industry. This is because ALMR ownership or badging of the survey appears to be the major sticking point for some.[179]

124. Even with these changes, Brigid Simmonds said that the BBPA did not consider the ALMR benchmarking study to be:

> properly representative, as it collected data from only managed pubs and also from clubs and wine bars, which while perhaps useful as comparators, did not provide information of much use to traditional tenants or leaseholders.[180]

Furthermore, the BBPA concluded that:

> We believe that the complexities of benchmarking within the pub sector have been under-estimated: this is an issue that cannot be resolved hastily without wider consideration.[181]

These last two statements from the BBPA seem entirely at odds with Brigid Simmonds' earlier assertion to us in evidence. For the record we set out the oral evidence below:

> Q88 Mr Wright: The previous witness gave evidence about the RICS national benchmarking scheme. In your submission you make clear that it is not part of the pub company's role to disclose commercial information. Does it mean that you will not work with RICS on its benchmarking scheme?
>
> Mrs Simmonds: The pub companies are absolutely committed to provide the right information. Whether it is the ALMR benchmarking or, as the RICS said, some other system we will provide the information to make sure they have the best information on which to base the rent setting.[182]

We cannot prove the claim that the BBPA's reluctance to engage with the ALMR scheme is a consequence of ALMR involvement with the IPC. What is clear is that despite the assertion that the BBPA is "absolutely committed" to providing information, we are not confident that the BBPA is committed to greater transparency in this area.

125. **We welcome the ALMR's decision to open up its benchmarking survey to the whole of the pub sector, the work it is doing to encourage other companies to provide data and the fact that it has undertaken to 'gift' the survey to the industry. We further welcome the undertaking by RICS to pursue the objective of a more open and transparent method of comparing and assessing rents. The same cannot be said of the BBPA which has appeared to resort to resistance, obfuscation and hostility. We appreciate the fact that there are 'complexities' in the pub sector but the BBPA has had long enough to overcome these problems.**

---

[179] Ev 29

[180] Ev 42

[181] Ev 43

[182] Q 88

126. **We believe that the publication of industry data on the costs of running a pub, such as that available in the ALMR's benchmarking survey, represent a significant step forward in increasing transparency in the industry.**

A wage for lessees to be treated as a variable cost?

127. The IPC recommended to the Committee that a salary for a lessee should be seen as a 'cost' in the calculation of rent. RICS said it had been "conducting a lot of work on the type of variables in a benchmarking system which will be useful to the industry".[183] We asked RICS whether the salary of a lessee could be considered as a variable and Mr Rusholme told us that although it would be possible to capture such information in a database[184] he was unsure as to whether it would "add a great deal to the process".[185] He explained that there was "no one line in the calculation that deals with a wage to the lessee"[186] but that "it would be ridiculous to set rents that did not make an allowance in the split of profit for making a living or profit out of the business".[187] He believed that it was only right that RICS' "rent guidance reflects a fair reward at the end of the day for the operator".[188]

128. Mr Rusholme told us that RICS will be pulling all of its discussions and work on this matter together in the 'next few months' and at that stage it will be able to "recommend the right direction in which it should go."[189] **We invite an update from RICS about the scope and progress of the national database of trading information by June 2010. We hope that it has greater success in its discussions with the BBPA than the ALMR had achieved.**

RICS Code of Practice for Rent Review

129. The Forum Report proposed that RICS should create a Code of Practice for landlord and tenants at rent review and lease renewal.[190] Although this recommendation was welcomed, concerns were raised that it could lead to duplication with the work of BBPA on its Framework Code.[191]

130. Mr Rusholme recognised that it was "an industry with quite a lot of codes"[192] but argued that RICS' thinking was that it should provide a "RICS code covering the issues that pertain purely to property and rent setting."[193] He believed that if it was part of the BBPA

[183] Q 25

[184] Q 31

[185] Q 32

[186] Q 50

[187] Q 51

[188] Q 52

[189] Q 26

[190] RICS, *Briefing Note: Summary of the Pub Industry Forum Report*, October 2009

[191] Ev 79 and Q 34

[192] Q 34

[193] Q 35

Code it could become "somewhat diluted and there will be confusion as to where authority and enforceability lie".[194]

131. There was also concern over how any RICS Code would be enforced. It would only be mandatory for RICS members[195] and yet many of the people who value pubs and carry out rent reviews are pub company staff who are not members of RICS. Mr Rusholme acknowledged this fact but pointed out that RICS could only develop a code for its own members".[196] He told us that:

> the carrot is to come up with well thought-out advice in the code which has the industry behind it. If we can carry those involved along with us in preparing the code there must be a greater chance that people will stick to it once it is published.[197]

He also said that "if there are some mandatory ways to make this happen we would very much welcome it".[198] The IPC have confirmed that they would be very happy to work with RICS on its industry code and to "endorse it."[199]

132. **We expect the BBPA and its constituent members to endorse the RICS Code of Practice for valuing pubs and to enshrine it into the BBPA Framework Code of Practice and individual company codes.**

[194] Q 37

[195] Q 35 and Ev 79

[196] Q 40

[197] Q 46

[198] Q 49

[199] Q 172

5 The Pubs Independent Rent Review Scheme (PIRRS) and Dispute Resolution

133. During the course of our 2009 inquiry we found that there was no low-cost independent way of resolving rent disputes. We concluded that "[…] some form of low-cost independent procedure for dealing with disputes over the rate of rent is needed and needed urgently."[200]

134. We are therefore pleased that the Pubs Independent Rent Review Scheme (PIRRS) is now up and running. The scheme is supported by five of the industry's associations; the Association of Licensed Multiple Retailers (ALMR), the British Beer and Pub Association (BBPA), the BII, the Federation of Licensed Victuallers Association (FLVA), and the Guild of Master Victuallers. It is funded by an annual levy of £2.50 per pub on BBPA members and £5.00 on non BBPA Members. All BBPA members have to sign up to the PIRRS scheme.[201]

135. Under the scheme, both parties in a dispute are required to opt out of any dispute procedures contained in their current contractual agreement and renounce any right to arbitration or referral to original final offers by signing a Deed of Variation.[202] PIRRS has capped fees, no higher than £2,000 for lessees. An independent valuer, who will oversee the dispute, is nominated by one of the Board organisations and approved by the Board as a whole. The valuer has to declare any potential conflict of interest with a landlord company.[203]

136. The BII has informed us that since the launch of PIRRS on 1 December 2009 it has received 36 enquires. Of these, two cases are now underway, and a further nine had applied to use the scheme. At the time of writing none had reached a decision. Another nine cases which had originally explored the option of resolving their dispute via the PIRRS with their landlord have resolved their dispute.[204] The BII went on to inform us that evidence from alternative arbitration schemes indicated that an average of one in 30 enquires would fully enter into the scheme.[205]

137. While the introduction of PIRRS is a welcome development, organisations representing lessees have been less enthusiastic. CAMRA believed that PIRRS was "open to manipulation by large pub owning companies who it seems will have clear power of veto over the surveyors that pub businesses can appoint".[206] Brigid Simmonds did not accept

[200] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 149

[201] PIRRS Website: http://pirrscheme.com

[202] PIRRS Website: http://pirrscheme.com

[203] PIRRS Website: http://pirrscheme.com

[204] Ev 47

[205] Ev 47

[206] Ev 58

this argument and highlighted the fact that the lessee chose the surveyor to hear the case and that the pub company had "absolutely no say in who is chosen".[207]

138. Justice for Licensees told us that the start of PIRRS was marred by problems over surveyors' declarations of interest on the BII website. It highlighted the fact that some surveyors had not declared interests despite close association with pub companies. It also noted that the PIRRS website went live for a couple of weeks and was then taken down because of this. Justice for Licensees believed that these issues had undermined the integrity of PIRRS.[208]

139. The Fair Pint Campaign although acknowledging that PIRRS had the potential to reduce costs in a rent review dispute believed that unless the tenant had the expertise to represent themselves they would still have to engage professional advisers. This, it argued meant that despite the establishment of the PIRRS "most tied tenants will not be able to afford to challenge unfair rent reviews".[209] The BBPA disputed this assertion arguing that representation costs would not be necessary as most of the work would be done by correspondence. However, if additional costs became apparent the BBPA would review the system.[210]

140. Mr Karl Harrison offered a wider perspective:

> If Mr Rusholme and the RICS deliver their report properly and address that very seriously […] PIRRS ought not to be required at all because the system that should be in operation in most of those contracts ought to run properly.[211]

General dispute resolution

141. PIRRS only covers disputes over rent reviews. Therefore it does not cover other areas of dispute between pub companies and their lessees. As Mrs Nicholls told us:

> there are other forms of complaint where there is no method of independent redress. PIRRS does not deal with it.[212]

The new Framework Code provides very little more on dispute resolution than the existing Code. The new Framework Code has not changed in any substantial manner, it states:

> Company Codes should explain the procedures to be adopted where either party feels that the provisions of the Code have not been followed. Where the tenant/lessee believes that he is the aggrieved party, the procedures should ensure that the matter is properly considered at an appropriately high level of management in the company

[207] Q 134

[208] Ev 109

[209] Ev 81

[210] Q 135

[211] Q 185

[212] Q 185

> concerned, and at a level of management higher than that at which the relevant decisions were initially taken.[213]

142. It appears to us that the main change in the dispute procedure process has been to replace the BBPA with the BII as the organisation to which information relating to a breach of a company code is passed.[214] In May 2009 we found that there had been no complaints to the BBPA because of its perceived bias to pub companies.[215] The BII had received three complaints[216] but lessees complained that the BII did not want to be involved in disputes.[217]

143. In 2004 the Trade and Industry Committee found that lessees were experiencing problems with pub companies not fulfilling their repairing obligations and recommended that:

> Pubcos would improve their reputation as landlords if they ensured that tenants' agreements contained an inexpensive and efficient system of arbitration or alternative dispute resolution with fully independent arbitrators or experts to resolve such disputes without imposing legal costs on either side.[218]

Our 2009 Report concluded that:

> the small number of cases pursued to independent arbitration should not be taken as a sign that all is well. It could simply demonstrate that, even though they were dissatisfied, lessees did not consider the dispute resolution system appropriate.[219]

144. The wider issue of dispute resolution has not been considered in the Framework Code and there has been no attempt to improve the complaints system or to form an independent body other than PIRRS, which deals only with rent. We note that the BII has been asked to accredit Codes, with the authority to investigate breaches and remove accreditation where necessary, but this does not address the need for a clear independent dispute mechanism.

145. The BII does have a business support helpline which it described as "a member benefit."[220] It says it receives around 15 calls a month which cover "a wide variety of issues" with 65% in relation to rent debt issues but other areas are raised including buying out of tie issues, business rates, agreement renewals, repairs and buying a pub.[221] The BII said it currently signposts members to other sources of information or assistance and liaises with the pub company on the member's behalf which it believes "has been welcomed by both

---

[213] BBPA, *Framework Code of Practice on the Granting of Tenancies and Leases,* January 2010, p 15

[214] BBPA, *Framework Code of Practice on the Granting of Tenancies and Leases,* January 2010, para 39

[215] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 150

[216] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-II, Ev 192

[217] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 150

[218] Trade and Industry Committee, Second Report of Session 2004–04, *Pub Companies*, HC128,para 90

[219] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I,para 142

[220] Ev 47

[221] Ev 47

members and pub companies in resolving issues of contention."[222] However, this is far from adequate for the industry as a whole.

146. Enterprise Inns offered to fund a body to advise lessees. This was welcome but the IPC seem reluctant to accept any body funded by pub companies at it would be perceived as having the same flaw as the BII, by virtue of similar funding. However, in the current financial climate it is difficult to see how any workable funding stream could exclude any funding from within the industry.

147. **We remain profoundly concerned that no effort has been made to create an independent dispute mechanism for general complaints about pub companies. The system still relies on complaints being made to managers within a company. This is a wholly inadequate response to a pressing need. Urgent consideration should be given to extending the work of the BII and PIRRS to cover this role. We recommend that the BII be recognised in the Company Codes of Practice as an independent dispute body and clear details of how a lessee can apply to the BII for help must be provided by the pub companies. The absence of such a mechanism may yet trigger regulatory intervention.**

[222] Ev 47

6 Choice to go free of tie

148. Our 2009 Report recommended that:

> The dispute over the tie could be ended easily: every lessee could be offered the choice of being free or being tied. This would enable both sides to prove their competing claims. We believe each and every existing lessee should, in a phased programme, be offered this choice and the same choice should be offered to every new lessee as he or she takes on the lease.[223]

149. When challenged over why this recommendation had not been taken up by the pub companies, Alistair Darby, in his capacity as Managing Director of Marston's, argued that for brewers such as Marston's and Greene King the tie was "fundamentally part of their DNA".[224]

150. That said, the BBPA believed that the situation was evolving and that more pub companies would be offering free of tie arrangements. Brigid Simmonds stated:

> the market will move over a period of time because if they are not attractive to tenants in that marketplace it will not work as a model going forward.[225]

Mr Alistair Darby warned against statutory intervention to push this forward. He believed that such intervention would result in "a substantial flood of pubs going free of tie onto the market" and that there would be "some baleful consequences".[226]

151. The contrary view was put by Simon Clarke representing the IPC, who told us that:

> The option for tenants to go free of tie is the very incentive the pubcos need to ensure they offer attractive benefits, rather than the window dressing and false promises currently tabled. It is an efficient and solid backstop to discourage the abuses currently all too apparent by some of the bigger companies.[227]

152. Mr Alistair Darby told us that 60 lessees at Marston's had been offered an agreement to buy at free trade prices in return for a higher rent but half of them chose not to take up this offer. He explained:

> the fundamental reason being that they do not wish to take on additional fixed cost in their business. They say they are happy with the way it works and recognise that rent is variable through beer pricing and that if trade goes up they benefit; if it goes down they suffer. That is the attraction.[228]

---

[223] Business and Enterprise Committee, Seventh Report of Session 2008–09, *Pub Companies*, HC 26-I, para 138

[224] Q 118

[225] Q 119

[226] Q 119

[227] Ev 137

[228] Q 113

We do not have enough information to judge the reasons for this but it does not necessarily follow that the offer should therefore not be made.

153. **We remain convinced 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. In the meantime, we recommend that the BII website makes clear for potential lessees what options are available to them, and sets out the benefits and disbenefits of being tied. This will ensure that both current and potential lessees are empowered by greater knowledge, so bringing more equal power to both sides in any commercial negotiation.**

154. The tie is a highly emotive issue in the pub industry and many organisations campaign for its removal. However, during the course of our inquiry we were made aware of an anti-tie campaign in which lessees have been encouraged to break their tie. This campaign encourages lessees to break their contract and therefore open themselves up to legal action. We have articulated our reservations about the tie on a number of occasions but this is not the way to proceed. It will only serve to harm those lessees who take part in the campaign. We are concerned about the potential harm to those lessees who decide to take part in the campaign.

List prices

155. One of the outstanding concerns of lessees which is not met by the Framework Code of Practice is the ability of pub companies to raise list prices for tied products as they wish with no controls. Simon Clarke, representing the IPC, believed that "RICS can resolve the misinterpretation of their rental valuation guidance but there remains no control whatsoever over the price that pub companies can dictate on tied products, what they lose on the roundabouts they will gain on the swings."[229]

156. **In the absence of pub companies offering their lessees a free of tie option with a full rent review we recommend that the BII, as part of its new website, list the prices pub companies charge for their tied products and the discounts available with comparisons to the free trade. The website should also contain information on the business support available from the various pub companies presented in an easily comparable way. This provides lessees entering the trade information on the best 'deals' but also brings to the attention of current lessees whether they are getting the best out of their pub company. We also recommend that the Office of Fair Trading monitors the pricing of products being offered to lessees to keep a check on unsubstantiated price rises.**

[229] Ev 70

7 Conclusion

157. Our Report has considered the proposals put forward by the pub industry in response to our 2009 Report. In general we welcome these developments as an example of positive engagement by industry and a recognition, if belated, that it needed to reform. However, this should in no way be interpreted as giving the industry a clean bill of health.

158. The 2004 Report and the 2009 Report demonstrated that proposals for reform mean nothing if they are not carried through. The industry now appears to be willing to change and we welcome that. However, past experience has taught us that this is not enough; we have been here before. **The industry must be aware that this is its last opportunity for self-regulated reform. If it cannot deliver this time, then government intervention will be necessary. We do not advocate such intervention at this stage, but remain committed to a resolution to all the problems discussed in this Report and those of the 2004 and 2009 Reports. Should those problems persist beyond June 2011, we will not hesitate to recommend that legislation to provide statutory regulation be introduced.**

159. In summary, we stand by all of our conclusions in the 2009 Report and still believe a reference to the Competition Commission may yet be necessary to resolve these long-standing issues. However, if all the initiatives prompted by our last Report deliver fully on their promise, such draconian action may yet be avoided. We urge our successor committee to indicate its willingness to return to this issue in the new Parliament and to undertake to keep the developments we have prompted under review.

160. **We urge the Government to monitor the success or otherwise of industry initiatives for reform and to keep the possibility of a reference to the Competition Commission firmly on the agenda. We also urge the Office of Fair Trading to look more carefully at the issues involved as it responds to CAMRA's super-complaint for the second time. The serious imbalance in power between pub companies and lessees that has prompted this Report and the two earlier ones must be a matter of deep concern to policy makers who are working to ensure that markets work fairly to the benefit of consumers.**

161. **The pub industry has been found wanting now on two occasions by committees of the House of Commons. If it fails to deliver on its promises by June 2011, it should be in no doubt what the reaction will be.**

Conclusions and recommendations

BBPA Code of Practice

1. We have grave doubts about the industry's willingness to do enough voluntarily to prevent statutory or regulatory intervention. We urge all the players to work together constructively to achieve this outcome. (Paragraph 8)

2. We deprecate the fact that the BBPA refuses to enter into dialogue with the IPC. The BBPA needs to work with the lessee groups and representatives towards a consensus on the issues raised in both this Report and the 2009 Report. We expect the BBPA to engage with the IPC as a matter of urgency. (Paragraph 11)

3. We do not believe previous BBPA and pub company Codes of Practice have been sufficiently robust. Nor do we believe the pub companies have properly complied with them. This history of evasiveness and the demonstrable consequences for lessees inevitably requires a critical response to the new Framework Code. (Paragraph 26)

4. We are disappointed that it took until the end of January 2010 to publish the new BBPA Framework Code of Practice. We were given sight of a draft Code ahead of the evidence session in December 2009 and the difference between the draft and the published Codes appears to be minimal. This delay put back publication of our Report as it was only fair to let other groups respond to it. (Paragraph 32)

Assignment of leases

5. The clauses in the Framework Code of Practice regarding the assignment of leases are an attempt to address our and our predecessor Committee's concerns. We note the concerns expressed by lessees about the obligations it would place upon them but we believe that the new Code represents a step in the right direction. However, lessees' existing right to assign their leases needs to be treated with the upmost consideration. (Paragraph 39)

6. The BBPA and the lessee organisations need to work together to develop processes in a way which are mutually beneficial. Both sides must ensure that the history of lack of trust and intimidating behaviour by pub companies does not magnify disagreements on this issue and undermine the Framework Code. (Paragraph 40)

Training and professional advice

7. We welcome the inclusion of the clauses on training and professional advice in the Framework Code which will greatly assist newcomers to the industry. We also agree that experienced publicans should not have to undertake basic training when taking on a new lease. We therefore understand why a waiver has been included in the training clause of the Framework Code of Practice. It is vital that both of these clauses are applied rigourasly. We will expect the BBPA to introduce a system to

monitor use of the waiver and publish clear guidelines on its use by the end of August 2010. (Paragraph 45)

Regional and family brewers

8. We welcome the fact that the BII will work to help and advise smaller pub companies and family brewers on the new Framework Code and the subsequent accreditation process. We recommend that the BII monitor closely compliance costs for regional and family brewers to ensure that these costs remain reasonable. (Paragraph 47)

9. We recommend that where leases have upward-only rent review clauses they should be removed by a deed of variation, the cost of which should be borne by the pub companies. This would also have the benefit of being binding on a pub company's successor in title. (Paragraph 50)

AWP machines

10. Removal of the AWP income from the divisible balance is a belated step in the right direction. It should never have been included in the divisible balance in the first place. To take 50% of profit as part of the machine tie and then 50% of the remaining profit as part of the divisible balance is totally unacceptable. (Paragraph 54)

11. It is unacceptable that pub companies have again failed to address the AWP tie or to seriously offer free of tie options. If the AWP tie offers the benefits claimed for it, offering such a choice on an informed basis would demonstrate goodwill at little if any cost to the pub companies as lessees will freely chose to retain the tied machines. (Paragraph 57)

Flow monitoring equipment

12. We welcome the inclusion in the Framework Code of the need for additional evidence above and beyond the data from flow monitoring equipment in any accusation of buying outside of the tie. However, such evidence must be physical evidence and not merely a signed 'confession' by the lessee. In relation to fines being taken by direct debit, without the authorisation of lessees, the BBPA must give public and unambiguous direction to its members that such a practice is incompatible with BBPA membership. (Paragraph 65)

13. The accuracy of data from flow monitoring equipment and the analysis of that data are highly contentious issues. Flow monitoring equipment could be a helpful tool, for both pub companies and lessees but only if it is reliable and has the confidence of both sides. Clearly this is not the case at the moment. We recommend that the Government, through the National Measurement Office, urgently clarifies the position of beer flow monitoring equipment in relation to the Weights and Measures Act 1985. Such equipment must be included under the Act for calibration and verification purposes. (Paragraph 69)

Conclusion on the Framework Code

14. The new Framework Code of Practice appears to be a modest step in the right direction. Of necessity it provides a framework for companies of all sizes. We expect the major pub companies to treat it as an absolute de-minimus requirement and to significantly build on it with their own Codes. Only by doing so will pub companies be able to demonstrate that they are committed to reform. We recommend that our successor committee, at an early opportunity in the next Parliament, assess the extent to which pub companies have built on what is a bare minimum of a Framework Code; and evaluate how effective the new Code has been in improving the relationship between lessees and pub companies. Previous codes have been weaker and not fully observed by the pub companies. We will need to see compelling and continuing evidence by June 2011 that the new codes are being observed and enforced if our successor committee is not to recommend statutory intervention. (Paragraph 70)

The role of the BII in policing the Codes

15. The BBPA must do more to highlight the importance to prospective lessees of choosing a pub company with BBPA membership and a BII accredited Code of Practice. (Paragraph 81)

16. We believe that real impartiality rather than notional independence is the essential quality required of the BII. Any body set up to administer the accreditation of Codes or monitor compliance would be bound to be partially funded by pub companies as they own so many pubs. Furthermore, we do not believe the complaints procedure should be funded by the taxpayer. The BII must act impartially and be seen to do so. They are in the best position to administer accreditation of codes and to oversee and monitor compliance. The success of all of the reforms proposed by the industry hinges on the credibility and effectiveness of the BII. (Paragraph 87)

17. We therefore give a cautious welcome to the BII's role in policing the Codes of Practice and its intention to publicise complaints and breaches on its website. We encourage the BII to do all in its power to publicise breaches widely. Although the sanctions available to the BII are limited and it has no power to fine, we have been told that the impact on a pub company of a decision by the BII to withdraw accreditation of a code would be extremely serious for that company. (Paragraph 88)

18. We need to see clear evidence by June 2011 that, in practice, the BII has the necessary authority and impartiality to be effective as a policeman for the industry. If it fails to demonstrate such qualities, the case for regulatory intervention by the Government, for example the establishment of an Ombudsman or intervention by the competition authorities, will be very strong. (Paragraph 89)

Enforceability of the Codes

19. The BBPA's assertion that Company Codes of Practice will be legally enforceable has yet to be proved and we are not in a position to reach a view on this issue; case law will determine this. Unless the BBPA can prove beyond doubt that the Codes of

Practice are legally binding, incorporating the Code into the lease would be the only remaining option. We urge our successor committee to keep this issue under review and to return to it if evidence emerges of the unenforceability of the Codes. (Paragraph 97)

Timings for change

20. The Codes of Practice are moving in the right direction, but they are not yet in place. We will hold the BBPA to its timetable for implementation for the larger pub companies. Any delay beyond June 2010 which is not accompanied with a justifiable reason, will not be acceptable. Furthermore, after the assurances it has given to the Committee, the BBPA not individual pub companies will be held responsible if delays and slippages occur. (Paragraph 101)

21. We recommend that the industry produces a project plan for change with key stages at which it can be marked against achievement. This would make it easier for the industry to see how it is progressing and for our Committee, our successor Committee and the Government to be confident that real change is happening. If slippage in the project plan occurs the Committee and Government must be provided with explanations and industry plans for action to get the timetable back on course. (Paragraph 102)

RICS guidance on pub rental evaluations

22. We welcome the fact that RICS has invited lessee representatives onto its working group to consider the revised RICS guidance. We expect their input to be as valued by RICS as that of industry representatives. (Paragraph 108)

23. We welcome the progress being made by RICS to address the shortcomings of its existing guidance, and we expect the BBPA to deliver on its undertaking to "completely abide" by the new guidance when it is published. However, the acid test of its 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. This should facilitate clearer discussion on what constitutes a countervailing benefit. If it does, then the guidance will represent a significant step forward in resolving a number of our concerns. (Paragraph 113)

24. We await with interest how RICS guidance will assess risks and rewards in light of the recent court ruling on the divisible balance. (Paragraph 115)

Benchmarking

25. We welcome the ALMR's decision to open up its benchmarking survey to the whole of the pub sector, the work it is doing to encourage other companies to provide data and the fact that it has undertaken to 'gift' the survey to the industry. We further welcome the undertaking by RICS to pursue the objective of a more open and transparent method of comparing and assessing rents. The same cannot be said of the BBPA which has appeared to resort to resistance, obfuscation and hostility. We

appreciate the fact that there are 'complexities' in the pub sector but the BBPA has had long enough to overcome these problems. (Paragraph 125)

26. We believe that the publication of industry data on the costs of running a pub, such as that available in the ALMR's benchmarking survey, represent a significant step forward in increasing transparency in the industry. (Paragraph 126)

27. We invite an update from RICS about the scope and progress of the national database of trading information by June 2010. We hope that it has greater success in its discussions with the BBPA than the ALMR had achieved. (Paragraph 128)

RICS Code of Practice

28. We expect the BBPA and its constituent members to endorse the RICS Code of Practice for valuing pubs and to enshrine it into the BBPA Framework Code of Practice and individual company codes. (Paragraph 132)

General dispute mechanism

29. We remain profoundly concerned that no effort has been made to create an independent dispute mechanism for general complaints about pub companies. The system still relies on complaints being made to managers within a company. This is a wholly inadequate response to a pressing need. Urgent consideration should be given to extending the work of the BII and PIRRS to cover this role. We recommend that the BII be recognised in the Company Codes of Practice as an independent dispute body and clear details of how a lessee can apply to the BII for help must be provided by the pub companies. The absence of such a mechanism may yet trigger regulatory intervention. (Paragraph 147)

Choice to go free of tie

30. We remain convinced 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. In the meantime, we recommend that the BII website makes clear for potential lessees what options are available to them, and sets out the benefits and disbenefits of being tied. This will ensure that both current and potential lessees are empowered by greater knowledge, so bringing more equal power to both sides in any commercial negotiation. (Paragraph 153)

31. In the absence of pub companies offering their lessees a free of tie option with a full rent review we recommend that the BII, as part of its new website, list the prices pub companies charge for their tied products and the discounts available with comparisons to the free trade. The website should also contain information on the business support available from the various pub companies presented in an easily comparable way. This provides lessees entering the trade information on the best 'deals' but also brings to the attention of current lessees whether they are getting the best out of their pub company. We also recommend that the Office of Fair Trading monitors the pricing of products being offered to lessees to keep a check on unsubstantiated price rises. (Paragraph 156)

Conclusion

32. The industry must be aware that this is its last opportunity for self-regulated reform. If it cannot deliver this time, then government intervention will be necessary. We do not advocate such intervention at this stage, but remain committed to a resolution to all the problems discussed in this Report and those of the 2004 and 2009 Reports. Should those problems persist beyond June 2011, we will not hesitate to recommend that legislation to provide statutory regulation be introduced. (Paragraph 158)

33. We urge the Government to monitor the success or otherwise of industry initiatives for reform and to keep the possibility of a reference to the Competition Commission firmly on the agenda. We also urge the Office of Fair Trading to look more carefully at the issues involved as it responds to CAMRA's super-complaint for the second time. The serious imbalance in power between pub companies and lessees that has prompted this Report and the two earlier ones must be a matter of deep concern to policy makers who are working to ensure that markets work fairly to the benefit of consumers. (Paragraph 160)

34. The pub industry has been found wanting now on two occasions by committees of the House of Commons. If it fails to deliver on its promises by June 2011, it should be in no doubt what the reaction will be. (Paragraph 161)

Annex: Comparison of BBPA Framework Code of Practices

	Code of Practice published 2005 (Post 2004 Trade and Industry Committee Report)	Code of Practice published 2010 (Post 2009 Business and Enterprise Committee Report)
BBPA Membership	All members of the BBPA with relevant pub owning interests agree to provide prospective lessees with a copy of the company's Code of Practice which will follow the Association's "Code of Practice Framework on the Granting and Operation of Tied Tenancies and Leases" where its provisions are applicable.	All pub companies operating tenanted or leased pubs should produce a Code of Practice based on the principles set out in this Code. This is a requirement for membership of the British Beer & Pub Association (BBPA). A full copy of the company's own Code of Practice must be provided to all new and existing tenants/lessees.
Signature		The Company Code of Practice will be signed by the tenant/lessee and the pub company, and thereby will become binding, and may be used as evidence in any disputes or subsequent court proceedings.
BII accreditation		Pub companies must also apply to the BII (British Institute of Innkeeping), and acquire, accreditation of their Codes.
Disputes over code	Codes should explain the procedures to be adopted where either party feels that the provisions of the Code have not been followed. Where the lessee believes that he is the aggrieved party, the procedures should ensure that the matter is properly considered at an appropriately high level of management in the company concerned, and at a level of management higher than that at which the relevant decisions were initially taken.	Company Codes should explain the procedures to be adopted where either party feels that the provisions of the Code have not been followed. Where the tenant/lessee believes that he is the aggrieved party, the procedures should ensure that the matter is properly considered at an appropriately high level of management in the company concerned, and at a level of management higher than that at which the relevant decisions were initially taken.
Independent dispute bodies	In such circumstances, and provided that the lessee has not referred his complaint to an independent adjudicator, it will be open to him or his representative to send the Association a brief description of the circumstances with an explanation why the lessee believes the code has not been properly followed. The Association will pass on this information to the company concerned and use its good offices to ensure, as far	In such circumstances, it will be open to him or his representative to send the BII a brief description of the circumstances with an explanation why the lessee believes the code has not been properly followed. The BII or FLVA will pass on this information to the company concerned and use its good offices to ensure, as far as possible, that there are no misunderstandings, or personality issues, that are standing in

	as possible, that there are no misunderstandings, or personality issues, that are standing in the way of a more fruitful dialogue between the company and the lessee or his representative.	the way of a more fruitful dialogue between the company and the lessee or his representative.
Outline	Companies should provide a full explanation of the types and terms of agreements offered and how these differ, i.e. leases vary in length and usually involve full repairing liability whereas tenancies are often offered for shorter periods and cannot be "sold on". With a lease agreement the business and any "goodwill" can often be sold (or assigned) to a third party after a qualifying period.)	Details of the business opportunities offered by the company will be described including the types of tenancy/lease agreements available and the period of tenure, any purchase obligations such as a beer tie, amusement machine tie and any other product ties.
Training		Obtain accredited pre-entry training to enable them to evaluate and understand the contract they are seeking to enter into
Professional Advice	It is of paramount importance that lessees should take proper independent professional advice prior to accepting a lease, and during the operation of the lease whenever the need arises. Lessees must demonstrate that they have taken such advice or have chosen not to do so	Before a prospective tenant/lessee is offered a substantive agreement, they MUST meet the following requirements: • Demonstrate they have taken proper independent professional advice prior to accepting a tenancy/lease (and during the operation of the tenancy/lease whenever the need arises) • Take professional legal and business advice which should be used to prepare an appropriate business plan
Financial Advice		Financial advisers should ensure their clients are made aware of the effects of changes on the business plan. For the avoidance of doubt a financial health-warning statement should be provided to the tenant/lessee, akin to the warnings attached to financial products such as endowments
Waiver		The above requirements may be waived, at the company's discretion, in cases where the acquiring tenant or leaseholder is suitably qualified through experience and achievement to rely on their judgement or is a company of sufficient standing.

Reasonably competent operator	Codes adopted by signatories to this Framework Code should provide procedures enabling the reasonably competent lessee to understand: • the nature of the business transaction embodied in the lease and trading conditions. • the features of the lease and other business opportunities available based on the assumption that the business will be run by a competent lessee capable of making the best of the opportunities presented	The key principles set out below must be followed to ensure sufficient information is provided to enable the "reasonably competent operator " to understand the nature of the pub business being offered and how this will be embodied in a tenancy or lease agreement.
Heads of agreement	Initial heads of agreement covering principle terms of lease are to be supplied to prospective lessee at the outset with a full copy of the lease before they are asked to sign any commitment	Initial heads of agreement covering the principle terms of a tenancy/lease will be supplied to prospective tenants/lessees at the outset with a full copy of the lease before they are asked to sign any commitment.
Price list	The company's current price list under the terms of the agreement for tied and other products and notification of any imminent changes	The Pub Company's current and relevant price list will be supplied (under the terms of the agreement for tied and other products) which will include notification about any imminent changes
Purchasing obligations	All purchasing obligations and an outline of trading terms (e.g. credit/payment terms)	Where beer is supplied under a tie details of the range of products available will be provided including the prices charged, qualifications for discount and whether the company will allow a guest beer supplied direct from a small brewer to be purchased outside the tie. Where wet products other than beer are also supplied, the terms of the purchase obligations attached to these products will be made clear according to the type of agreement. An outline of trading terms (e.g. credit/payment terms) will also be provided
Insurance	Liability for maintaining and meeting the cost of insurances required – (buildings/contents and business insurance liability)	Liability for maintaining and meeting the cost of insurances required. Full details of the insurance schedule (to include all aspects of cover provided) and the charges payable to the company will be given to the tenant/lessee together with any

		excess applicable. Companies will offer to "price-match" on any like for like policies identified by the tenant/lessee
Amusement Machines	Full and transparent description to be provided of arrangements for all leisure equipment, where applicable, including: terms of supply, number and siting of machines, how machine income and rental is calculated and apportioned, arrangements for the collection of cash	Company policy with regard to the supply and operation of tied amusement machines on the premises. Relevant information will include the terms of supply (whether or not a machine tie exists), number and siting of machines, arrangements for the collection of cash, machine-management support provided and details of how the landlord/tenant share of machine income will be assessed
Capital developments	Shared parameters for any future investment – how any future investment might be shared as between the tenant and the company and the terms thereof and any implications for rent	Company policy with regard to potential opportunities for improvements/refurbishments and any implications for rent.
Flow monitoring equipment		Pub companies to develop a protocol setting out the terms under which flow monitoring equipment may be installed and any further prima facie evidence available.
Licence	Details of the premises licence and any conditions relating thereto (including any enforcement action taken during previous two years)	Before a prospective tenant/lessee is offered a substantive agreement, they MUST hold a personal licence Details of the premises licence and any conditions attached thereto as well as any enforcement action taken during previous two years, where known
Material changes	To the best of knowledge awareness of any material changes of commercial conditions likely to appear in the area (licensees to be encouraged to make full consideration of any competition within their business plan)	To the best of knowledge information about any material changes of commercial conditions likely to appear in the area and how these might influence the business opportunity available
Lease restrictions	Any restrictions contained in the lease on the uses to which the premises may be put (e.g. planning constraints on types of trading and/or hours, disclosure of Use Classes – A3 or A4)	Details of any restrictions on the uses to which the premises may be put (e.g. planning constraints on types of trading and/or hours, disclosure of Use Classes – A3 or A4) will be provided.

Repairing covenants	Company Codes of Practice should, as far as reasonably practicable and possible, provide for the making available to the lessee of information relating to repairing covenants.	Companies will describe the nature, scope and extent of their policy with regard to repairing covenants. Companies will provide the prospective lessee with details about the nature, scope and extent of their obligations in the Heads of Terms agreement.
Pub Building	The pub building (prospective lessees to be urged to inspect the property thoroughly and encouraged to seek independent professional advice on the structure of the property)	Prospective lessees will be encouraged to inspect the property thoroughly, seeking independent professional advice on the structure.
Rent assessment	How the rent will be determined initially Assessment procedures for rent reviews, including those matters that should be taken into account or disregarded by both parties	The rental assessment model will be based on a lawful application of statute and common law. Companies will ensure that the prospective tenant or lessee is aware of the basis of the rental assessment (FMT) and how the market rent for the property is established. The setting of initial rent and its subsequent review will be handled fairly, with reasonable allowances made for costs and sustainable trade. The assumptions included in the rental assessment model will be explained together with assessment procedures for rent reviews, including those matters that will be taken into account or disregarded by both parties. When calculating gross profits for tied pubs the prices charged to the tenant or lessee by the pub company in the relevant tied price list should be used
AWP Rent		It will be made clear in the process of profit assessment that where AWP machines are tied, and the income is shared, such income will not be included in the "divisible balance".
Upward only rent review clauses	New lease agreements should not contain upward only rent reviews but in the circumstances outlined in section 4 the rent may be reviewed downwards after a negotiated settlement, subject to a floor of the initial rent agreed.	UORR clauses will not be included in leases. Some existing agreements may contain UORR clauses and, in such circumstances, company Codes of Practice will make it clear they will not enforce them. In addition, if lessees want a side letter/deed of variation to that effect it can be provided

		though at the lessee's expense. Companies will also provide lessees with the opportunity to convert to new agreements if terms can be agreed. All rent review clauses will be capable of upwards and downwards reviews
RPI clauses		Where a tenancy or lease refers to indexation by reference to the RPI, Pub Companies will notify their tenants or lessees that the adjustment in the rent may be upwards or downwards, according to the movement of the Retail Price Index at the time.
Disclosure and Transparency:		Full disclosure of all relevant information is an essential feature of the relationship between the pub company and tenant/lessee. Pub companies will provide, as a minimum, the following information to any prospective tenant or lessee at the start of a new tenancy/lease or rent review negotiation:
Profit and loss account		*A shadow profit and loss (P&L) account will be prepared by the pub company in good faith based on reasonable assumptions.*
Turnover	Information relating to the trading history of the pub. Precise turnover will not usually be available to the pub company but details of volume purchased from the company directly can be provided	Precise history of turnover and overheads will often not be available as such information rests with the existing or former holders of the tenancy/lease. However details of volume purchased directly from the company over the past three years will be provided where available.
Benchmarking report		Prospective tenants or lessees will be advised about the availability of industry Benchmarking Reports which may assist with the preparation of their business plan
Information at rent review		The same information that is provided at the commencement of new lease negotiations must be provided to all lessees at the start of a rent review negotiation (including a shadow P&L containing all the information prescribed above). In addition to a breakdown of costs, detailed information on

		the assumptions made on turnover by income stream must also be provided.
Goodwill		The treatment of "goodwill disregard" will follow RICS guidance: Any goodwill attached to the premises attributable to the tenant or lessee having achieved a greater level of business than an "average competent tenant" and the effects of the tenant's or lessee's improvements will be disregarded.
Rates		The rateable value used in the rent assessment will be the actual rates payable where available or, if not available, the estimated rates based on FMT.
Rent Disputes	The company should indicate to the tenant or lessee how the question can be referred to an adjudicator for an independent decision, indicating as far as possible the likely costs. Allocation of adjudicators' costs to be disclosed.	Company Codes should set out the procedures available where the rent review is not agreed including the company's internal procedures and the option for referral to an independent expert through PIRRS or arbitration.
PIRRS		Company codes must include details about the Pub Independent Rent Review Scheme and reference to the website www.pirrscheme.com Codes must also contain the company's commitment to support the PIRRS scheme which is a condition of BII accreditation.
Business Support	Codes of Practice to describe the range of support programmes and advice which may be available through the company, including, where appropriate • Commitment to assess capabilities and training needs of lessee and staff • Licences and any relevant training requirements under the new Licensing Act 2003 • Business management advice (tenants/lessees should be advised to obtain professional services in areas such as finance, stocktaking, book-keeping)	Codes of Practice will describe the range of support programmes and advice which may be available through the company . Such support might typically include: • Commitment to assess capabilities and training needs of tenants, lessees and staff • Licences and any relevant training requirements • Business management advice (tenants/lessees will be advised to obtain professional services in areas such as finance, stocktaking, book-keeping) • Brand promotion, merchandising and provision/

	• Brand promotion, merchandising and provision/maintenance of dispense equipment • Outlet promotion and marketing • Procurement benefits • Role of Regional Business Managers (or equivalent) in providing support and professional guidance • Rating advice • Landlords support – external decoration, signage, building repairs	maintenance of dispense equipment • Outlet promotion and marketing • Procurement benefits • Rating advice • Landlords support – external decoration, signage, building repairs (including car parks and gardens)
Material Changes/exceptional circumstances	The Code of Practice should explain how the relationship between the company and the lessee will be conducted during the operation of the lease so that the business opportunities presented by the outlet can be exploited to mutual benefit. Open discussions to be conducted on anything which could have material effect on the operation of the business (lessees to exercise their own due diligence in these deliberations),. or where lessee identifies business opportunities or experiences difficulties through no failing of his/her own including: • A change in the local economy – e.g. imminent or actual opening or closure of a major business in the locality • A major road development • Significant change in the circumstances of local competition where known • Significant brand range changes initiated by the company • Level of sustainable rents in exceptional circumstances • Significant legislative proposals or measures and their potential costs These procedures should include discussions with the lessee about: • Current trading pattern of the outlet • Efficiencies that might be achieved by the lessee • The quantified impact of the change of	Company codes will set out the company's policy for dealing with requests for assistance from competent tenants/lessees arising from circumstances where they experience business difficulties which are beyond their control.

	circumstances which has led to the trading difficulties • New approaches to the exploitation of the outlet designed to improve the trading situation • The potential for further viable investment in the outlet to improve the trading position • The possibility or not of an early surrender of assignment of the lease together with any potential cost implications for the lessee. Reference to be made to any contractual cooling-off periods.	
Assignment	Companies will: • Respond timely to requests for assignment • Explain implications for disposal of business • Provide full details of procedures and professional support/advice available • Disclose all relevant fees • Describe buy back arrangements if any • Give an early breakdown of any dilapidations to allow licensee time to put right before assignment	<u>Lessee Obligations</u>: Lessees wishing to assign their lease (assignors) must ensure that any assignee of their lease receives the same financial information disclosed by the pub company at commencement of the assignor's interest and actual trading figures and accounts for the preceding three years where appropriate . Where information is unavailable the reason for this must be disclosed. The assignor must disclose information as if he were the original landlord and will inform a prospective assignee that they must: • demonstrate they have complied with pre-entry training, • obtain qualified professional advice and produce a business plan. <u>Pub Company Obligations:</u> Companies will set out clearly how they will respond timely to requests for assignment and explain the implications for disposal of the business. Full details will be provided regarding procedures, professional support/advice available and all relevant fees. Buy back arrangements, if any, will be described and an early breakdown given of any dilapidations to allow lessees time to put right before assignment. All pre-entry requirements (including holding a personal licence under the Licensing Act 2003) concerning training or

		evidence based certification of professional or legal advice shall be capable of being waived by the Pub Company in the case of existing lessees or tenants or experienced operators, on production of suitable evidence. Pub Companies will not agree to an assignment unless the above requirements have been complied with.
Dilapidations	Early breakdown of any dilapidations to be given to allow licensee time to put right before surrender and whether fixtures and fittings will be purchased and, if so, arrangements for payment	Companies will provide an early breakdown of any dilapidations to allow lessees time to put right and advise whether fixtures and fittings will be purchased and, if so, arrangements for payment.
Surrender		Companies will set out how it will deal with any requests for surrender of the lease.
Business Relationship/Development Managers	Codes of Practice to describe the range of support programmes and advice which may be available through the company, including, where appropriate: • Role of Regional Business Managers (or equivalent) in providing support and professional guidance	Company codes will set out provisions and commitments governing the competence and future progression of BRM's/BDM's, including qualifications and on-going training Company codes will set out a procedure for complaints and a mechanism to resolve disputes arising from the relationship between the company and the tenant/lessee. Codes will set out the role of BRM/BDM's and the support and professional guidance they will provide.
Restrictive covenants		Individual Pub Companies will make their policy on restrictive covenants clear.

Formal Minutes

Tuesday 23 February 2010

Members present:

Peter Luff, in the Chair

Mr Roger Berry	Mr Lembit Öpik
Mr Brian Binley	Mr Ian Stewart

Draft Report (*Pub companies: follow-up*), proposed by the Chairman, brought up and read.

Ordered, That the draft Report be read a second time, paragraph by paragraph.

Paragraphs 1 to 161 read and agreed to.

Annex agreed to.

Summary agreed to.

Resolved, That the Report be the Fifth Report of the Committee to the House.

Ordered, That the Chairman make the Report to the House.

Written evidence was ordered to be reported to the House for printing with the Report.

Written evidence was ordered to be reported to the House for placing in the Library and Parliamentary Archives.

[Adjourned till Tuesday 9 March at 10.00 am

Witnesses

Tuesday 8 December 2009

List of written evidence

List of unprinted evidence

The following memoranda have been reported to the House, but to save printing costs they have not been printed and copies have been placed in the House of Commons Library, where they may be inspected by Members. Other copies are in the Parliamentary Archives, and are available to the public for inspection. Requests for inspection should be addressed to The Parliamentary Archives, Houses of Parliament, London SW1A 0PW (tel. 020 7219 3074). Opening hours are from 9.30 am to 5.00 pm on Mondays to Fridays.

Mike Bell
British Association of Pool Table Operators
Brulines Group plc
Simon Clarke
Jamie Denham
Sally Jane Emm
Bilgin Ersin
Fair Pint Campaign
The George St Helens
Karl Harrison
Independent Family Brewers of Britain
Independent Pub Confederation

List of Reports from the Committee during the current Parliament

The reference number of the Government's response to each Report is printed in brackets after the HC printing number.

Session 2009–10

First Report	The Creation of the Department for Business, Innovation and Skills and the Departmental Annual Report 2008–09	HC 160
Second Report	Committee Annual Report 2008–09	HC 195
Third Report	Exporting out of recession	HC 266
Fourth Report	Broadband	HC 72

Session 2008–09

First Report	Energy policy: future challenges	HC 32 (HC 317)
Second Report*	Pre-appointment hearing with the Chairman-elect of Ofcom, Dr Colette Bowe	HC 119
Third Report	Work of the Committee in 2007-08	HC 175
Fourth Report	Regional development agencies and the Local Democracy, Economic Development and Construction Bill	HC 89 (Cm 7463)
Fifth Report	The Postal Services Bill	HC 172 (Cm 7623)
Sixth Report	The Insolvency Service	HC 198 (HC 919)
Seventh Report	Pub Companies	HC 26
Eighth Report	Post Offices—securing their future	HC 371 (HC 1002)
Ninth Report	Automotive Assistance Programme	HC 550 (Cm 7706)
Tenth Report	Enterprise Finance Guarantee scheme	HC 588
Eleventh Report	Risk and Reward: sustaining a higher value-added economy	HC 746
Twelfth Report **	Scrutiny of Arms Export Controls (2009): UK Strategic Export Controls Annual Report 2007, Quarterly Reports for 2008, licensing policy and review of export control legislation	HC 178

* First Joint Report with Culture, Media and Sport Committee

** First Joint Report of Committees on Arms Export Controls

Session 2007–08

First Report	The work of the Committee in 2007	HC 233
Second Report	Jobs for the Girls: Two Years On	HC 291 (HC 634)
Third Report	Post Office Closure Programme	HC 292
Fourth Report	Funding the Nuclear Decommissioning Authority	HC 394 (HC 994)
Fifth Report	Waking up to India: Developments in UK-India economic relations	HC 209(HC 1006)
Sixth Report	After the Network Change Programme: the future of the post office network	HC 577 (HC 1091)
Seventh Report	Keeping the door wide open: Turkey and EU accession	HC 367 (HC 1070)
Eighth Report **	Scrutiny of Arms Export Controls (2008): UK Strategic Export Controls Annual Report 2006, Quarterly Reports for 2007, licensing policy and review of export control legislation	HC 254
Ninth Report	Construction matters	HC 127 (HC 1187)
Tenth Report	Post Office finance: matters arising from evidence taken on 10 June 2008	HC 662
Eleventh Report	Energy prices, fuel poverty and Ofgem	HC 293 (HC 1069)
Twelfth Report	Post Office Card Account: successor arrangements	HC 1052
Thirteenth Report	Companies House	HC 456 (HC 206 Session 2008-09)
Fourteenth Report	Departmental Annual Report and Scrutiny of the Department for Business, Enterprise and Regulatory Reform	HC 1116

** First Joint Report of Committees on Arms Export Controls

Oral evidence

Taken before the Business, Innovation and Skills Committee

on Tuesday 8 December 2009

Members present

Peter Luff, in the Chair

Mr Michael Clapham	Lembit Öpik
Mr Lindsay Hoyle	Ian Stewart
Miss Julie Kirkbride	Mr Anthony Wright

Witness: **Mr David Rusholme FRICS**, Director, RICS Valuation Professional Group, Royal Institution of Chartered Surveyors, gave evidence.

Q1 Chairman: I welcome everyone to this session. I begin by making a number of announcements from the chair. First, according to the timings given the BBPA evidence session is to start at 11.15 and the IPC at 12.00 I anticipate that we shall get through the first part of the evidence session relatively quickly and may be able to bring forward the BBPA from 11.15. They are aware of that because I see the witnesses nodding. We may begin the IPC a little late depending on how the BBPA evidence session goes. The second point is a practical one. As I expected, for this important meeting of the Committee the public gallery is very well attended. Perhaps I may explain some of the rules that govern our meetings. Only individuals who are witnesses may speak or pass comment on the issues at hand. If witnesses have staff to support them, as I think Mr Rusholme does, that support can be provided by way of written notes but staff are not able to speak directly to the Committee. Members of the public who are vocal in responding to either questions or answers may be asked to leave the meeting. Turning to a matter of much greater substance, this morning I received a letter from Kevin Brennan, Minister for Further Education, Skills, Apprenticeships and Consumer Affairs, in relation to our report from which the eagle-eyed will learn that the Government has not yet responded; it is well past its normal response date. I believe the important part of the letter is the following paragraph: "Many of the initiatives being taken forward, including the revision of the guidance and codes, have yet to conclude. I believe, therefore, at this stage it is too early to take a decision on whether government needs to intervene." My interpretation of that is that government is holding out the option of intervention but is waiting to hear what this Committee concludes following its deliberations today. With my full consent the Government has not responded to the report and so the option of intervention remains very much on the table. Against that background, let us get down to business. Mr Rusholme, perhaps you would respond to my first question quite briefly: at what stage is the RICS's *Pub Industry Forum Report and Recommendations*?
Mr Rusholme: As everyone will be aware, our forum report was published in mid-October. Since that date we have been consulting widely with those involved in the industry to make sure we have been broadly right in our conclusions and also to do a lot of behind-the-scenes work to ensure that the group now set up to put all our work in motion is a right and balanced one for the task. All the recommendations that have been made in the forum report have been endorsed by the RICS and will be acted upon.

Q2 Chairman: In full?
Mr Rusholme: Yes.

Q3 Chairman: Who is sitting on the reappointed trade related valuation group? Will there be representatives of lessees on that group?
Mr Rusholme: We are still to finalise the exact composition. We are setting up a working group to carry out the revisions to our guidance and the drawing up of our code of practice. We anticipate that from that group will emerge naturally the right people to reinforce participation on our trade group.

Q4 Chairman: I do not want to anticipate what this Committee may think. I believe that a representative of lessees would be no bad thing at all, and I can think of a few very suitable candidates.
Mr Rusholme: I will give you a very clear answer to that: yes, there will be representation from the lessees' point of view and it is crucial that that takes place.

Q5 Chairman: Perhaps I can get to the meat of the single most important issue in connection with the work of RICS in relation to BBPA. The RICS forum report states that the correct interpretation of RICS guidance follows the principle of the tied tenant being no worse off than a non-tied tenant. Is that a principle with which you agree?
Mr Rusholme: It is a statement with which we agree wholeheartedly. If you allow me to elaborate on what is an important point and explain the meaning behind the use of that phrase in our report, it seems to me we have to search quite widely and look very closely at our own guidance and check there is nothing within it that puts the parties at a disadvantage. If the starting point for the calculation of a rent review is market value then it should reflect what happens in the marketplace. One then moves

on to the lease arrangements and the contract between the two parties. In this industry typically lease arrangements will include such things as, very importantly, the price that the lessee pays for the beer. That is a product of the contract; it says what the pricing structure is. In calculating the rent it is wholly right that one takes into account that pricing structure. Therefore, one arrives at a rent that reflects the price the tenant pays for the beer. If there are advantages or disadvantages to the tenant of having a pubco landlord and all that goes with that package then those factors must also be put into the equation.

Q6 Chairman: The valuation of the pubco's relationship with its lessee is a matter of some controversy in the industry, to say the least.
Mr Rusholme: We are wholly aware of the controversy surrounding it and it is one of the key areas where we feel our guidance needs to be clearer in identifying and making it absolutely transparent when we publish an update of our information paper.

Q7 Chairman: There is speculation that on these issues the BBPA has exerted a good deal of pressure on you over the past few months. Is that true?
Mr Rusholme: I would say there has been a healthy debate about how valuation should take place and that is one reason we want to listen to all parties in the industry.

Q8 Lembit Öpik: Do you think you will be able formally to codify the value of that relationship, and is it your intention to do so, so there would not be any speculation; it would be almost formulaic?
Mr Rusholme: We are beginning to undertake two principal pieces of work. One is a review of the guidance itself and the second part of that is to come up with a code of practice for the parties, principally at rent review, and that is to cover such issues as better disclosure of comparable information, going back to the initial letting issues such as providing a breakdown of how the rent is calculated and using that as the basis of the rent calculation at review. The idea behind our code and revised guidance is that if we can take as much conflict out of the process as possible it will make it a lot easier for the two sides to come together and reach sensible agreements without having to move on to arbitration or any other resort.

Q9 Lembit Öpik: In that case are you looking for some kind of formula?
Mr Rusholme: I would not put it as a formula. One thing that became very clear from the forum report and also a review of the transcripts of previous meetings of the Committee is that there appears to be overwhelming support for the concept of the profits method as a way to calculate the rent for rent review and setting rents. We need to do a lot more to flesh out guidance on how that is calculated so that the parties understand a whole set of very complex variables in greater detail. If we can put more behind that it will develop a code and better valuation guidance which has certainly been lacking up to now.

Q10 Mr Hoyle: You referred to "a healthy debate" which I find an interesting expression. Do you mean there has been a pleasant exchange or an arm lock has been placed on you by those who say they have given you work and they want you to listen to them a little more and accept what they say?
Mr Rusholme: I would still use the words "healthy debate".

Q11 Mr Hoyle: You do not deny that that happened?
Mr Rusholme: I do not deny that there has been a healthy debate.

Q12 Mr Hoyle: Have bully boy tactics and an arm lock been employed on the basis that they give you a lot of work?
Mr Rusholme: Not at all. My role at the RICS is as head of valuation standards. I do not practise as a surveyor. One of the principal purposes of the RICS is to be independent and act in the public interest. We set valuation standards for the whole industry and we will not bow to influence by one particular party for its own good.

Q13 Mr Hoyle: There were no threats or intimidation?
Mr Rusholme: Absolutely not.

Q14 Mr Hoyle: It was a nice, gentle chat?
Mr Rusholme: We have had discussions between professional bodies and interested parties as well.

Q15 Chairman: That clarifies the matter. Obviously, we shall also push the BBPA on those issues later because it is important to hear their perspective on the "no worse off" principle. What is your definition of a reasonably efficient operator?
Mr Rusholme: I would have to look up the exact technical definition. Maybe it would help if I told you where the phrase originated. Our RICS valuation standards follow international ones. International valuation standards are set on a global level by the accounting professional bodies. The phrase "reasonably efficient operator" comes from international valuation standard definitions and was adopted by the RICS and is a broad term to describe part of the process of calculating the value of an asset. Would you like me to be a little more specific about the definition?

Q16 Chairman: That can probably be the subject of a written exchange. Another important expression, which I suspect is more a term of art, is "goodwill". The treatment of this is a particularly difficult one to define. Do you propose changes in your guidelines about the definition of "goodwill" to clarify the position?
Mr Rusholme: Goodwill has always been an area of controversy not just in setting rents in the pub sector but in all commercial property sectors. There is already quite extensive guidance within our

information papers and guidance notes on the treatment of goodwill, in particular the separation of goodwill which is personal to the individual who holds the lease from the goodwill that runs with the property. I have detected that in the pub sector there is more we can do in our guidance to provide greater explanation about that term. Again, that is something we are looking to do.

Q17 Chairman: You will be doing that?
Mr Rusholme: We will.

Q18 Chairman: I put a factual question to which I suppose I should know the answer. When a RICS member values a pub does he just give an overall figure or is there a requirement to give a complete breakdown to explain how the figure is calculated?
Mr Rusholme: That is probably best answered in the context of preparing a rental valuation at rent review because I detect this is one of the most controversial areas in the whole process. If a chartered surveyor is engaged, say, by the lessor or owner of the pub to negotiate a rent review it is good practice to pass on as much information as possible to the person one is trying to persuade to accept that rent. Giving a full breakdown of the rental calculation is absolutely fundamental to that process and should happen in all cases.

Q19 Chairman: It should happen as good practice but it is not a requirement?
Mr Rusholme: I agree it is good practice. I believe that all chartered surveyors would operate on that basis. I cannot tell you off the top of my head where it is written down.

Q20 Chairman: Perhaps you can correspond with the Committee on that point.
Mr Rusholme: I will.

Q21 Chairman: I have seen some very different presentations of rentals from pubcos certainly to their tenants or lessees: some are exemplary and others are, frankly, shocking.
Mr Rusholme: Would you mind if I draw a distinction here? There is a distinction to be made between rental proposals by chartered surveyors who have been engaged to carry out this work and business development managers or representatives of landlords who are doing this without any reference to chartered surveyors. As to the latter category I agree that there is much concern about what information has been provided.

Q22 Chairman: That is also my view. Without going into the details of it, how important is the *Brooker* case for rent review purposes in dealing with the issue of divisible balance?
Mr Rusholme: I believe that from time to time in all areas commercial valuation cases come along which have particular significance and the *Brooker* case is one of those.

Q23 Chairman: Therefore, is the figure of 35% a new benchmark?
Mr Rusholme: What I like about the *Brooker* case is that it has helped to dispel the myth that RICS or any other body sets in stone that there should be any particular split of divisible balance, be it 50-50 or whatever. Within *Brooker* there is a lot of discussion about risk and how one encapsulates it ultimately in the amount of money the tenant will pay. That is a very healthy discussion to have and an area where our guidance will provide a lot more support in terms of exactly where risks and rewards are taken into account.

Q24 Miss Kirkbride: One of the recommendations in the report of the Select Committee on Trade and Industry in 2004 was the establishment of a national register of rents to make things much more transparent. It appears you have suggested a national database of trading information as a better alternative. Can you explain how that would work and why you think it is a better proposal than our original one?
Mr Rusholme: We recognise that for a long time there have been calls for a national register of rents. Various groups including ourselves have looked at the practicalities of achieving that. There are lots of difficulties related to data protection issues and gaining the co-operation of the industry to make that happen. We came up with a better idea in the forum report. We looked at a number of other industries which had a trading element, for example hotels. There is a good deal of benchmarking information provided in that industry which is very helpful in getting the parties to come together in negotiations. That is one part of it. The other part is that chartered surveyors who act in that sector have their own databases of information and it is part of their skill and job to put together that information. One needs a whole range of information sources to make the process easier. We believe that benchmarking will do that job and that is achievable because there is an averaging of data from different sources; it is not just identifiable to one particular public house, for example. By averaging and making trading information slightly more discrete one is better able to get the whole industry to start to make more of that data available. We believe there is a lot of mileage in pursuing a benchmarking scheme and at the moment our efforts are devoted to trying to make that happen.

Q25 Miss Kirkbride: Are you getting both landlords and tenants to co-operate on this idea?
Mr Rusholme: At the moment there is a very good basis in that the ALMR runs a benchmarking scheme which takes information from a lot of tenants and lessees in this sector. We are looking at that and have a very healthy dialogue with that organisation on whether or not that is the place on which we should build. We are talking to a number of commercial providers of such databases in the marketplace. In addition our working group will be conducting a lot of work on the type of variables in a benchmarking system which will be useful to the

industry and in the course of the next few months we will be able to pull the whole thing together and recommend the right direction in which it should go.

Q26 Miss Kirkbride: You said you were obtaining information from tenants and lessees. Did you mention landlords?
Mr Rusholme: Most of the existing information provided to the ALMR system comes from tenants. What we would like to see is the development of a benchmarking system which works on the basis of all the industry including the operators and pubcos being able to feed into that as well. That is vitally important.

Q27 Miss Kirkbride: Have the pubcos and landlords refused to co-operate so far?
Mr Rusholme: We have not reached that stage in our investigations.

Q28 Miss Kirkbride: Is that because you have not asked them or they have just ignored you?
Mr Rusholme: We have not asked them directly. What we want to demonstrate first is that there is a system which will comply with data protection and give comfort to all sides that if they provide information to the benchmarking system it will be secure and useful. We would encourage all pubcos and owners to co-operate on that.

Q29 Miss Kirkbride: Who will maintain and update it?
Mr Rusholme: It is still to be decided whether it is the ALMR, an outside commercial body or whether the RICS has the capacity to take that on.

Q30 Miss Kirkbride: Who would be allowed to access it?
Mr Rusholme: It should be open to both lessors and lessees in the sector. The one in the hotel industry works on the basis of subscription; the one currently run by the ALMR does not work on the basis of a charge so it is pretty much open to all involved.

Q31 Miss Kirkbride: The Independent Pub Confederation has put forward the argument that in the cost basis of a rental calculation allowance should be made for time spent on pub business by the lessee. Is that something you are thinking of including in the database?
Mr Rusholme: Certainly, it is a variable that can be captured in a database. Yes, one can identify those costs by running a database or benchmarking system.

Q32 Miss Kirkbride: Are you going to include it or are you thinking of doing so?
Mr Rusholme: There are perhaps two separate issues here. First, the question is whether it is information that can be captured in a benchmarking system. Clearly, it can be. I suspect that the second part to the IPC's argument is whether in rental calculations allowance should be made for a manager's cost or a salary cost. I think that is a little more difficult. If it is included the consequences may be a little more than we wish because it goes back to the basis of valuation which is to establish what someone would pay in the market. What variables you put into the hypothetical calculation are only a way of getting to that answer. I am unsure whether it will add a great deal to that process.

Q33 Mr Clapham: Obviously, the code of practice will be enormously important. You referred earlier to the rent analysis statement being a very important aspect of the code. Are we likely to see in the code a reference to the types of variables that will be in the rent analysis statement?
Mr Rusholme: Very simply, yes; that is very much the direction we are looking to take with this.

Q34 Mr Clapham: In developing the code have you had discussions with the BBPA? Are you working together to avoid the possibility of two codes? If there were two valuation codes operated in the industry they would present a challenge.
Mr Rusholme: I agree with the comment that this seems to be an industry with quite a lot of codes.

Q35 Chairman: It would help if they followed them occasionally.
Mr Rusholme: As to a RICS and BBPA code I am aware of the latter which is being developed. It has not been published but we have had some sight of the direction that it is taking and we are very encouraged that it seeks to cover quite a number of issues we have recommended in our pubco report. As to whether we should join with that code or provide our own, our thinking is that we should provide a free-standing RICS code covering the issues that pertain purely to property and rent setting. It is stronger if it is free standing. I recognise that perhaps there are issues of enforceability of the code. If it is free standing it is clear that for our members it is mandatory and they should follow it.

Q36 Mr Clapham: That is an important statement. If there are too many codes it just makes for difficulties. If we have a RICS code it will be one that is acceptable throughout the industry; it will make things much easier when it comes to working out rent issues. Will you be pressing for that to happen rather than that there should be two or three codes? We now have the BBPA talking in terms of a code which you say is encouraging. Is it not possible for the two of you to come together and introduce one code that will be important for valuation?
Mr Rusholme: It is our intention to develop a free-standing RICS code.

Q37 Chairman: The important objective must be that nothing in the BBPA code, which deals with issues much wider than valuation, should conflict with the RICS code.
Mr Rusholme: I think so. If ours is only part of that code which deals with a wider range of issues there is a risk that it may become somewhat diluted and there will be confusion as to where authority and enforceability lie.

Q38 Mr Clapham: When are we likely to see the code? When will it be implemented?
Mr Rusholme: Our thinking is that it should be in place by the spring of next year.

Q39 Chairman: For politicians spring can be a rather flexible feast. What do you mean by "spring"?
Mr Rusholme: Our working group is to have its first session in January and perhaps it can come to its conclusions in six or seven weeks. I am mindful that there must be proper process; it must be got right, and to rush into something would be the worst kind of advice. Like this Committee, we consult on guidance that we publish. A consultation period would be built into that, hence it will probably be April or early May before it is published.

Q40 Mr Clapham: You referred earlier to enforceability. Do you expect the RICS code to be enforceable on anybody who values the rent aspect of a public house? For example, pub companies have development managers. Are we likely to see the RICS code being enforceable on them?
Mr Rusholme: The strict answer is that we can develop only a code by which our members abide. We would certainly call for everyone else in the industry to use that code and abide by it.

Q41 Mr Clapham: What kind of response have you had from the industry? Does the industry see the importance of a code that is enforceable across it and therefore are you encouraged?
Mr Rusholme: I am optimistic and encouraged that that can happen.

Q42 Mr Clapham: Where there is a code that is not adhered to normally there are sanctions. What kind of sanctions do you envisage being imposed if people deviate from the code or refuse to accept it?
Mr Rusholme: There are a great many sanctions within the armoury of the RICS as a professional organisation from arm's length regulation to a full range of disciplinary powers.

Q43 Mr Clapham: Has it been made plain to the pubcos that this is something you are looking at and there will be sanctions if people do not adhere to the codes?
Mr Rusholme: The sanctions will apply to chartered surveyors operating in this area.

Q44 Chairman: But not to businesses?
Mr Rusholme: Unfortunately, I do not have the power to make that happen.

Q45 Mr Hoyle: You have summed it up, have you not? You can put some meat on the bone only as far as your own organisation is concerned and that is the weakness of it. We come back to enforceability. The truth of the matter is that you can enforce it only against chartered surveyors and without that it is a toothless tiger. Are you not asking that this be mandatory across the whole industry?
Mr Rusholme: There is great merit in taking that route if others can make that happen.

Q46 Mr Hoyle: The only way it can make a difference and make things happen is if everybody signs up to it.
Mr Rusholme: Certainly, the stick of making that happen is an attractive one and perhaps the carrot is to come up with well thought-out advice in the code which has the industry behind it. If we can carry those involved along with us in preparing the code there must be a greater chance that people will stick to it once it is published.

Q47 Mr Hoyle: Who do you believe will be the fly in the ointment in coming up with a mandatory code?
Mr Rusholme: I would not single out any particular organisation.

Q48 Mr Hoyle: Is it your belief that this morning everybody will be happy; it will all be done and dusted and they will be with you all the way and will sign up to it?
Mr Rusholme: If we can carry everyone along in the process there is a good chance of people adhering to it.

Q49 Mr Hoyle: I think they are in danger of falling out of bed, waking up and facing reality. Is the truth of the matter that there are certain people from whom we will be hearing evidence who will not be quite as enthusiastic as yourself?
Mr Rusholme: I agree that it must be a combination of the two. If there are some mandatory ways to make this happen we would very much welcome it, as we would any support in achieving that.
Mr Hoyle: That is very fair of you; at least you are honest enough to say that a mandatory code is the way forward in reaching a solution. Let us hope everybody listens to you.

Q50 Mr Wright: If we turn back to the question of valuation, is there any element of it that takes into account the wage or salary of the publican?
Mr Rusholme: As I understand the profits method at the moment there is no specific allowance for the salary of the lessee himself. You make allowances for those you employ. Where that is reflected in the calculation is in the split of the balance that is apportioned at the end of the process. There is no one line in the calculation that deals with a wage to the lessee.

Q51 Mr Wright: Do you not think that should be included? We have heard all sorts of stories from various publicans who have significant incomes but the salaries and wages they draw are not commensurate with sales of £400,000 or £500,000 and salaries of perhaps £15,000 or £16,000. Do you not think there should be a standard within the valuation which says one should not go below a certain wage level?
Mr Rusholme: I agree that it is a very important element and it would be ridiculous to set rents that did not make an allowance in the split of profit for making a living or profit out of the business. As to where it is reflected in the calculation is something on which we would like the new guidance to focus

specifically. At the moment it is to do with how one apportions the balance of profit at the end. Of course there must be a commonsense check that it provides a decent living and return to anyone operating the business.

Q52 Mr Wright: The figures indicate that 65% receive less than £15,000 a year. For the hours put in that does not appear to be commensurate with an attractive option for those who want to come into the industry.
Mr Rusholme: It is only right that our rent guidance reflects a fair reward at the end of the day for the operator. It comes back to what people are prepared to pay in the market. If potential lessees are making high bids for rents in the first place it is very difficult to argue that rent levels should not follow those levels. A lot of things are changing now; for very obvious reasons rents are falling and rents at review should also fall. You also have to counterbalance that in the equation.

Q53 Chairman: Those are all the questions we want to ask you. Is there anything you particularly want to say that we have not covered?
Mr Rusholme: I do not believe so.

Q54 Chairman: The message of this Committee is: stick to your guns. We are encouraged by the progress RICS is making but it needs to stick to that and not slip back.
Mr Rusholme: That is recognised.
Chairman: Thank you very much.

Witnesses: **Mrs Brigid Simmonds OBE**, Chief Executive and **Mr Alistair Darby**, Managing Director, Marston's Pub Company, British Beer and Pub Association, gave evidence.

Chairman: Welcome. We all know who you are so we can dispense with the usual formality of introductions. When your colleagues representing the pubcos appeared here last time the trade press described it as a Spanish inquisition. That was not our intention. We are after the truth. Although Mr Darby is one of my constituents I am afraid that will not prevent me being a dogged searcher after the truth today. The Committee is disappointed that the industry did not respond more fully to the 2004 report and that we have to have these evidence sessions at all. I agree with the industry that there are other very important questions facing the future of British beer and pubs that need to be addressed, but this issue just will not go away; it simply has not addressed it. Almost the central question for us today as a committee is one that may provoke a titter in the public gallery, namely: can we trust you? I do not feel that we can and you need to persuade us otherwise. The reason is that the reaction by your industry to our May report was so bitterly disappointing. Let me quote what a few people have said. Enterprise Inns only recently described the Committee as being ill-informed and said the report was based upon hearsay rather than evidence. I reject that absolutely. Shortly after the report came out on 13 May Enterprise Inns said that, "The Committee has chosen to focus upon a highly emotive, and we believe unsubstantiated, allegation of systematic and widespread abuse by pub companies of their licensees." We think it is very well substantiated. The former head of Punch Leasing Division, Deborah Kemp, who to be fair is no longer in the industry, talked about the stage being monopolised by a minority group of bigoted and ill-informed MPs egged on by a small number of self-interested pressure groups. Mrs Simmonds, you yourself said of the OFT response to the recent CAMRA inquiry that the industry had a clean bill of health. I do not believe that even the most benign interpretation of the OFT report is that the industry is given a clean bill of health. The result of the OFT decision was disappointing, but it was not a clean bill of health. Giles Thorley, the man who misled this Committee when he gave evidence about flow monitoring equipment, described us as a "kangaroo court". Brulines said they were considering legal actions over claims made in the report. This is the kind of thing we are dealing with. I cannot remember the exact words but they said that at best it was irresponsible and at worst scandalous and the Committee was very lucky to have parliamentary privilege "after writing this trash. But I take heart from the fact that very little credibility will be given to them, given the current furore over their expenses." Brulines are wrong about that. Enterprise Inns' Ted Tuppen said, "Without parliamentary privilege, we would be considering action." If that is what Mr Tuppen has written it is not an idle threat. Being bullied, threatened, intimidated and slagged off is hardly an encouraging response from the industry to what was a very serious and well received report. That is the background to today's session which makes your task more difficult than it need have been. I ask the first question.
Mr Hoyle: Chairman, I think the witnesses ought to reply to what you have just put.

Q55 Chairman: Mr Hoyle is absolutely right in his comment, but my first question gives them precisely that opportunity. No major improvements were made following our 2004 report. Why should we not believe that that will be the case again after all I have said to you.
Mrs Simmonds: Thank you for that introduction. In sitting here the British Beer and Pub Association is not in any way complacent; we take the criticisms of this Committee very seriously. We have worked extremely hard in the past few months to come up with a new industry code that we believe gives greater detailed financial information to both prospective and actual tenants when rent is reviewed. It provides accredited training for both business development managers and prospective

tenants and above all we have PIRRS which will allow lessees and tenants to take concerns about their rents to that independent scheme which is already up and running. We are not in the slightest bit complacent. We genuinely believe that there is a sea change and hope that during the next hour we will have the opportunity to talk about any concerns you have and how we will tackle them.

Q56 Chairman: Your answer to my fundamental question which overhangs the whole session—why we should believe the same thing will not happen again—is what? Members of the industry including quite senior people within the BBPA said to me they had not realised the codes were not being followed and they were shocked by many aspects of the report. I have had some very encouraging and helpful discussions in private with many senior figures in the industry. That is why I take the comments I have just quoted so badly. I believe that most people in the industry think we have put our finger on some important issues. How can we trust you this time?
Mrs Simmonds: The overriding and important part of this is transparency. We must be open and honest with our tenants; they have to understand how the system will work in future and must have a low-cost process by which they can take action if they believe that the rent set is not the right one.

Q57 Chairman: Do you believe that the kind of response given to our report last time round by some high profile people in the industry is a helpful way to engage in public debate?
Mrs Simmonds: I do not think it is in the slightest way helpful. At the end of the day we have to come up with something that will work better. We need a system whereby everyone can understand how it works and an industry code—we have sent a draft to the Committee—to which all our members are committed in terms of its implementation and new company codes which will be accredited by BII. I am aware that the British Institute of Innkeeping has written to you separately on exactly how that will work and I am very happy to discuss that in due course today.

Q58 Chairman: I have seen the code and I agree that it is a great improvement on what has gone before; it has many things in it that I welcome. When do you expect it to come into force? It has not been approved yet by the BBPA; it awaits formal approval?
Mrs Simmonds: It has not been approved by the BBPA, and it must also be approved by the FLVA and BII who are co-signatories. We hope to have that done by the end of the year. We will then go through the process of bringing all the individual company codes into alignment with the overarching industry code. All of those codes will have to be implemented. We have said we expect to have the majority of those codes fully implemented by June of next year. We may need additional time particularly for some of the smallest tenanted individual company codes to be taken in.

Q59 Chairman: I have talked to some of the small regional brewers who are concerned about the compliance costs of the code for which I have some sympathy. It is easy for Enterprise and Punch to throw resources into these codes; it is much more difficult for small family brewers to cope. You are talking about extra time for enforcement of the codes. There are many fewer problems with the smaller regional brewers. Is it a matter of lighter codes or just extra time to bring them in?
Mrs Simmonds: We have to make sure that the code is applicable to a brewery tenancy and a fully leased pub. If you have a full repairing lease that is very different from a three-year tenancy. It is a matter of making sure that your practice is one that is reflected in the company code.
Mr Darby: Having chaired the BBPA working party in response to your report I should like to give a little background. I have been Marston's Pub Company's managing director for only a year. Prior to that I was in charge of our beer company and therefore operating in the free trade, so I have had experience dealing with free trade customers for six years: supermarkets and effectively non-tied customers. I come from an arena where you win business only if you do a good job for your customer. When I took over as managing director of Marston's Pub Company it was striking that the then existing industry relationships highlighted by the BESC report were simply not sustainable. It does not make good business to have unhappy relationships with your tenants. We as a business do care about the tie. We own five breweries and we have a lot of people employed in them and ensure we have successful, viable businesses with people employed in breweries and in delivering beer and so forth. But we recognise that you have to earn the tie. In the working party that I chaired there were a number of people including me who were new to the industry, for example Roger Whiteside at Punch. Here is a group of people on the working party who recognise that some very serious concerns are raised by the BESC report and they have to do a substantially better job this time than it did post the TISC report. Do not forget that the working party included not only Enterprise, Punch, Marston's and Greene King but also a cohort of small family brewers including Stephen Gould from Everards and Fullers. This was an industry-wide group that was determined to make a difference. I give you my reassurance that having chaired that group with my reputation being on the line those people absolutely want to make a difference and are determined to ensure that the new code is established and properly conducted in the trade, not least because fundamentally that is good for business.

Q60 Chairman: Obviously, I am encouraged to hear you say that; it is what I want you to say, but the fact remains that on 29 September our report was described by Enterprise as "ill-informed and based upon hearsay rather than evidence". Therefore, I am not filled with confidence that the optimism you express will be translated into practice.

Mr Darby: I understand that. Equally, I ask you to understand that in response I have had some fairly strong words with my colleagues at Enterprise. You are right. If you are trying to win trust and confidence in the industry you have to behave with decorum and I think that message is very clearly understood by my colleagues in Enterprise which was a very active member of the working party.

Q61 Ian Stewart: For 20 years I was regional secretary of the Transport & General Workers Union for the food and drink industry. I dealt with most of the breweries. That is the interest I declare. When you made your statement you presented it as though the relationship between your organisations and customers was all sweetness and light and completely equitable and acceptable. Is it not the case that your organisations have more power than your customers and what you do is push customers to the edge of acceptability and sometimes they go over the edge?
Mr Darby: As you would expect I disagree with that.

Q62 Chairman: Are you talking about from your personal perspective or Marston's?
Mr Darby: I was going to ask whether you wanted me to respond in terms of Marston's Pub Company or as an industry?

Q63 Ian Stewart: Both.
Mr Darby: As an industry I would make the point that fundamentally we will have successful pub businesses in the long term if tenants and lessees can make a decent living out of pubs. You know as well as I do that if tenant or lessees across the business cannot make an acceptable living there will be business failures, churn and dissatisfied relationships and also in the short and medium term the business will under-perform. That is not good business. It is no different from when I dealt with Sainsbury, Morrison and Waitrose. I knew that if they were not happy with the terms provided when I was with the beer company sooner rather than later there would be a problem.
Ian Stewart: Do you not accept that in the relationship you describe customers of Sainsbury and Waitrose have more power than publicans?

Q64 Chairman: For me the crucial issue here is the revelation of the power exercised by big businesses in relation to small ones.
Mrs Simmonds: This independent review system, which has clear accreditation by BII which will go out and seek the views of licensees and name and shame companies and eventually take away the accreditation of those company codes if they are not followed, gives much more information and power to the individual lessee to take it up with the BII if it is believed the code is not being followed.

Q65 Mr Hoyle: Pub beer used to be twice as expensive as supermarket beer. The fact is that now it is four and a half times as expensive in pubs as in supermarkets. That tells me that the supermarkets have the power over you at the same time that you have power over the publicans and that is what has gone wrong in the industry.
Mr Darby: I could probably speak for hours on end about what is going on with alcohol in supermarkets. I have worked in this trade and we are not comparing apples with apples. In particular in the case of supermarkets alcohol is one of the few product groups that can be promoted in a store to build traffic. A shopper will change his or her decision as to which supermarket to use, so there is a different dynamic going on in supermarkets. The point I am trying to make—forgive me if I did not get to it quicker—is that if our tenants and lessees cannot make a long-term sustainable good living from their pubs, they know how to from the start because they are given a very clear explanation of what we think the pub is capable of doing.

Q66 Chairman: That has not been so in the past.
Mr Darby: Absolutely. The whole point about the BBPA revised code is that it will be an absolute obligation for us to make that information clear; indeed, we will recognise it as a success if a prospective tenant or lessee with a particular interest in running a pub that is local to him—perhaps he has drunk in it in his youth—sees the figures and says it is not a business he wishes to run. If he walks away then the code will have worked admirably. We must get to a situation—this code does it—where a new tenant or lessee coming into the industry never says after the event that he did not know what he was signing up to. I appreciate that that has been an issue and it underpins a lot of the trouble we have had over the past year or two.

Q67 Chairman: Perhaps I may deal in parenthesis with assignments of leases.
Mrs Simmonds: There will be a requirement on the assignor to have as much information as is provided to the lessee. That information must be provided and the pub company must be satisfied that whoever the lease is assigned to has that information. There is no doubt that that has created problems up to now. Just as negative equity occurred in housing a lot of people have bought leases at prices which are different from what they are now worth.

Q68 Chairman: Enforceability is really the key. What happens if the pub company breaks the code? The old code was broken or ignored by pub companies. What happens now?
Mrs Simmonds: If the pub company breaks its code the BII will be undertaking telephone and online surveys so that complaints can be registered. Those complainants will remain confidential. A summary of the information will be reported to the individual pub company and feedback will be given. If there is a persistent code breach it will result in the removal of accreditation.

Q69 Chairman: What is "persistent"?
Mrs Simmonds: Measurement will be by repetition of a particular non-compliant practice or a cumulative picture, so it is up to the BII and the

board, which has on it representatives of lessees as well as members of the BII, to deal with it. They will be able to pick it up eventually and take it away. There is absolutely no doubt that these codes will be dealt with by a court of law.

Q70 Chairman: This is a very important point. Explain that to me at greater length.
Mrs Simmonds: The individual agreement will be signed by both the pub company and lessee. If the pub company then breaks the code and it ultimately goes to the court there is absolutely no doubt that the court will take into account the fact that the agreement was signed by both parties. As far as we are concerned in any dispute it is absolutely essential that a breach of the code is taken into account by a court of law.

Q71 Chairman: Because the code becomes part of the contract between the landlord and lessee it is actionable in civil law?
Mrs Simmonds: Yes.
Miss Kirkbride: That we welcome. On the other hand, why not consider having a scheme whereby there is a code under which when there is a disagreement the BII has its own body to adjudicate upon it and decide who is right and who is wrong? One of the problems facing lessees is the cost of going to court and the difficulty it creates with the landlord, whereas with an inhouse mandatory process the decision is one that sticks.

Q72 Chairman: But mediation did break down in this area.
Mrs Simmonds: Yes. That is exactly how the new scheme works. For the lessees themselves there would be a cost; it is £1,000 to £1,500 depending on where it is. That will take one to the arbitration system to deal with rent review which is run by BII.

Q73 Chairman: That is purely to do with rents?
Mrs Simmonds: Yes.

Q74 Chairman: We will deal with PIRRS later. We are talking about a broader range of issues.
Mr Darby: The code also mandates any BBPA member in their own individual company code to make absolutely crystal clear what their dispute resolution process is effectively at no cost. There should be a process where nobody incurs fees to confront a dispute and therefore there should be an escalation process that must be explained in each company's code of conduct. That should be designed to ensure that both parties can resolve any disputes as far as possible without incurring any costs by following a very clear dispute code. That is no different from an employee grievance process, for example, that all companies would have.

Q75 Miss Kirkbride: Why do you say "as far as possible"? If adjudication of the code is a mandatory part of the process why should it ever end up in court? What is the endgame that means it ends up in court if there is a mandatory process that falls short of court?
Mrs Simmonds: There are two sides to the BII: first, there is PIRRS which deals with rent reviews; second, BII is also responsible for accrediting the codes, full stop. It has a system whereby it will be able to remove accreditation. It is not just to do with rent; it covers all the issues encompassed in the code.

Q76 Chairman: But BII is in part funded by the pubcos and some lessees become uncomfortable with that arrangement.
Mrs Simmonds: We are very lucky in our industry that we have a professional body in BII. We should make greater use of it. We are one of the few industries with a professional institute that is so interested in raising standards. As far as I am concerned it would be considered to be independent by all parts of the industry. Indeed, the individuals on the board that is to be set up will not be members of pubcos; they will be individual licensees and other representatives.

Q77 Chairman: Enterprise Inns has said it is in favour of an independent body to provide "business advice, legal support and representation" and apparently is willing to provide financial support for such a body. Why has that idea not been taken forward?
Mrs Simmonds: It made that offer to the FLVA. We consider that the FLVA and BII between them represent about 9,000 licensees. They would be happy to provide more funding for that mechanism through those two bodies.
Mr Darby: In order that we do not effectively have the same problem again it is important that any such body is created arguably without the impetus of the pub companies. The danger is that if we are involved in the creation of an independent body that reviews disputes we shall be accused of again being the paymasters of that organisation. The key to the point made by Enterprise is that if an organisation came forward with such an arbitration process, such as the FLVA or others, it would be keen to support it as I am sure would other organisations in the BBPA, but for that arbitration process to be considered independent of the pub companies it must be those organisations that come forward with the proposal; otherwise, we will come back in the same loop.
Mrs Simmonds: Just as we make the point that we have many codes of practice we do not need yet another organisation. We have lots of organisations. I believe that FLVA and BII adequately represent them.
Mr Clapham: RICS stated that it was encouraged by the work you were doing. If we are to have a mandatory code it must be one that is acceptable right across the industry. To a large degree RICS is independent but at the same time I recognise the connection. It seems to me that the mandatory code ought to come from the independent input. From what we hear perhaps there is now an opportunity to introduce a code that really can be mandatory.

Q78 Chairman: That is the theme of the questions Mr Wright intends to put later, so perhaps that can be banked because we will return to it. If there is a great threat of being chucked out of the BBPA, Greene King is walking out of it but it does not appear to have suffered any damage to its reputation and it believes it is better off outside. We shall be meeting Greene King later to discuss the background to its position in greater detail. Therefore, the great sanction you have is one that is being willingly embraced. Is Wetherspoons a member of the BBPA?
Mrs Simmonds: Wetherspoons operates only managed sites. Greene King continues to be a member of the BBPA for the next year. It has announced its intention to leave the BBPA in September next year. It has assured us—I am sure it will also assure you later—that it has every intention of having its code accredited and will make its contributions to PIRRS because it is industry-funded and it will abide by any sanctions.

Q79 Chairman: I appreciate that Wetherspoons does not have lessees but it feels it does not need the imprimatur of BBPA to be a reputable pub operator. If a pub company is not happy with an adjudication it can just give a year's notice and leave BBPA.
Mrs Simmonds: To be fair, I have been the chief executive of BBPA for only three months. I would hope to have a good conversation with both Wetherspoons and other potential members of the BBPA out there and encourage them to become members. I believe this will set a standard. This is about raising standards of training, the information that is made available to everybody and transparency.

Q80 Chairman: To me the obvious solution is to make the code a statutory one.
Mrs Simmonds: I have never been in favour of a statutory versus voluntary code. I think you will find that a statutory code provides less information and a lower standard than a voluntary one. We have come up with a voluntary system that has real teeth in the form of the BII which will be able to pick up cases where companies do not follow exactly what is required by their codes.

Q81 Chairman: Mr Darby, you are an operator of pubs. From your point of view what would be the effect if you were kicked out of the BBPA?
Mr Darby: If we were outside we could have a code of conduct, but clearly because the BII and BBPA are linked we would not have a BII-accredited code. Over the past few months one of the great outcomes of everything that has been going on in the industry is that the extent to which prospective tenants and lessees now investigate whether or not you are the right pub company to join has absolutely gone up another gear. Underpinning all of this is that if one is to be a successful pub company that attracts the best tenants and lessees one will have to pass muster with those individuals. If Marston's Pub Company or any other does not have a competitive, fair and transparent code of practice I am convinced that as time goes on it will be at a commercial disadvantage. Why would I go to a pub company that did not have an accredited code of practice and therefore certainty of protection?

Q82 Chairman: One striking feature of the survey that informed our report was that the majority of publicans chose their pub because they wanted to be in that pub or community; it was not the pubco they chose. Do you suggest that what has been a driver of the industry will change; if so, how?
Mr Darby: There must be an absolute change in the industry. Having been in the industry for only a year, we must reach a position where people take on pubs because first and foremost they make a business decision, not an emotional one. We have a part to play in this; we have been responsible for appointing these people to pubs and so we are part of the problem. We are trying to solve that problem going forward. I do not want somebody to take on a pub for emotional and not business reasons. All of the evidence is that after the event the relationship rapidly sours. I do not really care whether somebody who comes to a pub knows it well and has drunk in it; I want the individual to look at the prospective P&L, take individual advice and be trained by the BII to understand what he is letting himself in for. Then we can talk about whether or not it is still the right pub for that individual. That is where the mistakes have arisen. Too many emotional and not enough commercial decisions have been made.

Q83 Chairman: One view is that some of the big pubcos are not motivated by those kinds of thoughts at all. Perhaps the people who owned them intended to flog them in two or three years and long-term decision-making was not part of their thought processes; for Marston's and small family breweries it clearly is. The idea was that they were in it for short-term gain, the mountain of debt then grew and their business model failed and we are dealing the consequences of it.
Mr Darby: Whether one views it as a benefit or disbenefit, the result of the spotlight being shone on this industry is that the issues that need to be attended to are absolutely in open forum. If one is a company that is not being run in a sustainable and effective way that will present one with all sorts of business risks going forward. I will not enumerate that any further because it would be inappropriate to do so, but it is no different from you or me trying to get a mortgage on the basis of a bad payment record. We will struggle to get a mortgage. If we are to be trusted by both customers and the people who back us we must prove that we have long-term, sustainable businesses.

Q84 Ian Stewart: Critics of the analysis you outlined earlier about a voluntary versus statutory code would say that the former approach has not worked up to now. This morning you have presented to the Committee an analysis which says that the new system will work. Do you accept that the voluntary

nature of it, even though it may be mandatory, will not carry as much weight in court as a statutory code which would have a deterrent effect?
Mrs Simmonds: We have taken advice on this issue. We are absolutely certain that if those agreements are signed by both the lessee and pub company they would be effective. For example, I was responsible for the "Good Practice Guide on *Planning for Tourism"*. It is not a planning policy statement as DCLG would understand it but it has been taken into account in countless appeals because it is there as guidance. I believe that the same situation would apply here. The fact that those agreements exist and are signed by both parties would be clearly taken into account by any court of law or arbitration panel.

Q85 Chairman: I suggest that following this session you send us a note about the legal consequences of the code. We can study that in detail rather than pursue it in this evidence session. It is a very important point that I want to hear about in a little more detail.
Mrs Simmonds: Certainly.

Q86 Mr Wright: You have already mentioned that your members will be signing up to the new RICS code. How will it be done? Will it be done verbally? Will they sign a document? Will it be legally binding?
Mrs Simmonds: We need to differentiate between the industry code and the RICS guidelines on the setting of rents which is exactly what it is. Perhaps I may explain a little how the PIRRS scheme works. One has a group of chartered surveyors who have been recommended by the organisations that are part of PIRRS, that is, the FLVA, the ALMR and the BII. That group of people will be available to lessees if they wish to take up PIRRS. We have already had two examples where that has been taken up and three cases where the matter has been settled before it has got that far.

Q87 Chairman: We are not talking about PIRRS at this stage; we are distinguishing between the BBPA code and the RICS guidance.
Mrs Simmonds: We need to distinguish between the two. The RICS guidance is for chartered surveyors wherever they deal with the matter; the industry code is for pub companies.

Q88 Mr Wright: The previous witness gave evidence about the RICS national benchmarking scheme. In your submission you make clear that it is not part of the pub company's role to disclose commercial information. Does it mean that you will not work with RICS on its benchmarking scheme?
Mrs Simmonds: The pub companies are absolutely committed to provide the right information. Whether it is the ALMR benchmarking or, as the RICS said, some other system we will provide the information to make sure they have the best information on which to base the rent setting.

Q89 Mr Wright: That would be so even if you determined that it was commercially sensitive? That has always been a get-out for other industries; it is said that the information is commercially sensitive and so it cannot be provided.
Mr Darby: You touch on the key point here. Like other members of the BBPA we would be willing participants in a benchmarking survey as long as the information was clearly ring-fenced and kept confidential. For those of us who are publicly-listed companies margin performance is a critical part of the perception of our business. If we are to input market-sensitive information we should have the confidence that it will be protected and kept confidential. There are all sorts of other ways in which we contribute data. For example, we contribute market data to the BBPA in a way that is ring-fenced and secure so that nobody can see individual data. If that kind of protection is provided there will be no issue about participating.

Q90 Mr Wright: I go on to the question of upward-only rent reviews that have been abolished since 2005. Existing lessees are entitled to comfort letters. What status would they have in court? There is a degree of scepticism that they will not be binding in terms of any past contractual obligations. Will these comfort letters bear the test of time?
Mrs Simmonds: Again, we have taken legal advice on it and I am happy to share that with the Committee. We are absolutely clear that side letters are legally binding. At the end of the day the lessee also has the choice of having a deed of variation but both would be applicable and are available.

Q91 Mr Wright: Why not just change the terms of the contract at the lessee's or lessor's expense so it is clear and unambiguous that upward rents are a thing of the past?
Mrs Simmonds: Upward rent reviews have been a thing of the past since 2005. It must be made absolutely clear that even if you have an RPI lease your rent can go down as well as up obviously depending on the market. If one is concerned that the rent has been set incorrectly that is where the PIRRS comes in.

Q92 Mr Hoyle: Mr Darby, you appear to be the man who has come to cleanse the industry; you are telling us that you are the good guy on the scene.
Mr Darby: I try to be.

Q93 Mr Hoyle: Mrs Simmonds, what do you think you are? Are you the bad part of the industry or will you be part of the good side of it?
Mrs Simmonds: I hope I shall be part of the good side in encouraging all my members to work with the scheme.

Q94 Mr Hoyle: Do you agree with the RICS forum report that in principle the tied tenant should be no worse off than a non-tied tenant?
Mrs Simmonds: I think we need to look a little at where this originated. That form of words was used by the European block exemption and was dropped

in 1988 as being inappropriate. It was designed to talk about the market as a whole, not individual premises. The important part is that the rent arrived at must reflect the price you pay for the beer and the benefits arising from that particular agreement. Therefore, if the pub company offers marketing and security—whatever funding it requires—all of that is put into the mix.

Q95 Mr Hoyle: Is that a "yes" or "no"?
Mrs Simmonds: The answer is that we will completely abide by the RICS guidance when it comes out, so it is "yes".

Q96 Mr Hoyle: Mr Darby?
Mr Darby: The BBPA code makes very clear that in terms of rent-setting it will abide by the guidelines set by the independent organisation which at the moment is RICS. Therefore, if RICS in its latest guidelines in the industry forum next year comes up with a methodology for the calculation of tied versus non-tied benefit, which is a complex issue, we will be bound by the code to follow those guidelines.

Q97 Mr Hoyle: If you are the new BBPA person on the block why are you trying to get RICS to change its mind?
Mrs Simmonds: We are not trying to get them to change their mind.

Q98 Mr Hoyle: You have not put any pressure on them?
Mrs Simmonds: We have had some discussion with them, but as the BBPA we have put absolutely no pressure on the RICS on anything that is to be put in its code. We will work with RICS to help them to understand our sector better but we have not put any pressure on them.

Q99 Chairman: Perhaps I may quote something sent to me a few days ago on this issue: "The pubcos are hopping mad and are trying to wriggle out with the usual old 'countervailing benefits' routine, but as RICS said if there are any beneficial or onerous terms in the relationship they are only taken at valuation if they are agreed between the parties and explicitly included in the lease." Apart from "wriggle out", which is a pejorative term, the conclusion seems to be absolutely sound intellectually.
Mrs Simmonds: The independence of RICS is absolutely vital to this process. We will abide by whatever they come up with in their guidance. I can promise you that we have put no pressure on RICS.

Q100 Mr Hoyle: You have not asked them to change anything; you have not said you disagree with that. Are you really telling us this?
Mrs Simmonds: First, we have not got to the stage of negotiation.

Q101 Mr Hoyle: In fairness to RICS, they did say that there had been some strong negotiations.
Mrs Simmonds: They said there had been healthy dialogue.

Q102 Mr Hoyle: That means strong negotiations, does it not? Do you want us to get RICS back and ask them what they mean?
Mrs Simmonds: We had not got to the stage of negotiations. Clearly, the witness sat here this morning and said RICS was at a very early stage of working up the code. We shall work with RICS in any way they wish, but we have certainly not put any pressure on them and see their independence as absolutely fundamental to the way this goes forward.

Q103 Mr Hoyle: What is your definition of "healthy negotiation"?
Mrs Simmonds: We have had a couple of meetings with RICS. I have met the representatives.

Q104 Mr Hoyle: I am sure that is not what it means.
Mrs Simmonds: I know the chief executive, but it has been no more than a conversation. Members of my staff have had a meeting with RICS but we have put them under no pressure at all; nor would we consider doing so.
Mr Darby: My definition of "healthy debate" is just the kind of debate we are having here. It is a frank exchange of views and a general, healthy discussion of the issues in the industry.

Q105 Mr Hoyle: That is how I look at it. Mrs Simmonds sees it slightly differently. It appears to be a cup of tea, a biscuit and a bit of sympathy. That appears to be what she is expressing to me at the moment. You can reassure us that there have been no disagreements and pressure and you absolutely accept what RICS propose?
Mrs Simmonds: Absolutely.

Q106 Mr Hoyle: No doubt that will unravel in future. If the tie is beneficial to the lessee why is it being recommended that lessees should be offered the choice of being free of tie? If it is so open why not give them the benefit?
Mrs Simmonds: I know that the Committee has received a good deal of information particularly from family brewers about the importance of the tie to the distribution of beer. That has been absolutely clear. It is also hugely important that we understand the support that pub companies and breweries can give to individual tenants particularly in this very difficult economic time. My colleague has just returned from Cockermouth with all the problems it has experienced. It is absolutely clear that individual businesses are struggling there. Where one has the support of a company to help open up the business as quickly as possible that takes place. I think your report made clear that the breaking of ties would end up raising rents in individual premises which probably would not move us forward. BBPA is very supportive of keeping the tie; it does not believe it should be broken. Therefore, to go completely free of tie was not an option we were prepared to discuss even in mediation, although we were absolutely clear that we would discuss the operation of the tie at the time. That is what we are here to do today.

Q107 Mr Hoyle: That is the real failure, is it not? If you were good, honest brokers and were given a really good deal you should be saying that you are so transparent, above board and reputable that you would allow people to choose whether or not they wanted the tie. Surely, there is nothing wrong with that?
Mrs Simmonds: You would be changing the way that market worked in a fundamental way.

Q108 Mr Hoyle: You are saying that you can screw them into the ground and you do not want the screws taken off?
Mrs Simmonds: Not at all. As my colleague has made absolutely clear, up to now it is absolutely vital to us that we have tenants who are doing well in business and have the opportunities which we believe they will have through the new code to take up the issues so we do not have a David and Goliath-type situation emerging from it. Therefore, there is more transparency in the system and greater equality in the way it is negotiated. We do not believe that the ties should be broken. If you want to be free of tie you operate a different type of premises. One of the ways the tied model has worked and the problem it has got into is that it gives people an early opportunity to go into something where they can make some money, particularly on assignment. One of the problems we have is that those assignments now are not worth what they would have been a year or so ago.

Q109 Mr Hoyle: You are saying that you use that profitable instrument and you do not want fairness for anybody in the system. That is the way you can make profit; you can hide behind it and it is the way you see it going in future. Am I right that last time the tax increase because of zero inflation was about 2%?
Mrs Simmonds: In terms of excise duty on beer it has been 20% since the March Budget 2008.

Q110 Mr Hoyle: No; it went up 2% last time.
Mrs Simmonds: It went up 2% in March 2009 and a further 8% when VAT went down in December 2008.
Mr Hoyle: When VAT decreased it went up more?
Chairman: I do not want to go too far into these other issues. They are important questions but not for today.

Q111 Mr Hoyle: It is a key point, Chairman. The tax went up 2% and yet you put up the price by 7% to those people who were tied under the beer orders. Mr Darby will confirm it if Mrs Simmonds does not understand her own industry.
Mrs Simmonds: It is not only the 2%. When VAT went down excise duty was put up by 8%, and we very much hope that the chancellor will remove that when we have the Pre-Budget Statement tomorrow. I know that we are not here to discuss that situation.

Q112 Mr Hoyle: Mrs Simmonds, you can hide all day. I have given you the facts. Mr Darby will not deny it because he knows I am absolutely correct on that.
Mr Darby: Forgive me; you have not given me an opportunity to answer the question.

Q113 Mr Hoyle: To put it another way, the government is taking 70p a pint and the pubcos are taking 95p a pint.
Mr Darby: This is an absolutely crucial and complex issue. Having visited 400 of our pubs plus those of competitors in the year that I have been in charge of this pub company—I have conducted business reviews with tenants and lessees in many of those pubs—I absolutely agree that the fundamental issue when sitting before a lessee is not the tie but the price he is paying for beer. That has been accelerated by the fact that during a recession big managed house pub companies with large square footage pubs have used price as a means to attract more and more customers. There has been a lot of pricing activity in the market and we are the first to acknowledge that. In my discussions with tenants they do not say they are unhappy about the range of beers they get; they are unhappy about their ability to compete. We have to address that. First, the new code makes it very clear that before anybody enters a pub the terms on which they buy beer must be made very clear. Second, already in the market with existing tenants and lessees there is an enormous amount of evolution and support going in on pricing in the trade. We alone have given £2 million worth of concessions to tenants in the form of reduced prices, but at the present time we are trialling two agreements. The first is our retail agreement which means that the price of beer ceases to be an issue because effectively we run a business which we refurbish. The operator takes 20% of the take and we take responsibility for everything else, so you remove pricing and rent as an issue. The other agreement we are trialling is one which admittedly continues to be tied because we have five breweries and we care about our beers sold in our pubs. We have been in business brewing and selling beer for 175 years. We have offered 60 tenants an agreement to permit them access to what we consider to be free trade pricing. The reason we say it is free trade pricing is that we have a free trade business against which we can compare it, so we know what the prevailing rates are. Of those 60 tenants and lessees to whom we offered that agreement as a side letter, which means they get extra discounts in return for a higher payment but not a complete transfer of the discounts for that payment—the deal is arranged so that in the first instance they are at least £5,000 better off—half of them have chosen not to take the side agreement, the fundamental reason being that they do not wish to take on additional fixed cost in their business. They say they are happy with the way it works and recognise that rent is variable through beer pricing and that if trade goes up they benefit; if it goes down they suffer. That is the attraction. If you look at the pubs in Cockermouth that have been flooded, The Bush is effectively the brewery tap in the high street. The Bush sells 10% of Jennings' annual brewery output; it sells 500 barrels of ale a year. We are blooming keen to get that pub open for the benefit of the lessee who cannot trade now and

because at the moment 10% less beer is coming out of Jennings' brewery. We have a very real interest in getting that pub open. In going up and down the high street yesterday in Cockermouth in the pouring rain it was interesting that the building activity was most intense in the pubs on the high street and least intense in small shops such as toys shops and shoe shops. That gives you an indication of what the tie does; it provides a sharing of risk.

Q114 Mr Hoyle: I welcome what you have done in Cockermouth which is in the North West. I am from Lancashire. I understand what you are doing to ensure that Jennings reopens and continues to serve good beer. Nobody will take that away from you, but most people would say that it is in your interests to get those pubs reopened; it is coming up to the busy Christmas period and you have to get that brewery moving. But let us look at the rest of the country that has not suffered a flood and people have been screwed into the ground. Has any pub company offered their lessees the ability to opt out of the tie or restrict it? If so, what has been the result and how many examples are there?
Mrs Simmonds: I am aware that at least one of our members has mentioned that. Wellington Pub Company did go free of tie. The information made available is that it is suffering as much as those who are tied pubs.

Q115 Mr Hoyle: Is Wellington completely untied?
Mr Darby: Yes.

Q116 Mr Hoyle: But has any pub company offered that to lessees other than Wellington?
Mr Darby: I think you know the answer to this question which is that at the moment there is still a preponderance of tie.

Q117 Mr Hoyle: So, the answer is no?
Mr Darby: No.

Q118 Mr Hoyle: Is it "yes"? You cannot have it both ways.
Mr Darby: Perhaps I may finish the answer. In this industry evolution was already going on, but there has been an absolute acceleration of the evolution of agreements. You will see that fundamentally to be commercially successful one of the things a pub company wants to offer in its armoury of agreement is free of tie. That will increase in number and you have to let time take its toll. But clearly a business like Marston's, Greene King, Fullers and Everards which care about the link between their brewing operations and pubs will not be queuing up to start releasing their pubs of tie because it is fundamentally part of their DNA.

Q119 Chairman: It is different for Enterprise and Punch, is it not?
Mrs Simmonds: But the market will move over a period of time because if they are not attractive to tenants in that marketplace it will not work as a model going forward.
Mr Darby: I speak from experience of free trade. I am convinced that there will be evolution. If somebody goes to Punch or Enterprise and says he sees a distinct difference between them and Marston's and Greene King and therefore will not buy the "brewery" argument or whatever presumably there will be customer pressure to evolve their agreements. Their business model will evolve over time. But the biggest fear I have is that if there is some form of statutory intervention which results in a substantial flood of pubs going free of tie onto the market there will be some baleful consequences. Having been in free trade myself and knowing how thin margins are because there is a limited universe as a brewer it would represent a wonderful opportunity to build margin. As a brewer to make the running in the UK beer market is very challenging. I am not entirely of the view that the sudden wholesale release of tied pubs will result in an equally sudden leap in the profitability of tenants and lessees. Indeed, the Committee is on record as saying that a fundamental restructuring of the tie arrangements has consequences that are very difficult to predict. You have to consider the market pressure that customers will put on landlords to evolve.

Q120 Mr Hoyle: I did not quite hear an apology for the way the industry treated the Chairman and the way he had been intimidated. I know the witnesses have said they do not quite agree with some of those comments, but I think it would have been nice, Mrs Simmonds, if you had apologised on behalf of the BBPA for the treatment dished out to the Chairman. He should not have had to put up with that. I hope that will be taken back by you and will be recognised.
Mrs Simmonds: I do recognise that. Having met the Chairman I certainly was not intimidating; I would not be capable of intimidating anyone.

Q121 Mr Hoyle: Is that an apology?
Mrs Simmonds: It is a complete apology for what has happened. We are here today to talk about how we move forward. I certainly apologise if we have in any way brought Parliament into disrepute.

Q122 Chairman: I am unused to being unable to comment on my own reports for fear of litigation.
Mr Darby: One must make a judgment as to whether or not to trust the industry and I am sure that judgment will be made in discussion in the fullness of time.

Q123 Mr Hoyle: It leaves us with a bad taste.
Mr Darby: I understand that. Having taken the role as chairman of the working party I saw it as my job to bring together a diverse group of people to stand by a harder, tougher code which will result in greater transparency in the conduct of business. I am absolutely committed to that. I believe that is commercially right and proper. One of the baleful consequences of this process, which is one reason why we are so keen to get it resolved urgently, is that it detracts from the time taken to visit pubs. All I can

say is that if I have managed to visit 400 pubs in a year despite having spent two to three months in committees, writing reports and so on, I could have visited 700.

Q124 Mr Hoyle: I look forward to seeing you at the Euxton Mills in Chorley.
Mr Darby: I have been there; it is a very good pub.

Q125 Chairman: Our ambition as a committee is to make sure the industry can get on with fighting its ordinary commercial battles by rebalancing the power between the small companies which we believe are being abused and the big companies that abuse them. One aspect of abuse is enforcement of the tie by flow monitoring equipment. This was a moment of spectacular inaccuracy in our evidence session with Mr Thorley. I am encouraged by some of the things the new code says about it, but I put some specific questions. Your agreement with the BII and FLVA calls for a protocol which would cover minimum standards for its operation and application. Will that protocol be enforced by you or the individual pubs?
Mrs Simmonds: It is part of the BBPA code and therefore how that protocol is written is up to the individual company but it must be accredited by BII. It has to be transparent and above board.

Q126 Chairman: The practice of assessing data, which is an art and not a science, and the arbitrary use of direct debits to take money out of lessees' bank accounts will end?
Mrs Simmonds: I was not aware that that was practised, but if that is the case I am absolutely certain that will be the case.

Q127 Chairman: It was a fairly widespread practice.
Mrs Simmonds: I have talked to Brulines and Trading Standards have considered that their equipment should not be prescribed under the weights and measures regulations, which is probably one of the matters about which you intended to ask me. But they have had their system tested and set up a protocol with Trading Standards so it can be tested in the future, which I believe is important.

Q128 Chairman: Frankly, I do not think that is enough, and there is also a dispute about this within the local authority sector. In June of this year I received a letter from a trading standards officer in which he said: "I am able to say that the equipment shown to me is definitely not legal for trade use. In addition, by your own admission since about 2003 following initial verification no further testing of the equipment has taken place. I have 40 years' experience as a weights and measures inspector and in my opinion such a long period of use without testing or verification of equipment is unacceptable to claim confidence in its accuracy." There are big questions about the accuracy of flow monitoring equipment.
Mrs Simmonds: I do not know how recent is the information I have from Brulines about the discussion with Trading Standards. They have been told by Trading Standards that their equipment is not required to be approved for the purposes of trade.

Q129 Chairman: That is a legal definition but not a politically acceptable one. I accept that legally that is the correct position, but the issue is about customer protection rather than small business protection.
Mrs Simmonds: The other important aspect on which my colleague may be able to comment is how pub companies deal with that data. What you would not want—and is important in terms of the new code—is for the Brulines equipment to be the only way to deal with it.

Q130 Chairman: There are two issues: the accuracy of the raw data and the interpretation of that data, which is the crucial point because at the moment one cannot distinguish between beer and water, though we were told one could. The question then is: is that sufficient evidence for buying outside the tie? Here you say that additional *prima facie* evidence must be provided. What is the nature of the additional evidence that will be required?
Mrs Simmonds: In the annex we talk about the nature of some of the evidence required which would be third-party information as well as other considerations, for example being absolutely honest as to whether there are other kegs and casks available from another brewery. There is a whole range of things put forward in the annex to be taken into account, not only the Brulines equipment.

Q131 Chairman: I am concerned by what you said earlier in answer to one of my questions, namely that you were unaware of the practice of direct debiting as instantaneous fines or punishments. It has been happening. Many thousands of pounds have been taken from lessees' bank accounts on the basis of just an interpretation of Brulines' data.
Mrs Simmonds: I shall be honest and say I am probably too new to the industry.
Chairman: I would appreciate receiving an assurance in writing following this meeting that the practice of automatic direct debiting will end immediately. That is unacceptable.

Q132 Mr Clapham: I take you to PIRRS. Mrs Simmonds, earlier you began to explain how the scheme worked. I understand that this is an initiative across the industry.
Mrs Simmonds: Yes.

Q133 Mr Clapham: Where there is a dispute between the landlord and tenant there is an agreement to go to PIRRS and the tenant is able to choose a valuer from the scheme's list.
Mrs Simmonds: Yes.

Q134 Mr Clapham: On the face of it, it appears that that scheme would work independently, but a note received from Justice for Licensees reveals that it believes the scheme has to some degree already been tainted. They say that pressure has been applied and the integrity of the scheme has been influenced by

pubcos. I am aware that PIRRS had a website which was then removed. Did that happen because pressure was exerted?
Mrs Simmonds: No; it was just a technical reason. That website has been live in the past week. Two cases are in process and three went forward but settled before proceeding. Under the scheme nominations to be a surveyor on the group are received by the whole body. This includes the ALMR, the FLVA, the GMV and the BII. The lessee chooses one of those surveyors to hear the case. The pub company has absolutely no say in who is chosen.

Q135 Mr Clapham: It is one issue that takes us back to the discussion about independence and the way in which we may see the code of practice operating. In this example of PIRRS a mandatory scheme may well be a great help in deciding how to move forward. But when we get to that point does the licensee need representation? If so, obviously a cost is involved. Are there any ideas in the industry about how that cost will be met?
Mrs Simmonds: Most of the work is done by correspondence although it is possible to have a hearing where they have 20 minutes. We do not anticipate that there is any cost whatsoever in having professional representation in the scheme. It is not looked at in that way; it is done in writing and, if necessary, by a meeting. If the system does not work we can review it, but that is how it is envisaged it will work at the moment.

Q136 Mr Clapham: Initially it is dealt with in correspondence but should there be a need for a face-to-face meeting that can take place?
Mrs Simmonds: Absolutely.

Q137 Mr Clapham: I understand that this kicked off in December.
Mrs Simmonds: It began a few days ago.

Q138 Mr Clapham: Does it appear to be working?
Mrs Simmonds: I think the fact that three of the cases were settled before they even got to that stage means it has worked. I see no reason why it should not work. It is something we must all support. Every member of the BBPA, plus anyone outside its membership, will be paying for the cost of doing it. It is an industry scheme and involves the individual in low cost, and that is the way we wish it to work.

Q139 Chairman: The BII told us that the scheme was legally binding in the same way as the code; it becomes part of the contract between the pubco and lessee?
Mr Darby: It is captured within the revised BBPA code that we will fully support and we will abide by PIRRS. I am aware that we have to confirm the legal basis of the BBPA code in separate submission, but PIRRS is captured within the code.

Q140 Chairman: The legally binding nature of PIRRS depends on the legally binding nature of the wider BBPA code?
Mrs Simmonds: The BBPA code is legally binding on our members.

Q141 Chairman: It is not legally binding, is it? It is done by agreement.
Mrs Simmonds: It is a requirement of membership of the BBPA that members abide by the code, but the individual company codes are legally binding because they are signed by both the company and the lessee.

Q142 Chairman: And PIRRS is also part of it and so is legally binding?
Mrs Simmonds: Exactly.
Mr Darby: It is caught in that net.

Q143 Chairman: Because of our doubts about the good intentions of your industry born out of bitter experience these questions of enforceability are not marginal but central to our consideration. If on reflection you want to flesh out or reconfirm that answer subsequently we shall be delighted to have it.
Mrs Simmonds: I would like to write to you about it.

Q144 Chairman: Make sure you get it right so we get it correctly on the record.
Mrs Simmonds: Absolutely.

Q145 Chairman: There are many things we would like to talk about, but I take just one: the AWP tie. I have met AWP providers in my constituency and as a result I know a little more about the industry, more than I ever expected or wanted to know. Can you tell me why pub companies are so keen to keep the AWP tie in principle?
Mrs Simmonds: The important part of the new code is that the AWP tie will be dealt with below the divisible balance; in other words, it means that income is shared only once.

Q146 Chairman: That should not ever have been the case; it is wrong, and you have to make that plain?
Mrs Simmonds: That is absolutely important. Enterprise have offered all their tenants the ability to go free of tie. The problem is that gaming machines are a very precise science. You need a certain level of expertise and some tenants and lessees find that they do not have the expertise to make the most out of the machine. Therefore, they choose not to go free of tie because they want to make sure they get the support to maximise income.

Q147 Chairman: I would have a lot of sympathy for the argument if the share of income was correct and appropriate. I share with you some information that intrigues me. The average AWP stays in a pubco pub for 12 weeks before it is changed to maximise income and a much longer period is typical in the free sector. There is some prima facie evidence to suggest that they are better managed, not that I approve of these machines at all—that is a different matter—but I have heard only one side of the argument.
Mr Darby: The important thing to have in mind in regard to gaming machines is that they are successful in a pub only if they appeal to game machine players

and often they represent a very small group of people. Therefore, the currency of the machine and the fact it is refreshed on a regular basis and, as a statement of the obvious, is operating—in some cases it will not be—is absolutely crucial. A gaming machine player will swap between pubs if the machine offered in one becomes jaded. That is the reason we are so committed to the gaming machine tie, albeit also committed to an absolutely fair sharing of the income. Again, we apologise that this was one of the key recommendations of the previous Committee to which we did not respond. That was a failure on our part and for the record we are trying to address it in the revised code. What the tie enables us to do as a pub company is use our buying and negotiating power with gaming machine companies and provide internal expertise to ensure that the machines in our pubs are as far as possible of the highest quality. Just recently we have experimented with a tracker agreement, of which we now have 100, whereby we retain the machine tie, that is, we keep the relationship with the gaming machine manufacturers, but 100% of the income post rent and excise duties goes to the tenant of those pubs as a means of providing income. We try to maximise the income for the tenant but also guarantee the quality of the machine for consumers. Effectively, we do not draw any income from the machines in the tracker pubs. The net effect of it is that to make it work we depend on the gaming machine company to make sure that decent quality machines are in the pubs. Effectively, the working relationship ceases to be between the pub company and gaming machine company; it is between the tenant and gaming machine company. In those tracker pubs we have already seen a rapid divergence of takings from machines in those pubs where we are actively managing the offer and the tenant is or is not actively managing the offer. The net effect is that there is now a divergence in average takings of about £40 a week between our company average and the tracker average; the tracker is taking less. The gaming machine companies now say to us that the takings of the machines are reaching a de minimis level and they do not want to service them any longer because they take too little. A tenant on average will seek to reduce the rent of the machine by agreeing to less frequent servicing and emptying, a lower quality machine and so on, the net effect being that the tenant and company are worse off and the consumers stop using the pub because the machine is aged and not interesting to play. There is a loss of income for everybody as well as a loss of appeal to the consumer. We are absolutely convinced that the tie brings value. The key is that the income must be shared transparently and fairly.

Q148 Mr Hoyle: You have told us that this is an experiment but different pubs also have different appeals. Is it across the whole range of pubs, or did you experiment with certain types of pub? Some people do not want to see gaming machines in pubs and certain pubs benefit from not having them. On the other hand, gaming machines are on the decline anyhow; people have shied away from them during the recession.

Mr Darby: There has been a recent upturn in gaming machines because digital machines that are kept up to date operate on a more frequent basis. Because they break down less often there has been a significant upturn in gaming machine performance. In our managed estate our gaming machines are now back in growth.

Q149 Mr Hoyle: In your managed estate where you have the tie?

Mr Darby: No—where we control the machine offer. There has been a long decline in gaming machine take but recently there has been an upsurge because new technology and better payout, £70, has made them more interesting to players. The problem is that if those machines are not available in a tenanted pub because the tenant makes the choice to go for a lower quality machine for consumers the machine holds less appeal.

Q150 Chairman: On the question of the fair split of income from the machines, have you estimated what the difference will be as a result of the divisible balance being split differently?

Mr Darby: In our advance agreement we are changing the divisible balance. The arrangement for the divisible balance in the advance agreement is that the income post duty and rent is shared 50/50, but we set a gaming machine target at 90% of the past 12 weeks of take. We then say to the tenant/lessee that he receives 75% of any income he makes above the 90% target. Therefore, it is three-quarters rather than half.

Q151 Chairman: That is Marston's?

Mr Darby: Yes. We are not unique in changing the relationship with the machines. It comes back to a general point I made earlier about commercial success. The most likely way to maximise income from a gaming machine is to have a partnership between the pub company and tenant/lessee. Whatever way you look at it, if the tenant/lessee is incentivised to drive the machine, which historically he might not have been because he did not get a fair share, there is a better gaming machine performance. At the moment we seek to have a significantly more attractive relationship on gaming machines. The net effect of it is that the tenant/lessee makes more money and so do we. You see that evolution already in pub companies.

Q152 Mr Clapham: Mrs Simmonds is to reply in writing to the questions on PIRRS. Can she tell us in that reply why it is that the Royal Institution of Chartered Surveyors is excluded from the list?

Mrs Simmonds: The RICS is the body. The individual chartered surveyors are able to go on that list; there is no problem about that, but I am very happy to reply in writing to make that absolutely clear.

Q153 Mr Hoyle: Mr Darby, you said that if tenants went above the bar they received an extra take. What happens if they go below it?
Mr Darby: We share the pain; it is 50-50.

Q154 Mr Hoyle: Therefore, you do not have a guaranteed income; you share the pain 50-50 and the incentive is on the publican to go above the bar?
Mr Darby: Yes. It is no different from the situation at the moment. We are on record as giving £3 million worth of support to struggling tenants and lessees to try to help them. We are happy to have discussions with them about reducing rent and providing more discount support, but equally when times are good outside the normal rent review cycle we would not dream of going to a successful tenant, saying that he has a successful business and is making lots of money and asking for a higher rent.

Q155 Chairman: The trouble is that companies have done that in the past.
Mr Darby: I am saying that in between the five-year review and outside the cycle we are now abating and conceding on rents, machine income and so forth.

Q156 Chairman: I accept that you, Marston's, are doing it, but the picture I have of the industry as a whole and the response to our report and to these changes by individual pubcos is a very varied one. Some respond magnificently and others grudgingly. I heard that in the case of one pubco BDMs and area managers were uncertain what they were supposed to do as a result of what they had been told and were sacked for doing these things 18 months earlier. Do they really mean it? Is it a culture change or a temporary face-saving exercise just to see them through to the other side while we consider our recommendations? This is the challenge. You, Mr Darby, have told us of the good things you are doing. We need to be confident that the industry as a whole is doing these things.
Mrs Simmonds: We need time to make these agreements work in the industry. We are happy to come back before this Committee and explain exactly how they are working on the ground, but we need to ensure that everyone is on a level playing field that Marston's have described to you in their answers today. We need to make sure that all of the new system will work properly because it is in the interests of tenants and individual companies that it does work and you are not dissatisfied. I do not want to hear again the accusations you made at the beginning.
Mr Hoyle: It has taken us five years to get to this point. How much more time do you want?

Q157 Chairman: The last question is: when do we next make our judgment of you?
Mrs Simmonds: I believe we need at least a couple of years to make this work. We have already talked about June of next year as the time to get the bigger companies through with a little extra time, so we will have the full system in force next year. I suggest we come back in a year—I am happy to come back earlier if that is what you would like—to discuss how the system is working.
Mr Hoyle: Tomorrow never comes, does it?
Chairman: We shall reflect on that offer, but two years is pushing it a bit. Mrs Simmonds and Mr Darby, thank you very much indeed.

Witnesses: **Mrs Kate Nicholls**, IPC Secretary, **Mr Karl Harrison**, Member of the Fair Pint Campaign, **Mr Simon Clarke**, publican and member of RICS and **Mr Garry Mallen**, publican and member of ALMR council, gave evidence.

Q158 Chairman: Thank you for being so patient. We are a little late coming to you but I think it was important to take our time with the previous witnesses. Frankly, there are further questions I would have liked to ask but there is never enough time. Although I have not done so with the previous witness because they were few in number, I ask you to begin by introducing yourselves and your roles.
Mrs Nicholls: My name is Kate Nicholls, head of communication at the Association of Licensed Multiple Retailers and I also act as secretary to the newly-formed Independent Pub Confederation. We are very pleased to be here today to assist you in your deliberations. We have pulled together a team of people who have not only direct operational experience but are also intimately involved in all of the negotiations at the RICS, in mediation and before this Committee. We are the people who have had the dialogue on a day-to-day basis and hope to be able to answer your questions fully and factually.

Q159 Chairman: I also ought to say we are very pleased that you are here as a single group; it makes our life a great deal easier.

Mr Harrison: I am Karl Harrison and I am a publican with four pubs in London and the Home Counties. One of them is a large comedy and music venue in Balham called The Bedford which is one of the largest tenancies of Enterprise Inns. I have two free of tie pubs in the centre of London and one Mitchells & Butlers lease in Surrey. I am also a founding member of the Fair Pint Campaign and I echo my colleague's comment. We are very pleased to be here today on behalf of the IPC.
Mr Clarke: My name is Simon Clarke and I am a publican and member of the RICS. You may recall that in 2008 I made a presentation to this Committee. I have represented Fair Pint at the mediation and attended the RICS forums. I spend over 60 hours a week in my own pub, The Eagle Ale House, so you could say that I am here to represent the frontline of the industry.

Q160 Chairman: Have you had any approaches yet from RICS to be on the trade related valuation group?

Mr Clarke: Not yet.

Q161 Chairman: They could do much worse.
Mr Mallen: My name is Garry Mallen. I am a council member of the ALMR. I was part of the ALMR team of mediation and also attended the RICS forum.

Q162 Chairman: I want to ask some brief factual questions. Your confederation is made up of a large number of organisations with quite a variety of views on some of the key issues. How easy is it to provide a unified voice? When we take evidence again in however many months from now on this subject what are the chances that you will still be together as a confederation?
Mrs Nicholls: The key point is that we are a confederation. We are not a new trade body but an umbrella grouping that seeks to bring together the national trade bodies that represent publicans and we are a unified voice for them. We believe that there is a very real democratic deficit in vocalising the views of publicans and we speak where we can on common points of interest with consensus. As an umbrella we work alongside our component organisations in support of them; we do not replace them. Each of them retains its own distinct voice. We are a very broad church. You will appreciate that our component members hold distinct positions. We do not try to hammer home one position that must be held by all; we speak where we can with a consensus and common position where we reach agreement. Therefore, today we are presenting to you where we have reached agreement. We will continue to present on all issues focusing on publicans where we have reached agreement, not just on the tie and the issues before the Committee today.

Q163 Chairman: You are not driven by the need to reach a consensus on every issue, so you are not an organisation that tries to find the lowest common denominator. You speak only where you can genuinely agree?
Mrs Nicholls: When we came together and felt there was a role for us to play we very much wanted to avoid the allegation that we would be the lowest common denominator. We want to speak where we can with a common voice and allow our member organisations to speak freely on other issues where they have distinct positions.

Q164 Chairman: You are not the only ones who have been slagged off by the pubcos. I think Punch said that you represented only a handful of licensees. How do you respond to that allegation?
Mrs Nicholls: We bring together all the national trade bodies currently representing the interests of publicans: the Association of Licensed Multiple Retailers; the Guild of Master Victuallers; campaigning groups such as Justice for Licensees, Fair Pint and Unite; the Federation of Small Businesses, which has over 4,000 individual publican members, and CAMRA and SIBA. We are also supported in our work by the BII. Therefore, between us as national trade bodies, leaving aside the campaign groups who have many thousands of supporters, we alone directly represent 25,000 publicans or just under half of all pubs in England and Wales. About half of those will be leased and three-quarters will be tied. Therefore, to dismiss us as being a disgruntled minority is foolish in the extreme.

Q165 Chairman: It is a pretty large handful, certainly. The FSB has said in relation to the concern we pursued in our previous evidence session with the BBPA: "There has been much activity by the pub companies but little delivery of meaningful change." I would like to hear your observations on that.
Mr Harrison: I was quite disappointed by what I heard a short while ago in terms of what is supposed to have happened since the Committee's previous report. Our experience on the ground is that there has been little movement certainly in the main pubcos which control many thousands of pubs. Initially, there was criticism of your report and some legal threats; there has been continuing pressure on tenants and churn in the large pubco estates; there have been heavy-handed evictions, closures and breaches of codes as confirmed by the BII; and there has been a denial of problems in the sector generally in its formal reporting and in the media. There has been some window-dressing. I give just one piece of information that relates to Punch Taverns and their existing code of practice. I refer to a court case that took place as recently as 17 November.

Q166 Chairman: Is it a court case that has concluded?
Mr Harrison: Yes. Their barrister pointed out in strident terms—I can send you a copy of it—that their retail charter was not binding in law and the tenant ought not to seek to rely on it; furthermore, their commitment to upward and downward rent reviews also was not appropriate and the court could not rely on that either. That was said as recently as 17 November by those who otherwise hold themselves out as having taken big strides.

Q167 Chairman: To what extent does that conflict with the evidence we have just heard from BBPA about the legal enforceability of the codes? If you cannot answer that question now perhaps you can think about it and drop me a note.
Mr Harrison: Yes.

Q168 Chairman: Enforceability lies at the heart of the debate.
Mr Harrison: In relation to the strides supposedly made on the codes we have seen what we believe to be some ill-considered codes certainly in terms of enforceability. All of it seems to have been hashed together at the last moment in advance of this Committee's inquiry. Letters have arrived with you from the BII and other people turn up. We have not seen a draft code. I would have thought that if a great deal of collaboration was going on we would have seen it but we have not; and we have not been asked to comment on it. We do know from the heads of terms that the code proposed is not independent

and binding. As of today it does not seem to be enforceable. There appear to be no effective sanctions apart from forcing somebody out of the BBPA possibly at the cost of a six-figure sum to that organisation. That does not seem to me to be a sanction. ALMR as a member of the IPC initiated the mediation process. Only one pubco turned up to it. We formed the new confederation. It is great to see it because no longer do we have to put up with the BBPA claiming it represents publicans: you now have before you people who do. We have been working with the RICS and have been instrumental in encouraging them to report as they did. We have all been working together with the ALMR on benchmarking and also with the BII to look towards the future in terms of training.

Q169 Chairman: We shall go into detailed questions about rents and so on in a minute or two, but that is a helpful general picture. Mr Clarke, do you want to add anything?
Mr Clarke: The code we have just heard about has been offered up as a solution to a multitude of previous sins. It is almost as if there was never any code before and this will now be the code. I remind the Committee that there was a code before the TISC in 2004 and a code before the BESC in 2008 and one after the BESC in 2008. This one really cannot be any different in that it is not mandatory, not regulated and independent.
Mr Mallen: There is further evidence of this. Pubcos have stated that their code is non-contractual and all deals done under the code are concessionary and wholly discretionary. I received such correspondence in September.

Q170 Chairman: With one particular pubco?
Mr Mallen: Yes.
Chairman: That makes the answers we are to get from BBPA on that issue all the more important. I am sure they are listening to this.

Q171 Mr Clapham: Mrs Nicholls, the Confederation has welcomed the RICS forum report. Can you confirm whether or not the Confederation will sign up to it? We would also like to know whether you will provide information to the benchmarking register following the RICS code of practice in providing information for rent reviews *et cetera.*
Mrs Nicholls: I take those in two parts. First, we very much welcome the RICS report which entirely concurs with the analysis and some of the recommendations of this Committee. It is a welcome recognition by an independent third party of the problems that face the industry and our members.

Q172 Chairman: Initially, they were not quite so inclined to change but there is more joy in heaven over one sinner who repenteth.
Mrs Nicholls: Absolutely. I see the role of a Select Committee as making observations on an industry and for an industry to listen and respond positively where it can. Undoubtedly RICS have done that and you have heard from them today. We have worked collaboratively with them; both Mr Clarke and Mr Mallen made presentations to the forum. We held meetings with them subsequently about inputting into the trade related valuation working group guidelines and their code, which incidentally we agree with entirely. There are too many industry codes; there should be one that is independent and RICS should have primacy. If we are invited to do so we shall be very happy to work with them and endorse it. Benchmarking falls entirely within my area of responsibility at ALMR; I am the person who runs the survey that we carry out at present. We shall be very happy to work with them. We have already had meetings with them about how we can take that forward. We have not been sitting still and waiting to have a follow-up session or for somebody to come to us. As lessee groups we have worked to refine the benchmarking study so that now we split it out from multiples to lessees. RICS have said that at present the study is limited by a lack of pan-industry co-operation and that has been proved in spades when we have gone out into the marketplace to ask people to input. Previously it was limited to ALMR members; it has now been extended to anybody in the industry who wants to participate in that study. We have had lots and lots of responses from individual lessee groups but not from the landlord groups. Landlords who previously participated in the survey have pulled out.

Q173 Mr Clapham: Why do you think that is?
Mrs Nicholls: I do not have to guess; I have been told that it is because of ALMR's participation in the IPC and before this Committee.

Q174 Mr Clapham: You expressed some concerns about how and when the RICS code would be implemented. We heard from RICS that it would happen in spring of next year but we know that spring might turn into summer and summer into autumn. Are you helped by what you have heard from RICS?
Mrs Nicholls: Yes.
Mr Mallen: I am very much encouraged by the RICS report and the speed with which they have dealt with it. They seem to have taken on board the comments in the Committee's report earlier this year, dealt with it quickly and issued their report promptly. I believe they have acted in the interests of the industry. I am sure the IPC share their desire to see somebody make the code mandatory because in that way it is enforceable and we shall not end up with the same problems we had in 2004, 2008 and today.

Q175 Mr Clapham: Is there anything missing from the RICS report that you feel ought to be included?
Mr Clarke: We are delighted to hear that they intend to enshrine the recommendations of the report in their revised guidance, particularly the issue of the tied tenant being no worse off than the free of tie tenant that is a principle for which all of us have been fighting for some time.

Q176 Chairman: You heard the earlier discussion in this room. Are you happy about the way that crucial issue was met?

Mr Clarke: That is exactly what I am about to touch upon. We must be sure that the guidance will be absolutely clear. Even the RICS would be the first to admit that the misinterpretation of the guidance has been used to the benefit of some surveyors. We must ensure that there is now no muddying of the water. As to the issue of advantages and disadvantages being valued I believe that is a perfectly valid comment. If those benefits or onerous terms are contractual and are in the terms of the lease they should be included in the valuation. If they are discretionary—some would describe them as onerous—there is no way that effectively they should be quantified and included in the rental valuation.

Q177 Mr Clapham: Were you encouraged by what was said this morning by RICS in relation to the *Brooker* case and the ways in which they see it providing some flexibility?
Mr Harrison: To put it in a wider context, since the RICS report came out there has not been a rush to accept its findings. Earlier Mr Hoyle asked whether any pressure had been brought to bear. We know that there are plenty of surveyors working within the RICS and trade related valuation group on behalf of the pubcos who will no doubt be lobbying in relation to that report. The report has not been universally accepted. We have seen correspondences to tenants of companies such as Greene King. I know that the Chairman is meeting them later so perhaps he could ask them why they are writing to tenants denying what that report means or perhaps suggesting that the *Brooker* case does not have significance. I use that word 'significance' because that was how Mr Rusholme described it earlier in his evidence. Therefore, we are not seeing as we have been told by the BBPA a rush to embrace this report. That is not our experience at the moment. *Brooker* has been put in context by BBPA members and large pubcos as being specific to that particular case but it is not at all. That is why Mr Rusholme describes it as significant. The judge in that case, Ian Hughes QC, was very specific about making two general points. First, he conferred some credibility on valuation information paper no.2, which is the guidance that Mr Rusholme is looking to revise; second, he went on to include a set of issues that hypothetical tenants could consider in rent reviews, such as the general economy and the fact that a tied lease is likely to be more onerous than a free of tie lease *et cetera.* Therefore, in some ways he was already embracing the prime principle in that judgment. I believe that is why the RICS and their solicitors are interested in a general and not specific set of principles. It has wider implications. We are in the process of taking leading counsel's advice on that at the moment and perhaps in due course we can come back to the Committee on that.

Q178 Mr Clapham: Mr Mallen, you are not as encouraged by the BBPA's code of practice as you are by some of the recommendations that RICS make in relation to their code of practice. Is it that you are not happy with the implementation of the BBPA code or what is contained in that code of practice?
Mr Mallen: I am sure I could bore you for hours on the things in the code that do and do not suit the industry. In one word the issue is enforceability. As long as it is not possible to enforce it it is an issue. I do not see the sanction of being thrown out of the BBPA as a matter of great concern. The BBPA does not even represent all the landlords in the country in any event, so if they are not members they do not have to abide by it.

Q179 Mr Clapham: One point made earlier by the previous witnesses was that the codes of practice established a kind of contract and it might be possible to enforce it, but you tend to disagree with that.
Mr Mallen: The evidence I have in front of me is that a senior executive of one pubco says that they are wholly discretionary. I believe that the lease is the contract and a court would see it that way.

Q180 Mr Clapham: We heard about enforceability from the previous witnesses. Because of the way the code is not totally accepted by the industry you believe that the BBPA code just would not be enforceable?
Mr Mallen: No. I think it would end up in a long drawn-out process where for years it was contested that in signing the code the pubco had agreed to the terms within it.

Q181 Mr Clapham: Presumably, the confederation wishes to see a mandatory code and that would be the RICS code?
Mr Mallen: Yes.

Q182 Chairman: There are issues in the BBPA code which RICS would not even touch. The question is: what advice can you give the Committee about those other issues that cannot be part of the RICS code which you would like to see mandated? What recommendation should be made?
Mrs Nicholls: We have to go back to the 2004 report of the Select Committee on Trade and Industry which made a clear recommendation about what an adequate code would cover. We have not seen a copy of the code they are talking about, so we do not know whether that meets the definition of what the Committee asked for at that time. But the Select Committee was quite clear that if the industry did not produce an adequate code and enforce it there should be a statutory one. The only way one can deliver true enforceability is to make something legally binding and bring about real change.

Q183 Chairman: Should we give them a year or two on the voluntary code or have they already visited the last chance saloon?
Mrs Nicholls: I take you back even further to 1989 and the MMC which said that the lack of an enforceable—they underlined that word—code of practice meant that brewers could limit the economic independence of tenants and reinforce

their position of economic strength. If you substitute "pub companies" for "brewers" you are in exactly the same situation. We have not moved forward since 1989; we have no enforceable code of practice in this industry.

Q184 Mr Clapham: In terms of scrutiny you believe that the BII is less than an independent redress mechanism. Can you add to that?
Mr Harrison: You have to deal with two things: the ability of the BII to be genuinely independent in the long term and the perception of it as an independent body. Both of those are extremely hindered by financial connections between pub-owning companies and the BII. We are really looking for an available body to scrutinise a code written by the people who fund the body that is to scrutinise it. Given the suspicion that exists and the problems faced by the industry at the moment that does not seem to be an excellent starting point. We need something that is mandatory or statutory, almost a licence to operate tied and tenanted pubs, and in order to do so you have to sign up to a code which is genuinely enforced with real financial penalties, not just one organisation's arbitrary understanding of what constitutes a persistent breach. Individual breaches can be extremely damaging to tenants; they can put them out of business. The breaches may not be visible until the tenant has already gone out of business. This needs to be statutory, mandatory and properly enforced with financial penalties by a separate organisation. I realise that that is not what the BBPA want to hear, but that is needed in order to give confidence in the sector.
Mrs Nicholls: It is the absence of effective sanctions and penalties that goes to the heart of it. The evidence is that this year alone there have been 100 cases in which code complaints have arisen. I have not seen anybody's accreditation being removed or anybody leaving the BBPA. There is talk about multiple persistent breaches and then a possible move towards a sanction. I do not see that there is a truly independent and effective sanction. I sit on a property codes compliance board which deals with codes of practice in the residential sector; it deals with HIP and search providers. It is an entirely independent, separate board nominated by public interest bodies and consumer representatives. They are the people who deal with the issues of compliance, not the industry. The industry cannot sit in judgment on itself.

Q185 Mr Clapham: I turn to PIRRS about which you have expressed some concerns. Perhaps you would take us through them.
Mr Harrison: Perhaps I may deal with a preliminary point related to the PIRRS website. I am aware that the chief executive of BII, Neil Robertson, is here today. He behaved perfectly in dealing with this. We raised a complaint with Mr Robertson in regard to the declaration of interests of surveyors who put themselves forward to be members of the panel. From the website it transpired that a number of those surveyors had not declared their interest in the way they had been asked to do by the BII. That website was not taken down for a technical reason as Mrs Simmonds said; it was taken down by Mr Robertson for a very sensible and pragmatic reason, namely that as a new system it was potentially exposed to ridicule at an early stage. Very sensibly, he took it down and took forward that matter. To make one quick comment on PIRRS, if Mr Rusholme and the RICS deliver their report properly and address that very seriously—the RICS is capable of behaving in this sector truly independently, which we would argue it has not been—PIRRS ought not to be required at all because the system that should be in operation in most of those contracts ought to run properly. Some people in the BII would agree that that is probably the case and their attempt to come up with an alternative system has also been very useful as part of the RICS consideration. Maybe the RICS have said that somebody else is stepping onto their turf, if you like. I believe that has been very helpful.
Mrs Nicholls: PIRRS undoubtedly has the potential but it is limited and deals only with rents. The matter we urge you to dig away at again is that there are other forms of complaint where there is no method of independent redress. PIRRS does not deal with it.
Mr Clarke: As to PIRRS, as Mr Harrison rightly stated there was obviously concern about the independence of some of the surveyors who nominated themselves for the role of independent adjudicator. PIRRS is in its infancy and I am sure there will be various tweaks and consideration will be given to its development as time goes on, but the problem still faced by BII is that it must depend on the disclosure given by the surveyor. For example, Fleurets are still on that independent body. As we speak they have 150 pubco pubs on the market of which 70 are Punch. I cannot see how that can be considered to be independent.

Q186 Mr Clapham: Looking at some of the evidence we were given, the Federation of Small Businesses told us that PIRRS excluded the involvement of RICS. We heard that that was not correct. Is it your view that RICS is excluded?
Mr Clarke: I do not think RICS is excluded; nine times out of 10 it will be a RICS man who will be the independent adjudicator. They might have been referring to the fact that PIRRS is not necessarily bound by the RICS code of conduct. Essentially, even if the RICS has come up with a code of conduct that is suitable for the industry it will bind only chartered surveyors. As touched on earlier, BDMs and area managers, who nine times out of 10 are the negotiators on rent reviews, are not chartered surveyors and they will not be bound by that code. As far as I know, PIRRS is to be based on chartered surveyors operating the system and using the same formula and valuation guidance as the RICS guidance that is about to be revised.

Q187 Mr Clapham: What do you believe needs to be done to make your members feel confident that the pubcos are working with you to create an industry that has a prosperous future?

Mrs Nicholls: I think we must go back to the Committee's recommendations in its May report. Your analysis and recommendations are right. The only way forward is to work in partnership on freedom of choice, flexibility and fairness. That is what the IPC stands for and we are happy to have dialogue with any stakeholder who shares those aspirations and wants to work with us to deliver them. Ultimately, we come back to the Committee's recommendation that it will not happen on a voluntary basis and the Government now needs to intervene to ensure there is a legal framework and the competition issues are investigated thoroughly.

Q188 Mr Hoyle: I turn to the very important area of the beer tie. What is the Confederation's collective view on the beer tie? What changes could be made to the tie to satisfy your members and make it workable for them?
Mrs Nicholls: I make clear that here I speak on behalf of the IPC collectively, so I give the common position and consensus. Our position on the tie is very simple. We support a model that offers fairness, flexibility and freedom of choice and therefore we concur wholeheartedly with your recommendation that the way forward is for lessees and tied tenants to be given that choice. If it works it will be to their benefit; if not, they will remain tied, but that choice can be offered only in the context of the proposed revisions to the RICS rent valuation model based on the prime principle that the tied tenant should be no worse off than if he was free of tie. We fully support the recommendation you made and cannot see that good operators and landlords have anything to fear from offering people a choice.

Q189 Mr Hoyle: That is interesting because CAMRA says the tie should be kept and the FLVA say it should be abolished, so where does that leave you?
Mrs Nicholls: We are not here to replace the views of our members who hold disparate views.

Q190 Mr Hoyle: I did ask for the collective view.
Mrs Nicholls: The collective view where we do have commonality is support and endorsement of the Committee's recommendation because that allows both sides to keep saying the same things. Your recommendation is a very clever one because it says that if tie is of such great benefit lessees and tied tenants in particular will choose not to exercise their choice. Our position is all about fairness, flexibility and freedom of choice.

Q191 Chairman: Would you extend that choice to every brewery and pubco or would you put a limit above or below a certain size?
Mrs Nicholls: To try to make it a pragmatic and straightforward solution, as a first step we would put a limit on it. We suggest that you should adopt the European Union definition of de minimis and exempt those below a certain market share.

Q192 Chairman: What would that market share be?
Mrs Nicholls: One per cent of the UK pub market.

Q193 Mr Hoyle: You say that some small landlords have leases that give them the choice of being free of the tie. How has this been taken up?
Mr Clarke: The important point to note is that you can be offered the option of free of tie or flexibility of tie. Mr Darby referred to Marston's proposal. I do not know the details of that proposal but I have seen other ones. Nine times out of 10 the opportunity to go free of tie is accompanied by a rental increase which is determined by the landlord who offers that opportunity. I would argue that if you are to be offered freedom from the tie or any flexibility at all which alters the terms of the lease that should be accompanied by a rent review based on open market rental value, not something that is dictated, namely that the tenant can have *this* but in exchange the pubco wants *that*.

Q194 Mr Hoyle: Do you suggest that it is a pub that does not sell a lot of beer anyhow and so they would be quite happy to give up the tie because they could derive income from, say, food and the brewery could get a bigger take by putting up rent due to the volume of beer going through the pumps?
Mr Clarke: I suppose there is that possibility, but the nature of the profits valuation is that those other income streams would be valued anyway on a cash flow basis. Therefore, there would be gross profits allocated to tie and free of tie products. They are all encompassed in the rental value as it is. The point is that if the lease is changed in any shape or form it is accompanied by an open market rent review.

Q195 Mr Hoyle: The BBPA has said that pub companies should develop a protocol on the operation of flow monitoring equipment. What would you like to see in such a protocol?
Mr Harrison: First, we have been doing some work on this with regard to Brulines which is pretty well the only flow monitoring device that is installed in the vast majority of tenanted estates. We have commissioned a report, which we have submitted to the Committee, from SGS which is the world's leading expert in verification instrumentation and certification. In its detailed report it concluded that the system was not fit for purpose, inaccurate and ought not to be put to the use that it is being put. Second, it is not true that LACORS and Trading Standards have approved this system.

Q196 Chairman: It is said they do not need to.
Mr Harrison: LACORS do not say that at all but that in their view—we have a letter from Ms Wendy Martin, their policy director—the system is likely to be in use in trade. We have taken leading counsel's advice, which we have also submitted to the Committee, that it is also in use in trade and as such probably falls under weights and measures legislation. LACORS have also suggested that Brulines ought voluntarily to submit their system for testing in government labs. That has not been volunteered yet and we believe that is because it is

not accurate and does not work. What we do know about it is that it is inaccurate; it is possibly unlawful and we have been advised that it perhaps also falls foul of the Misleading Marketing Regulations 2008. We know that it is used largely for the intimidation of tenants; that is what happens on the ground and it continues to be the case. Mrs Simmonds did know about direct debits which were used to take money directly out of people's bank accounts because I told her personally when I met her some weeks ago. I spent about 15 minutes talking about Brulines and not much of it seemed to sink in, to be frank, but that is the case. We have done some work on it, so our view is that it is inaccurate; it is possibly unlawful; and it is used for intimidation.

Q197 Mr Hoyle: The BBPA suggest that evidence in addition to flow monitoring equipment is required by pub companies before accusing a lessee of buying out of tie. What evidence do you suggest is necessary to do this?
Mr Harrison: It would be for the court to decide, would it not?

Q198 Mr Hoyle: But is there anything else to add?
Mr Clarke: Corroborating evidence would be necessary for any sort of action to be taken. The discovery of foreign barrels in a cellar is perfectly good evidence, but nine times out of 10 the corroborating evidence that is used to back the Brulines' evidence is a confession by the tenant which is usually obtained by using Brulines' evidence. It is a self-fulfilling process. You could go to court with all this evidence about singing and dancing and nicely coloured graphs. Here is also a confession by the tenant. When faced with that information at the outset the tenant would consider that a nominal fine and confession would probably be better than the forfeiture of the lease which is what he is being threatened with.

Q199 Mr Hoyle: It is as draconian as that?
Mr Clarke: Absolutely.

Q200 Mr Hoyle: And the equipment is questionable?
Mr Clarke: I had Brulines' calibration two weeks ago in my pub, The Eagle. Obviously, you have had plenty of evidence about my pub before. It was a Brulines technician who undertook the calibration test. He dispensed 14 pints from eight of our pumps, I believe, and all the time it was going on the proceedings were live with HQ and an analyst sat in front of a screen and said that, yes, he had just pulled half a pint through a particular pump. When we got the final report three days later the system failed to record five of the 14 pints they had pulled. Bear in mind that this was when the pub was closed and other than us there was nobody else to interfere with the dispensing or anything like that. Their own technician and analyst were totally unhindered; we gave them free rein to do what they considered to be their job. The result was a 33% or 40% inaccuracy.

Q201 Chairman: That is why you have so much beer in your cellar?
Mr Clarke: We still have 2,000 gallons sloshing around in the cellar.

Q202 Mr Hoyle: Is it fair to say there is absolutely no faith in the Brulines equipment and you have proved it has been totally discredited?
Mr Clarke: As far as I am concerned it is an utter joke.
Chairman: I should warn Mr Hoyle that Brulines is as litigious as Ted Tuppen.

Q203 Mr Hoyle: But we are only repeating the evidence we have received. There is something wrong here. Surely, even Brulines would hold up their hands and say they ought to look at it because there is something seriously amiss.
Mr Clarke: We have put evidence to the Committee. We have had anomalies in our records. I have queried them and at the flick of a switch they convert what they have down as a water allowance into beer and what they have had down as beer is possibly some gas in the pipe that has turned round the meter and therefore it has registered a half-pint.
Mr Harrison: In relation to Brulines the argument is that something is needed to police the beer tie. If there was flexibility, fairness and freedom of choice as IPC advocate then as in the free of tie sector the need to police the system might not exist. Having said that, if you are to police any system in a time when we are used to things being extremely accurate—all of us have satnavs in our cars that can place us to within a metre of any point on the globe—a 40% degree of inaccuracy on the part of a company that makes millions of pounds in profits a year is completely unacceptable. If they want to put it on the market they should make proper investment in it to make it work.

Q204 Mr Hoyle: Let me put the reverse of that: is there any benefit to you of having the flow monitoring equipment?
Mr Clarke: There is no benefit to me whatsoever. I suppose they would use the argument if I had a number of pubs that I could oversee dispensing, but in my case I am behind the bar for 35 to 40 hours a week. I know when I am busy; I do not need them to tell me that a week later. It is of no benefit to me whatsoever. Only two weeks ago I was in a Punch-managed pub, of which there are 1,000. They do not have this system fitted in that managed pub. It might be in some but not that one.

Q205 Mr Hoyle: Therefore, the flow monitoring equipment is about as effective as European fish quotas, in which case we are looking for a new system. Consideration has been given to installing video cameras on every fishing boat so everything is recorded and can be viewed at any time. Do you think that may be a way forward for everyone?
Mr Clarke: I suppose it is an option.

Q206 Mr Hoyle: I presume it is better than the one you have now?

Mr Clarke: I do not believe that is an option. As Mr Harrison put it very eloquently, if there were no tie there would be no necessity to try to police it.

Q207 Miss Kirkbride: Although I am aware this point was made in our report, I just want to satisfy my own mind why it is fair to insist that pubcos offer choice of tie or free of tie. I completely sympathise with you about the way pubcos have behaved badly in that you cannot properly enforce your leases and all the stuff we have just been hearing. I suppose that in terms of being obliged to offer a choice their argument would be that this is their business and their property; they have a business model in which they offer these services in return to landlords and it undermines that business model if they do not achieve the scale over all their properties; further, we do not go after other people's private business practices. In a way it looks slightly vindictive—I understand why given the way they have behaved in the past—to say that not only should they have more enforceable leases but they should also be required to change their business in a way that could undermine it. Tell me why it is fair and then I will be happier.
Mrs Nicholls: First, we are not asking them to change their business model. If one did that one would be saying that it was no longer legal for them to tie. You are not saying that; we are not saying that. We say that if you want a tie it confers on you a duty of care to ensure fairness to the people on whom you impose the restriction. If you genuinely offer benefits and the tie is of value those lessees will not exercise that choice.

Q208 Miss Kirkbride: But on the basis that they properly did what you have just said why is it fair and right to go further and say that they must also offer this alternative business? If they do what you have just said why do we have to go further and strip them of the right to insist on having the tie?
Mrs Nicholls: Because there are people who do not offer fairness, flexibility and freedom of choice; they impose onerous conditions and arguably the tie does not work in that model or on those premises. Therefore, the lessee should be given the choice. They would still have a business model; they would still own the property and get dry rent. The balance of risk would change.
Miss Kirkbride: But if they dealt with the first bit they would not have to deal with the second bit?
Chairman: This is the old Irish question: we should not be starting from here.

Q209 Ian Stewart: I have been asked to press you on the AWP tie. On behalf of the BBPA we heard Alistair Darby give what appeared to be compelling evidence that the AWP tie benefits publicans. The Committee has been concerned about the abuse of that system. Can you say how the AWP tie can be made fairer? Does the suggestion by the BBPA go far enough?
Mrs Nicholls: The Select Committee's recommendation in 2004 was very clear. The benefits of the tie are not outweighed by the restrictions imposed as a result of it. The BBPA suggestion does not go far enough because it does not meet the fundamental recommendation that the AWP tie should go. Whatever one thinks of the OFT's recent report on CAMRA's complaint, it found that lessees were £3,000 a year worse off as a result of the AWP tie. That is the answer to whether or not it benefits a lessee. The OFT says the lessee is £3,000 worse off.
Mr Mallen: In 2004 there was a request that it be removed; in 2008-09 that request was repeated. As Mr Harrison said yesterday, this was mooted as low-hanging fruit. It appears to have risen to the top of the tree. The BBPA appear to suggest that the lessee can operate his business but he is not capable of managing his own machines. Perhaps if they provided managers we would all be better off; we could sit back and take a share of the profit. In my view and presumably that of the IPC the publican should be entitled to manage his own business. For years they have taken upfront access payments; they have refused to allow machine operators onto their list unless they pay their weekly rents; they have taken a disproportionate amount of the machine income over four years. I do not believe we can leave the BBPA to manage these machines on our behalf.

Q210 Ian Stewart: Do the other witnesses take that view?
Mr Clarke: I do not have machines because I do not recognise any value in them.
Mr Harrison: I listened carefully to what Mr Darby said, but his theory that one's income falls if one manages the machine oneself means that one needs 200% income once one has given him the 50% split in order to stand still. I have information here from one of the major pubcos. We are told that this is becoming fairer and fairer, but let me read it to you: "On AWP terms, if the net take is insufficient to pay the rental this is deducted from the tenant's share. If the tenant's share reduces to zero any outstanding balance is paid by Enterprise Inns." Therefore, in that particular case the tenant has to lose all his money from the failure of the machine which is in the management of the pubco before the latter chips in and pays anything towards it. That is not our experience; we do not see it becoming fairer. It is a lucrative form of income for the pubco.
Ian Stewart: What about the $33\frac{1}{3}$-$33\frac{1}{3}$-$33\frac{1}{3}$ system?

Q211 Chairman: The machine owner, the pubco and the publican each get a third?
Mr Harrison: It comes back to choice, does it not? Why can we not be offered a range of choices? Some publicans will feel more comfortable perhaps with that arrangement; others will want to manage their own machines because they are very good at it, but at the moment the choice is not there.

Q212 Chairman: I want to rattle through a few questions before we end. I refer to the repeal of the Competition Act 1998 (Land Agreements Exclusion and Revocation) Order 2004 and the EU block exemption. It sounds immensely technical—one almost falls asleep at the mention of it—but it is probably rather important, is it not?

Mrs Nicholls: I would not want to overstate its importance, but it is a sensible and pragmatic step forward. If you will pardon the pun, it is a hangover from the previous competition regime and basically is used to exempt vertical agreements and leasing agreements from the provisions of the Competition Act 1998. Basically, it creates an anomaly between European and UK law which is one that the Competition Commission and now government appear to recognise. Under the EU block exemption the EU Commission's guidelines are clear. Even if one falls within the scope of it one should individually scrutinise oneself and one's agreements to ensure one satisfies the criteria for exemption. The land agreements exclusion order rides roughshod over that and says that basically there is a blanket exemption and you can forget about the need to self-assess and ensure the specific criteria apply; you are automatically covered. Because of it we have seen the creeping extension of exclusive purchase agreements and restrictions, longer terms, upfront access payments and the extension of the beer tie to other products. Therefore, the two go hand in hand entirely. The land agreements exclusion order would simply bring us back into line with Europe and require companies to scrutinise themselves on an annual basis and self-assess whether or not they comply with competition law. The government is minded to rescind it. We support that. The only thing we disagree with is that April 2011 sounds a long time away. As to the EU block exemption, we are happy to provide you with the details of what we have been doing in Europe at that level, but obviously there is an issue there. Both of those issues are extremely important.

Q213 Chairman: As to the EU block exemption the de minimis level would again be the idea, would it not?
Mrs Nicholls: Exactly. At the present those levels are set far too high, particularly where there is a network of parallel agreements.

Q214 Chairman: Is it right that the EU block exemption is 5%?
Mrs Nicholls: Yes. Both of them are important issues but they do not obviate the need for a market investigation as per the Committee's recommendation.

Q215 Chairman: It is useful but not world-changing?
Mrs Nicholls: Yes.

Q216 Chairman: The last question is about restrictive covenants. There is some speculation that Punch, Enterprise and Marston's have ceased to use restrictive covenants, at least for the time being. Is that the case? How long will it last? What effect has it had?
Mrs Nicholls: We have no particular information about that. I am aware that warm intentions have been expressed. It is not an issue on which the IPC is currently focusing. It is an issue for our member CAMRA and they are pursuing it independently.

Q217 Chairman: Should we stick to our call for a ban on all restrictive covenants in the future use of pubs or should we say instead that consultation with local communities and local authorities before covenants are imposed would be acceptable?
Mr Clarke: The important point is that overall the IPC does not have a common voice on that. If you want to know what the individual parties think then we can safely say that Fair Pint very much backs that recommendation and certainly CAMRA's initiative.

Q218 Chairman: The reason I think it is important—I do not know whether the Committee agrees with me—is that it is just another manifestation of the way the market is not being allowed to speak in your sector. Recently I was asked by a brewer about my vision of the industry in 20 years' time. I said that it was one in which the market operated freely and fairly, nothing more than that, and we must strive to reach that position. I was interested by your suggestion that pressure might be applied by the BBPA and others. Does the BBPA talk to you individually and collectively? What is your relationship?
Mrs Nicholls: BBPA talks to us individually. There is a dialogue between ALMR and BBPA as recognised national trade bodies. I have not been put under pressure by the BBPA but references have been made by individual member companies to ALMR. There is no dialogue at all between the BBPA and IPC.

Q219 Chairman: To ask a silly question, would it be a good thing to have such a dialogue?
Mrs Nicholls: Absolutely. We are more than willing to have a dialogue. When ALMR first said back in June that we ought to have mediation to try to sort it out ourselves that was the whole purpose of it. We are willing to talk to anybody at any time in order to pursue the objectives we have outlined.

Q220 Chairman: To jaw-jaw is better than war-war?
Mrs Nicholls: Absolutely.
Chairman: I hope we can reach nirvana. Thank you very much. Happy Christmas, and sell lots of beer!

Written evidence

Memorandum submitted by the Department for Business, Innovation and Skills

I am writing to you in advance of the Business Innovation and Skills (BIS) Committee evidence gathering meeting on 8 December to set out the Department's current position in relation to the Pub Company Report published in May.

You wrote to me in July asking that we delay responding so that you could assess progress made on developments rather than have an incomplete reply.

I believe that progress has been made over the summer. I am encouraged by the efforts that the Royal Institution of Chartered Surveyors (RICS) has made in responding to the concerns in the Pub Company Report. This includes producing enhanced guidance on pub rent valuations, a new benchmarking scheme and a code of practice. The British Beer and Pub Association (BBPA) is also amending its code to address a number of issues highlighted in the Report. This is concentrating on improving transparency, providing better and more complete information and a more open rent review process with redress for new and existing licencees.

I have since met and listened to the views of a number of the parties that have an interest in the outcome of the report and are actively engaged in resolving the raised concerns.

Many of the initiatives being taken forward including the revision of guidance and codes have yet to conclude. I believe, therefore, that at this stage it is too early to take a decision on whether Government needs to intervene.

Once the Committee has taken all the evidence and concluded its investigations and reported we will then, subject to any other developments, formally respond. We shall be monitoring progress closely over the coming months.

8 December 2009

Memorandum submitted by The All Party Parliamentary Save the Pub Group

1. Abstract

1.1 This memorandum supplements the evidence submitted by the All Party Parliamentary Save the Pub Group on 25 March 2009. The Save the Pub Group campaign for a fair deal for pubs. We are active in helping to preserve pubs as a corner-stone of sustainable communities.

1.2 This memorandum focuses on varying approaches suggested by the British Beer and Pub Association ("BBPA") and the Independent Pub Confederation (IPC). The Save the Pub Group believes that real reform is needed, not just window dressing by way of a voluntary code.

2. Recent Developments

2.1 The Committee will be familiar with the recent Office of Fair Trade Report on the Campaign for Real Ale's ("CAMRA") super-complaint. The Save the Pub Group is of the opinion that this report failed to take full and proper account of the evidence submitted, with excessive weight being placed upon the submissions of large pubcos.

2.2 The BBPA has recently proposed a voluntary code of practice as a way to allow the industry to effectively self-regulate. Despite unusually draconian restrictions governing its publication, this code has recently been made public.

2.3 Following unsuccessful attempts at mediation, the Independent Pub Confederation was launched. This has been warmly welcomed by the Save the Pub Group as a way to bring together groups representing tenants and small brewers.

3. The BBPA's Proposed Code

3.1 The Save the Pub Group has grave concerns about the way the information has been allowed to trickle out. If this is a serious code designed to move the industry forward, we believe it should have been submitted for full consultation so that interested groups could consider it and add their input.

3.2 In principle, the Save the Pub Group believes that a voluntary code is an ineffective. Despite the previous report of the Committee, the number of pubs closing continues to skyrocket. The proposed code includes points which were in the 2004 Trade and Industry Select Committee Report which were almost entirely ignored by the industry, and other clauses which are simply good practice and should already be in place. The report will not address the fundamental imbalance inherent in the tied relationship as it currently exists. The industry is in crisis; a voluntary code has little hope of changing the ingrained business habits of the larger pubcos.

4. IPC's Proposals

4.1 The Save the Pub Group supports the proposals of the IPC in their manifesto proposals, including:

4.1.1 Lessees being given the option of going free of the beer supply tie.

4.1.2 Should there be a beer tie, all other product ties should be severely restricted with lessees being offered a guest beer sourced direct from a small brewer.

4.1.3 The establishment of new rent valuation guidelines.

4.1.4 The principle that the tied tenant should be no financially worse off than a tenant who is free of tie.

4.1.5 The establishment of minimum standards of fairness, disclosure and transparency in the handling of rent negotiations.

4.1.6 The establishment of representative lessee forums to discuss issues of concern.

4.1.7 The removal the Amusement With Prizes (AWP) tie from all long leases.

4.1.8 To have a legally binding code of practice.

4.2 The final point is of key importance. The Save the Pub Group believes that the only constructive way to achieve progress in the industry is to have a compulsory code.

5. Conclusion

5.1 Pubs are under fire. In every village, in every town, in every city across the country a pub used to stand at the heart of each community, bringing people and societies together. The cold business practice of an unfair tie, standing like a Goliath in the trade, is chipping away at the pubs they are meant to support.

5.2 The availability of cheap alcohol in supermarkets, the economic downturn and the smoking ban may have affected the industry, but it is the pub tie which is more influential than any other single factor in the wildfire closure of pubs. The extortionate prices for drinks charged by the pubcos, with an absence of support in the bad times, slashes the profits from previously prosperous establishments.

5.3 The BBPA's voluntary code is simply rearranging deckchairs; it will not stop the ship sinking. It is a sticking plaster too easily disregarded by their masters, the large pubcos, where it does not suit. Big companies have shown that they are unwilling and unable to bring forward the kind of changes to save pubs that are currently closing (temporarily and permanently) because of the tied system as operated by some companies.

5.4 The IPC's proposals are the only way for the trade to be properly regulated. The fact that the BBPA (who represent the big pubcos and breweries) are not prepared to support the proposals means that intervention by the Committee will be necessary. It may in time be necessary for the Competition Commission to also be involved, however we cannot wait that long so the Government must act soon to arrest the decline of community pubs. many of which are viable in the right hands.

5.5 The Save the Pub Group therefore hopes that the Committee will place the greatest weight on the IPC's submissions in preference to the BBPA.

25 November 2009

Memorandum submitted by Association of Licensed Multiple Retailers (ALMR)

Further to your e-mail of 7 January I have now had an opportunity to pull together the additional information you requested:

— Update on *ALMR* Benchmarking Survey 2009–10.

— Dialogue between IPC and BBPA.

— Further information on the domestic property regulatory structure.

I have also attached a copy of the letter referred to by Garry Mallen in respect of the Codes of Practice and our submission on the EU Block Exemption (*not printed here*), both referred to in oral evidence. I understand that Simon Clarke will be writing to you separately with a copy of the transcript of the court case, but please come back to me if this is not forthcoming.

ALMR Benchmarking

I wanted to take this opportunity to update the Committee on developments with regard to the survey made since the publication of your report in May 2009 as well as providing the additional information in support of my response to Mr Clapham MP at the evidence session.

As you will be aware, the *ALMR* Benchmarking Survey is carried out on an annual basis in October, with replies being received by the end of November. The current round was due to have been completed by the time of your follow up evidence session and we had hoped to have results available early this year. This timetable has been extended in order to allow any companies who may have reconsidered their position following the December evidence session to participate.

Immediately following the December evidence session the *ALMR* announced it would extend the deadline for responses to 15 January and held a series of discussions with landlord representatives and individual companies to encourage participation and to discuss outstanding concerns. Disappointingly, no additional companies have confirmed their participation to date.

Some large companies remain reluctant to take part for reasons that only they can explain but others have publicly expressed reservations about the use to which the data may be put. Landlord concerns appear to relate to the survey's limited scope ie restriction to managed house operators, confidentiality of results and perceived independence ie ownership of results by *ALMR* and potential spin or misuse of them. BBPA have confirmed in correspondence that they have done nothing to discourage participation, but equally they have done nothing to encourage it; they go on to note that "for obvious reasons some are not keen to work with you".

Following publication of your report in May we significantly changed the scope of the survey in order to address these first two concerns. In particular we opened up participation to non-*ALMR* members and individual lessees and have structured it in such a way as to allow separate analysis of results for singleton and multiple operators, lessees and free of tie sites. All returns will now be collated by an independent research company and results analysed by an independent economic adviser, subject to peer group review. These points have been reiterated to landlord representatives and individual companies.

We have now gone further and proposed that we will relinquish ownership of the survey and results and "gift" it to the industry. This is because *ALMR* ownership or badging of the survey appears to be the major sticking point for some. I have attached a press release announcing this move but in essence it would mean that data was interpreted and analysed by an editorial panel—comprising a cross-section of stakeholders—which RICS has agreed to chair.

The response from landlord representatives has been a cautious welcome but is still non-committal. We understand that the issue of benchmarking will be discussed at the BBPA pubs group meeting in February and discussions about participation in the current survey round cannot progress until then. We would be willing to further postpone the deadline for responses until after then if we had any positive statements of intent; regrettably these have not been forthcoming to date. We believe that we have addressed all legitimate concerns about participation in the initiative and that it is now a matter of goodwill. Whilst this may be forthcoming from individual companies, it is clear that landlords are working collectively on all issues related to your enquiry.

The *ALMR* remains committed to continue to refine and develop the survey to provide information which is of use to operators not only in respect of rent setting but also more widely. We have had a number of productive and substantive discussions with RICS over the course of the summer and post the December evidence session. They have agreed to work with us to develop the survey—which they agree is largely fit for purpose—and to chair any editorial board for analysis purposes.

Dialogue between BBPA and Lessee Representatives

Following the evidence session, the *ALMR* has had both a formal and informal meeting with the BBPA to discuss developments. In both instances, the BBPA has expressed its willingness to meet with the *ALMR* as a recognised representative body but is disinclined to meet IPC.

A further meeting is planned at the end of January/early February once the revised BBPA Code is finalised and signed off by FLVA and BII. The BBPA will not, however, engage on discussion on the content of its Code in draft form ahead of that unless the *ALMR* agrees to sign the Industry Framework Agreement.

Domestic Property Regulatory Structure

I mentioned at the evidence session that I sit on the Board of the Property Codes Compliance Board in a personal capacity related to my other consultancy work. You asked for more information on this structure.

The PCCB was established in 2006 independently to monitor compliance with industry codes of practice—the Search Code and the HIP Code. The Board sprang directly from government legislation to introduce Home Information Packs and a decision by the industry that it should introduce a system of self-regulation. This decision was taken on the basis that the domestic property sector involves a high proportion of regulated professionals—lawyers, solicitors and surveyors—as well as statutory licensing arrangements for estate agents.

Whilst the HIP and Search Codes were drawn up by the two trade bodies representing companies in the two sectors, the decision was taken to place compliance and enforcement activity at arms length. The PCCB is fully independent and is funded by means of a subscription on companies wishing to exploit the Code logos, which act as kitemarks of quality and standards. The PCCB carries out pre-registration assessment of terms and conditions, practice and procedure as well as full compliance inspections and spot enforcement checks.

Any breaches of the Codes are referred to a Compliance Committee and can result in removal of subscription. This has a very real financial penalty as the HIP Code requires pack providers to only use Search Code subscribers. Conveyancers, lawyers estate agents and ultimately end users are recommended to only use code subscribers as well. Complaints about subscribers or operation of the Code can also be referred to The Property Ombudsman, who also provides independent redress for estate agents.

The key points of difference between this regulatory structure and that proposed by the BBPA are the independence of the regulatory structure and "regulator" itself and the existence of a separate means of independent redress. The PCCB Board has only two industry representatives on it out of a Board of eight members. Public interest and consumer groups dominate and exclusively make up the Compliance Committee.

In addition, RICS has recently helped to establish a Property Standards Board bringing together all stakeholders, professional bodies and independent regulators in the residential property sector. The PS will develop codes of practice for estate agents and property managers and again is characterised by independent standard setting, assessment and redress.

You can obtain further information on the PCCB and TPO at www.propertycodes.org.uk and PSB at www.propertystandardsboard.org.uk. I should be happy to provide any additional details if you require them.

Conclusion

Our key concern about any proposed Industry Code is that it should be independent from the companies and bodies whose behaviour it seeks to regulate. There must be a mechanism for proactive enforcement and compliance, independent complaint and redress. Above all else, however, it must be legally enforceable and carry equal weight with and form part of the contractual arrangements.

We remain to be convinced that the BBPA proposals will deliver this. We very much hope that they will do so and that the commitments given to the Committee in this respect are fully realised. If so then the proposed Industry Code may well deliver real results. Unfortunately, it is impossible to confirm whether this is the case at present as we have still to see a copy of any revised Code.

In all of these issues, the concern remains that there are no concrete deliverables which could be pointed to to demonstrate good will. It is telling that we are still talking about a revised *draft* Code of Practice some eight months after the publication of the Committee's report and five years after the TISC Report first outlined what would constitute an adequate Code of Practice. This is in stark contrast to the activity undertaken by RICS over the same period.

APPENDIX

Letter to Garry Mallen from Enterprise Inns, as referred to in Oral Evidence given to the Committee

Please recognise that your client's application for the Ox Row was REFUSED months ago.

That is the end of the Code of Practice process for that pub. The claim has been handled exactly in line with every other claim which, following investigation of the financial evidence and market comparables, were adjudged by us not to have merit when they were made. Your client has not been treated exceptionally.

You also say in your e-mail that "they are entitled to the same rights that other tenants are being afforded". This is a misunderstanding of the status of the Code of Practice—it sets out no "rights" at all. The Code of Practice is non-contractual (the leases are the contracts) and all the deals done under this Code are concessionary and wholly discretionary.

On the two Reigate pubs I am aware that a subject to contract and subject to approval rent proposal has been agreed with your client on both, but absent the usual financial disclosures from your client neither I nor the regional team have authority to settle them with you within our Code of Practice. We have escalated the problem to try to get approval at a higher level, but you and your client could solve this problem immediately if you would complete the financial disclosures including monthly results and stock results during the time that the Bar Group has been managing them on your client's behalf.

10 January 2010

Memorandum submitted by the British Association of Pool Table Operators (BAPTO)

BAPTO is a long established (1975) trade association representing suppliers of coin-operated pool tables, juke boxes, AWP machines etc.

We gave written evidence to the original Trade and Industry Committee's (T&ISC) inquiry into Pubcos in 2004 and the Business and Enterprise Committee's inquiry into Pubcos in 2008.

I enclose a copy of a letter and information BAPTO sent in October 2009 to each individual member of the Business, Innovation and Skills Committee (*not printed here*). The letter and information were sent before the Committee announced it would look into developments following its Report on Pubcos earlier in the year.

Following this announcement we would now like the letter and information to be presented officially as evidence to the Committee for their joint consideration.

BAPTO made submissions to the Business and Enterprise Committee (BEC) inquiry into Pubcos with regards to the AWP tie. The reason for my writing is to inform you of the present position regarding the machine tie.

Following the BEC Report there has been months of mediation between the BBPA representing the Pubcos and other bodies representing the tenants of the Pubcos. As a result of the mediation the only concession made by the Pubcos regarding the machine tie is that they will no longer rentalise the tenant's share of the machine income. This amounts to a token gesture, the very least the pubcos think they can do to "get away with it".

In 2004 the T&ISC recommended the "AWP machine tie to be removed" and the BEC Report four years later concluded that "that recommendation still remains valid".

The Pubcos have no intention and never have had any intention of removing the machine tie, they totally ignored the T&ISC Report in 2004 and if they are allowed to they will do the same to the BEC Report.

While the mechanism of the machine tie remains, any loss suffered by the Pubcos by not rentalising the tenants machine income can be more than made up for at a later date by Pubcos increasing the royalties they charge and increasing their percentage share of the machine takings, it is the actual mechanism of the machine tie that needs to be removed.

The Pubcos only argument in defence of the AWP machine tie is that they add value to the AWP machine takings (the value they add bears no relation to the amount of money they take out) but even the Pubcos do not claim to "add value" to Pool Tables, Juke Boxes and SWPs (quizzes) but they will continue to charge royalties and take a share of the taking of these machines by way of the machine tie mechanism.

The latest rent lists of Enterprise Inns and Punch Taverns and the rent list from "What Amusement Machines" the magazine for pub landlords which shows them what rents they should be paying for their AWP machines this information shows that for the latest AWP machines Punch Taverns tenants are paying £22.50 per week more for their machine than a free of tie tenant and Enterprise Inns tenants are paying £21.00 per week more than a free of tie tenant (the machine supplier then pays the extra rental payment to the Pubco in the form of a "royalty").

I hope there is some way in which the Committee's recommendations can be imposed on the Pubcos because the only way the Pubcos will move on this issue is if the removal of the machine tie is made mandatory.

I would like to repeat what the chairman of the T&ISC, Martin O'Neil was moved to say in 2004 "the issue of machine income is the last blatant example of the profiteering that had been common place among pub landlord companies historically". The machine tie was unfair, unjust and wrong when it was evolved by the brewers and it is still unfair unjust and wrong today.

17 November 2009

Supplementary memorandum submitted by BAPTO

I am sorry to be writing to you at such a late stage in the pubco inquiry but I feel I am obliged too because I perceive that the pubcos are moving the argument on the machine tie from the removal of the tie to how the machine takings should be divided.

The recommendation of the TISC in 2004 and your own report in 2009 was that the machine tie to be removed and for the BBPA to only offer not to rentalise the machine income is I feel an insult, and no more than a token gesture.

If the machine tie remains the pubcos will still have control over their tenants in this issue and use this control to the pubcos advantage as they have always done.

I attended the meeting on 8 December 2009 in which you took oral evidence, I would like to make some observations on replies given to questions posed my members of your Committee relating to gaming machines and the machine tie. I enclose the relevant questions and our observations.

Once again I am sorry to be writing at such a late stage but I feel I would be failing in my duty if I did not.

Q145 *Chairman: Observation*

If the AWP provider you visited was RECAF Equipment Ltd, I would ask you to bear in mind when making your judgement the major part of RECAF business is supplying pubcos so they are one of the 15% of potential suppliers who have a vested interest in seeing the machine tie retained.

Q146 *Mrs Simmonds: Observation*

The operation of AWP machines is not a science but common sense, if a machine takings are good you keep it, if they are poor you change it. Thousands of free houses and social clubs have been doing this successfully for many years. Why do pubcos continue to peddle this fallacy?

Q147 *Chairman: Observation*

AWP machines in pubco sites are changed every 12–13 weeks but so are those in many free houses to suggest that free houses receive second rate service, and that machines are on site much longer is incorrect.

Q147 *Mr Darby: Observations*

(a) A gaming machine player will swap between pubs if the machine offered in one becomes jaded. There is no evidence to support this assertion.

(b) Again, we apologise that this was one of the key recommendations of the previous Committee to which we did not respond. It is easy to imagine reading the same apology in five years time if the machine tie is not ended.

(c) What the tie enables us to do as a pub company is use our buying and negotiating power with gaming machine companies and provide internal expertise to ensure that the machines in our pubs are as far as possible of the highest quality. We have given written evidence to your committee and to the TISC that proves that pubco tenants pay more rent for the same machines than do free of tie tenants.

(d) Whereby we retain the machine tie, that is, we keep the relationship with the gaming machine manufacturers. The AWP are supplied by a Marstons "approved" supplier at a rent set by Marstons on their rent list. Not rents freely negotiated by the tenant.

(e) There is now a divergence in average takings of about £40 a week between our company average and the tracker average; the tracker is taking less. Alistair Darby has been quoted as follows: "There is a performance gap of nearly 10 percentage points between the tracker pubs and the rest of our estate" This may well be true but what they are in fact saying is we will increase your AWP takings by 10% gross in return we want 50% of the net takings, Alistair Darby goes on to say we are discussing this drop in performance with the tracker tenants in question in order to improve things ideally by us taking back control of the AWP management and a share of the income in return.

(f) The gaming machine companies now say to us that the takings of the machine are reaching a *de minimis* level and they do not want to service them any longer because they take too little. Let these tenants choose their own suppliers not from only those nominated by Marstons and they will have no difficulty finding a good supplier.

(g) A tenant on average will seek to reduce the rent of the machine by agreeing to less frequent servicing and emptying, a lower quality machine and so on, the net effect being that the tenant and company are worse off. This age old argument has been shown to be false time and time again certainly the pubco will be worse off but the tenant will be much better off because 100% of the net take will be the tenants.

Q148 *Mr Darby: Observation*

I enclose an article [not printed here] from *What Machine* an independent magazine which advises tenants on amusement machine issues, this gives a very different view on video and AWPs and is much nearer the truth, that the sole reason for the upturn AWP takings is the increase in payouts from £35 to £70.00, not the introduction of video AWP's.

Q209 *Mrs Nicholls: Observation*

The OFT report says the lessee is £3,000 per year worse off. With my 35 years experience of operating machines taking into account royalties, pool tables, quizzes and Juke Boxes, I would think the average tenant would be between £4,500—£5,000 per year worse off and in busy sites this amount would be much higher.

Q209 *Mr Mallen: Observation*

These are other names for royalties paid to pubcos these royalties are not only for AWP's but also pool tables, juke boxes, quizzes in the BBPA frame work code of practice, there is no mention of 'royalties' why?

Q210 *Mr Harrison: Observation*

(a) I listened carefully to what Mr Darby said, but his theory that one's income falls if one manages the machine oneself means that one needs a 200% increase in income once one has given him 50% split in order to stand still. This is basic arithmetic and is perfectly true has any pubco even suggested they can double the takings of an AWP machine? This point alone is enough reason to remove the machine tie and any fair minded person would acknowledge this.

(b) On AWP terms, if the net take is insufficient to pay the rental this is deducted from the tenant's share. If the tenant's share reduces to zero any outstanding balance is paid by Enterprise Inns' Therefore, in that particular case the tenant has to lose all his money from the failure of the machine which is in the management of the pubco before the latter chips in and pays anything towards it. This is representative of the pubcos attitude towards machine income and sums up their attitude completely.

Q210 *Ian Stewart: Observation*

The issue is not about the way machine income is divided it is about the mechanism of the machine tie itself while the machine tie exists the pubcos will still have the power to bully and take advantage of their tenants. Surgeons treat causes not symptoms their philosophy being "eliminate the cause and the effect ceases" in this case the sharing of the income is only the effect the real cause being the machine tie.

9 February 2010

Memorandum submitted by The British Beer and Pub Association (BBPA)

The Trade Association Representing the Interests of Owners and Operators of Over 32,000 Public Houses Throughout the UK

Introduction

1. The Business and Enterprise Committee Report was highly critical of the tied pub business model and there has since been recognition by BBPA members operating tenanted and leased pubs of the need to accelerate change. Significant progress has already been achieved towards this objective which we regard as a continuing process and we are not in any way complacent about the work and changes required.

2. In addition during extremely challenging trading conditions, pub companies are providing significant support (around £4 million every month) to their retailers on an on-going basis in many different ways, through rent reductions, absorption of price increases, discounts and business support.

Addressing the BEC Report

3. Following the Report BBPA immediately set up a working group to develop a mandate for change. A series of industry commitments was later endorsed by the BBPA Council which was communicated to Lord Mandelson in July 2009.

4. Late in the Summer BBPA took part in a "mediation" process with licensee representative bodies and other groups to try to seek resolution on the issues raised in the BEC report. This process was largely funded by BBPA at a cost to the Association of £142,000. (In advance of the mediation sessions BBPA also attended three consultation meetings with the other parties involved, facilitated by the BII, during which there was open debate on all the issues raised in the BEC report.)

5. The wide disparity of interests held by various other parties involved in the mediation process meant that total agreement could not be reached. A number of these parties called for the BBPA to arrange collective agreements with its members on matters that would clearly contravene competition law. Others were looking for an end to the Tie which is a view the BBPA does not support.

6. It was possible, however, to achieve a binding agreement of commitments with two of the most respected organisations representing 9,000 individual licensees, namely the British Institute of Innkeeping (BII) and the Federation of Licensed Victuallers Associations (FLVA).

Revised Pub Industry Code of Practice (Incorporating BBPA, FLVA and BII Agreement)

7. The BBPA (in conjunction with the BII and FLVA) is developing a new industry Code of Practice that will bring real tangible benefits to both those entering into new agreements and existing licensees (a final draft will be made available to Committee members in advance of the oral evidence session on 8 December). The revised Code will implement all of the measures contained within the Agreement referred to above which

includes improved transparency, better and more complete information, better protection for prospective tied pub operators and a more open rent review process with inexpensive and accessible re-dress in case of dispute.

— Compliance with the new industry Code will be a mandatory requirement for members of the BBPA and all members will be required to seek accreditation of their Codes with the BII.

8. All BBPA members' codes will bear the BBPA and BII logos to indicate compliance with the industry code of practice and the BII's own standards for compliance. The purpose of the dual-badge is to indicate to prospective tenants and lessees that a pub company code displaying both these logos operates in accordance with industry standards of fairness and transparency.

— A full copy of the industry code and relevant pub company code will be supplied to all prospective tenants and lessees

— Revised company codes will be signed by the tenant/lessee and the pub company and thereby will become binding and may be used as evidence in any disputes or subsequent court proceedings. Existing tenants and lessees will be offered the opportunity to sign up to new Codes but this will be at their own discretion.

— The Code will be binding on successors since they form part of the basis on which the original agreements were entered into.

9. In the event that a BBPA member does not follow the Code its accreditation with the BII will be removed and they will not be allowed to display the BBPA logo on their Codes. Ultimately any such company could not remain a member of the BBPA.

10. The Industry Code can only be changed with agreement by all the signatories to the agreement namely the BBPA, BII and the FLVA (and any other parties that might apply to be part of that agreement). Companies will always be able to change their own Codes but cannot diminish them by removing any of the obligations contained in the industry Code. Where a company wants to offer enhancements to those conditions it is free to offer those. By definition additions through Company Codes can only be improvements since they must meet the standards laid down by the joint industry Code.

Pub Independent Rent Review Service (PIRRS)

11. The PIRRS scheme has been piloted and will be available soon www.pirrscheme.com. The scheme offers a transparent, independent, low cost rent review resolution service as an alternative to arbitration. The PIRRS scheme will be funded by BBPA members but with fees payable in equal proportions by both parties to the dispute. The scheme is available to the tenants/lessees of pub companies who are members of the scheme. All BBPA members will be members of PIRRS and non-BBPA members may join the scheme on payment of a £5 levy per premise.

12. The scheme is governed by a management board (comprising representation from the Association of Licensed Multiple Retailers (ALMR), BII, BBPA, FLVA and the Guild of Master Victuallers (GMV)) and is administered by the BII. The list of valuers involved in the PIRRS scheme is approved by the management board. The choice of valuer is at the discretion of the tenant/lessee and the company has no power to intervene.

Specific Issues Raised in the BEC Report and How These are Dealt with in the Code

13. We set out below how we consider the revised industry Code will address aspects of the BEC Report:

Rent Setting/Transparency/Trading History:

14. The new Code requires companies to demonstrate far greater transparency with regard to prices charged for beer, eligibility for discounts and whether they will allow guest beers supplied outside the tie.

15. Companies must set out clearly their policies in respect of rent setting and review including full transparency in regard to how the Fair Maintainable Trade (FMT) has been calculated with a breakdown of costs and detailed information on the assumptions made on turnover. The BBPA Code also incorporates a checklist of information that may be requested by the tenant or lessee from the pub company where it has not already been supplied.

16. Shadow profit and loss accounts (P&L's) must be provided with sufficient detail to enable tenants and lessees to take proper professional advice.

17. Companies must also draw attention to the availability of ALMR and other benchmarking reports. (We also understand that RICS has offered to develop a database that would gather all such information available.)

Fair Share of Profits:

18. RICS has undertaken to review and revise its guidelines on valuation. The principle put forward by other parties that "a tied tenant should be no worse off financially than a free of tie tenant" does not mean that there is financial neutrality between the two models given the nature of the business relationship, the support and difference in business risks. We are happy to be guided by RICS on this and will await their judgment, to which we will adhere. The BBPA considers the independence of RICS in this process to be vital.

Comparables:

19. It is not part of the pub companies role to disclose commercial information and such information will be equally sensitive to the lessee/tenant as it is to the pub company. Rent should always be a matter of negotiation between two parties and a prospective tenant/lessee has the right to walk away from the negotiation. The "market" will prevail and during the current economic climate, the market is enabling new tenants/lessees to negotiate extremely favourable terms.

20. In future an existing tenant subject to a rent review may, of course use the PIRRS scheme to resolve any disputes.

Goodwill:

21. The Code makes it very clear that any goodwill attached to the premises attributable to the tenant or lessee having achieved a greater level of business than an "average competent tenant", and the effects of the tenant or lessee's improvements, must be disregarded on rent review.

RPI Increases:

22. Individual companies must be free to decide whether or not to include RPI increases within their agreements. However, companies must advise tenants or lessees, where their agreement refers to indexation by reference to RPI, that the adjustment in the rent may be upwards or downwards.

Upwards Only Rent Reviews:

23. Upward only reviews have been excluded from new leases ever since the 2005 revision of the Code. Companies also undertook not to implement such clauses and to provide comfort letters to that effect if requested and to amend leases by deed of variation (at lessees expense).

24. This pledge is continued through to the latest revision and will include such phraseology as to make it clear that reviews can result in reductions as well as increases.

Beer Prices and Wet Rent:

25. Competition law prevents BBPA members from holding any discussions regarding relative prices. The BBPA considers the overriding consideration to be the potential profitability of individual tenants/lessees. Therefore, companies must provide total transparency to prospective tenants/lessees about all aspects of the contract they are about to enter.

Enforcing the Tie:

26. Companies seeking to enforce the tie by the use of flow monitoring equipment (eg Brulines) must include within their Codes a protocol on the use of such equipment, including any prima facie evidence available. The protocol must follow the minimum standards described in the industry Code.

Amusements with Prizes (AWP's) income:

27. BBPA cannot make any industry commitment to remove AWP ties as this would restrict its members ability to compete in a free market.

28. Recent evidence (we understand that this will be submitted under separate cover by a member company) suggests that in circumstances where the tie has been removed, the absence of company support, old machines and the inability of licensees to manage machines effectively has led to a significant drop in machine income in only a short space of time. Individual companies will respond to requests for removal of the tie on machines at their own discretion.

29. However, machine deals are changing constantly and will be introduced over time not necessarily waiting on the rent cycle, providing of course that the tenant consents.

30. The revised Code also stipulates that in future machine income must not be included in the "divisible balance". This will apply to new agreements and to existing agreements on review. We do not exclude earlier introduction but that is up to individual companies and tenants.

Insurance

31. Insurance schedules are often not provided because policies are not tailored to individual pubs. A block policy is usually negotiated by pub companies and premiums are allocated according to risk and size of pub.

32. In future companies must supply lessees with full details about insurance cover, ie provide copies of the policy and any excess payable and price-match where lessees are able to find a cheaper like-for-like policy.

33. It has been suggested that tenants/lessees should be able to insure the property themselves. However, experience shows that many pubs would be left exposed through delay or the absence of any insurance being obtained. The risk to the company is too great to resolve in this fashion.

34. We appreciate that some insurance companies may be unwilling to quote if they suspect that they are just being used to price-match. There is no easy solution to this one except to say that pub companies obtain very competitive quotes and this process ensures that companies pass on that benefit to their tenants through the transparency that is being given.

BDM's and support services

35. BDM quality varies as it will in any job or profession and tenants/lessees are entitled to pass any complaint about service levels to those higher up in the company.

36. Company codes must set out provisions and commitments governing the competence and future progression of BRM's/BDM's together with the procedure for complaints and a mechanism to resolve disputes. The BBPA has agreed to work with the BII to develop professional qualification standards that companies can offer as appropriate.

37. Codes should also set out the role of BRM/BDM's and the support and professional services they are expected to provide.

Dispute Resolution:

38. The BEC Report considered that a mechanism should exist to deal with disputes between individual companies and their tenants/lessees.

39. As part of its accreditation scheme the BII will assess whether companies have adopted all the requirements of the industry Code within their own individual codes of practice. Companies must comply with all the requirements of the industry Code to receive accreditation. BII also looks at other issues such as clarity and content beyond the Code.

40. Company Codes will explain the procedures to be adopted where either party feels the provisions of the Code have not been followed. Company Codes will also set out how any complaints will be properly considered at an appropriately high level of management in the company, and at a level of management higher than that at which the relevant decisions were initially taken.

41. With effect from 2010, under the new Code, companies will be accredited on an annual basis and any transgressions from the Code will be publicised by the BII.

Tenants/Lessees Responsibilities

42. There has been criticism that incoming tenants and lessees have been ill-prepared to enter the licensed trade. To ensure prospective future tenants and lessees are better prepared and protected, it will be a mandatory requirement for anyone wishing to enter the trade to undertake a course (currently being devised by the BII) to ensure they are fully conversant with the tied pub model, contracts etc. Pub Companies will not let anyone sign a lease or tenancy agreement until they have fulfilled this obligation.

43. It will also be mandatory for companies to insist that, prior to accepting a tenancy/lease, the tenant/lessee takes independent professional legal and business advice and prepares a business plan which should be based on that advice.

(The above requirements may be waived where the tenant/lessee can demonstrate to the satisfaction of the pub company that they have relevant prior experience).

Prospective tenants/lessees must also hold a personal licence.

Further Issues Raised in the BEC Report

Financial Assistance:

44. Reasons for business failure are many and varied, some of which are inevitably due to market conditions and individual circumstantial changes but others, sadly, are down to the inability of individual tenants/lessees to sustain and maintain a good business. Where this is the case companies will usually use their best endeavours to work with the tenant to improve the business and if this fails, to assist the licensee to exit their agreement as sympathetically as possible.

45. However, further flexibility is provided by direct financial support through permanent, or temporary rent reductions, reduced prices, reduction in other charges and further operational support.

Pubco Model:

46. The pub company business model has been much criticised but the support given by pub companies to struggling tenants and lessees has ensured that many pub businesses have survived. No other sector has provided this level of back-up.

47. The sudden downturn in both the economy and consumer spending has shaken many business models and brought many sectors under acute pressure. The partnership arrangement of the tied model means that a pub company has no incentive for a pub business to fail and companies have worked very hard with their tenants and lessees to safeguard their long-term mutual interests.

The Tie

48. Companies are competing hard for the best tenants which is why there is no single industry standard tie. The many pub-owning companies in the sector operate different versions of a tied agreement, including those micro-brewers that own pubs. Some of the larger companies, in particular, have a number of different models operating in parallel. In addition, many of these general contractual agreements are then tailored to the specific agreement on a specific pub. This flexibility is necessary because no two pubs or individual tenants are alike. Each final contractual agreement for the tenancy of a particular pub will be unique to that particular pub and tenant.

49. Such variety and flexibility provides a unique opportunity for those with entrepreneurial skills to operate highly successful businesses.

Restrictive Covenants

50. Covenants have historically been applied to protect the business interests of other lessees operating in the area where there is persistent overcapacity. The use of such covenants is not restricted or limited to the pub trade and is common in other industries. Restrictive Covenants cannot be removed from this mechanism since tied pubs account for only 60% of the market. Managed houses and free houses would still be free to apply Restrictive Covenants.

51. The OFT recently investigated the subject of Restrictive Covenants in responding to the CAMRA super-complaint. The OFT found that the use of Restrictive Covenants is not widespread in the pub sector but intends to keep the issue under review should such practice become persistent and widespread.

52. Competition law prevents BBPA from seeking a collective agreement from its members on this issue but the Code requires all companies to make their policies clear on the use of Restrictive Covenants.

Assignments

53. The process of assignment results in changes to the economic model as far as the incoming lessee is concerned since the price of entry and therefore the level of investment will generally have increased as a result of the premiums paid. The assignee has to service the debt resulting from the premium whilst continuing to operate the business under the terms of the lease that has been purchased. The landlord plays little or no part in this transaction and derives no financial benefit from it.

54. Given the downturn in the economy, the value of these leases has diminished significantly, in line with the decline in the property market. Therefore leaseholders have seen their asset values decline and this has been particularly acute for those who bought their leases in 2006 7 and who probably now find themselves in "negative equity". The locking of the market also means they have no ready exit.

55. We have undertaken a brief survey of members which revealed that 34% of current leases have been acquired through assignment.

56. We have become increasingly concerned to ensure that assignees are given the same information as the original leaseholder. In order to protect incoming lessees the Code places new obligations on both the pub company and the lessee wishing to assign the lease (assignor) to ensure that the purchaser of the lease (assignee) is supplied with the same information as that provided by the original landlord at the commencement of the lease. The assignor must also insist that the assignee has fulfilled the same requirements made of a prospective tenant/lessee by a pub company (ie hold a personal licence, prepare a business plan, attend a pre-entry course and take professional advice).

RICS Pub Industry Forum Report and Recommendations

57. BBPA recognises RICS as the independent expert body and, following the recent RICS review of rent setting methodology, will abide by any revised guidelines on rent setting that emerge.

Formation of the Independent Pub Confederation (IPC)

58. For many years the BBPA and its members have worked successfully in co-operation with a variety of industry bodies and will continue to do so wherever possible. However, the wide ranging and fixed positions held by members of the IPC makes it difficult to reach further agreement on issues that would damage the economic success of our members and, in our view, the businesses of many tenants and lessees. As stated previously, the BBPA is unable to engage in discussions that would breach competition law, by restricting the ability of our members to compete in the market place, or that seek to remove the Tie.

59. BBPA will continue to work hard on behalf of all the industry to minimise the effects of legislation on the pub sector. All pub operators, whether free houses, tenanted/leased or managed, benefit from the BBPA's activity which recently has included campaigning on taxation, an increase in stakes and prizes, a lengthy and costly legal case defending pubs against excessive charges by PPL and judicial reviews of licensing authorities on occasions where they have exceeded their legal powers.

Conclusion:

60. Pub Companies have demonstrated an unprecedented commitment to implement change quickly with prospective tenants/lessees being better protected and informed under the Code. Existing tenants will also benefit considerably from the provisions of the new Code and especially from the introduction of the PIRRS scheme.

61. We do not believe that a referral of the Tie to the Competition Commission is either necessary or helpful at this stage. Any referral would leave the industry in a state of turmoil and limbo for several years with vital investment drying up until certainty returned to the sector. The industry cannot afford to be left behind at a time when the rest of the hospitality sector is recovering from the recession and gearing up for the 2012 Olympics.

62. Changes continue to be made to the tied pub business model with greater competition between pub companies seeking to recruit the best tenants and lessees.

63. Any further intervention in the industry would mean irrecoverable damage and unintended consequences as those that resulted from the MMC Inquiry back in 1989.

64. We should be happy to keep the Committee informed about progress with the implementation of the above and the significant changes that will be brought into place. The Code will be reviewed in June 2010 and reviewed on a regular basis thereafter with the full participation of the organisations involved. We recognise the need to change, but hope that the Committee will recognise the significant progress made so far.

18 November 2009

Supplementary memorandum submitted by BBPA

Thank you for the opportunity to follow up the evidence session from Alistair Darby and myself with a letter of clarification on a few key points. I am writing at this stage with what I consider an interim letter in order to clarify a few issues before the House rises for Christmas, but there will be more information to follow in the New Year.

Legality of Company Codes

We all agree that it is vital to be able to enforce the new Code of Conduct. We are seeking legal confirmation about the admissibility in court of a breach or misrepresentation of the contract on individual company codes.

I would however like to explain how we expect this to work. The Industry Framework Code will be used by individual companies to develop new and modify existing codes for their tenants and lessees. It is expected that the Company Code would then exist as a "side agreement" to the contract signed by the Pub Company and lessee or tenant. As such, if either party went to court for breach or misrepresentation then there is no doubt that failure to follow the Code would be admissible in court. We will provide further clarification from our lawyers.

In addition to this legal stance, BII will be accrediting, monitoring and taking action with companies who breach the Code, acting for individual tenants or lessees. We believe these two actions acting in tandem provide not only transparency, but real teeth for the new Codes.

BII

Questions have been asked about the ability of BII to provide independent advice and action against pub companies who breach their Codes. I will ask their Chief Executive to write to you, but re-iterate that contributions to BII from pub companies are directly connected with training and the activities of BII as a Professional Body for the industry and in no way impinges on the independence of the BII.. We are firmly of the belief that BII will undertake all the actions promised in their letter to you and to which I referred during oral evidence to monitor and take proactive action to help tenants and lessees.

Rent Reviews

The Pub Independent Rent Review Scheme (PIRRS) is now operational and offers a low cost review of rents for lessees and tenants. We had promised to clarify the enforceability of the scheme. The independent review is bought into play where a tenant or lessee is unhappy with the rent review being sought by the company. Application to the scheme is made by the tenant or lessee and by so doing waives the right to take the dispute to arbitration and agrees to be bound by the decision of the expert valuer as does the company. The decision is binding on both parties and there is no appeal. We can supply further details of how the scheme operates if that would be helpful.

Brulines

Conflicting statements were made as between the BBPA and the IPC at the Select Committee about whether the BBPA were aware of an issue to do with direct debits in relation to Brulines equipment. Whilst it is possible that this matter was raised with me early on in my role as Chief Executive of the BBPA I do not recall this having been the case. If it was, the technical nature of the issue was not clear to me at that early stage and I therefore stand by my evidence last week in which I said that I was unaware of the issue. Indeed, there is no recent correspondence that I have seen which indicates that this has been a matter of particular concern.

I have since explored this issue in more detail. Payment for beer usage is usually made by direct debit. As you will be aware the new Industry Code requires members of the BBPA to have a protocol in their company code to deal with any evidence which suggests that a lessee or tenant is buying outside the tie. This must include other evidence that malpractice is taking place (such as evidence of other kegs or casks) etc. If other evidence exists and the licensee admits guilt (without coercion) then they are asked to sign papers agreeing to pay extra to the pub company. What would be totally unacceptable would be either coercion of licensees in any way or actions being taken without proper evidence [or funds being withdrawn without permission].

We will explore this point further with our members and come back to you with further comments in the New Year.

Review

The length of time before a review is clearly a matter of judgement. In suggesting a two year period I was simply making the point that we do need time to implement the Code and some time must pass before the effect of that can be audited. The BBPA would of course be pleased to meet with your Committee at any stage to reassure that both the BBPA and our member companies really are implementing the new Code

I hope this is a useful interim response before Christmas and look forward to writing to you again in the New Year.

14 December 2009

Supplementary memorandum submitted by BBPA

BIS COMMITTEE: 8 DECEMBER 2009
FOLLOW-UP INFORMATION

Further to Brigid Simmonds' letter to Peter Luff dated 14 December 2009, we are now able to respond to the further questions raised by the BIS Committee:

Q85 Attached is clarification of the legal consequences of the UK pub industry framework code of practice and individual pub company codes of practice for tied tenanted and leased pubs. As indicated in the attached letter the industry Code of Practice is binding on all members of the BBPA who will undertake to incorporate the pub industry Code into their own codes of practice. These codes will be signed by the tenant/lessee and the company and, as such, will place obligations on both parties. This will constitute a legal contract between the parties, again enforceable in the way that such arrangements are usually enforceable by the courts.

Q90 Comfort letters will not now be necessary since, as DLA Piper point out, company codes will state categorically that any upward only enforcement clauses remaining in leases will not be enforced. (UORR clauses have been excluded from new leases by BBPA members since the last revision of the Code in 2005 and as such this is a diminishing problem. Obviously new leases or tenancy agreements do not contain UORR clauses.)

Q130 The Annex referred to can be found on page 16 of the provisional industry Code supplied to the Committee. This sets out the suggested detail for inclusion in a protocol which each pub company is required to prepare. This is not a prescriptive list and companies may choose to list additional evidence that might be used.

Q131 Payment by direct debit is now common practice within the industry as a way of completing business transactions. Any monies due to companies on receipt of invoices are processed in this way. We are assured by our members that direct debits are not applied where transgressions against buying-out are concerned without the consent of the tenant or lessee concerned.

Where such permission is not obtained companies have to resort to legal proceedings in order to gain recompense. The company "fine" allows the company and the transgressor to resolve the issue without recourse to the courts but only with the agreement of the transgressor.

Q139 and Q143 The Pub Independent Rent Review Scheme (PIRRS) is an integral part of the pub industry Code. All BBPA members are bound to honour the commitment to offer PIRRS, as an alternative to the contractual obligation contained in tenancy/lease agreements, to arbitration in the event of an unresolved dispute on the level of rent following a rent review. The scheme operates by application by the tenant/lessee to PIRRS for adjudication of the rent by an independent expert which cannot be refused by the company, as a signatory to the Code, and a member thereby of the scheme.

In order to proceed to the independent valuation both parties sign a waiver of their right to refer the dispute to arbitration and agree to abide by the decision of the independent expert. This is effected by signing the PIRRS Deed of Variation. This is binding on both parties and there is no appeal.

The independent expert then takes written evidence from both parties which is limited to six sides of A4. It is important to note that copies of any code of practice binding on the landlord are to be submitted to the independent valuer. The company code of practice that derives from the pub industry Code must obviously be included in the submission made by the landlord.

The choice of the independent expert is made by the tenant or lessee from the PIRRS panel of independent valuers and that choice cannot be challenged by the pub company.

We would like to emphasise that while commitment to PIRRS is now part of the pub industry Code, BBPA members are already committed to a scheme by virtue of their membership of the BBPA, one of the conditions of which is that they are members of PIRRS (which is funded by them through the BBPA). As such PIRRS also stands alone as a service to the industry.

Q147 Mr Darby has provided the following clarification of his trial of AWP machines not being tied:

> "In the Tracker agreement pubs we have maintained the AWP tie in order to give the tenant access to our high quality machine suppliers but also to allow us to continue to see the actual performance of the machines. However, with the tenant taking 100% of the income from AWPs after tax and machine supplier rent we have stood back and allowed the tenant to manage the day to day relations with the machine supplying company. Our experience is that AWP income rapidly diminishes because the tenant seeks to reduce the rent on the machines in his pub by selecting lower quality machines or opting for lesser levels of service from the machine supplier. The tenant hopes to maximize revenue but actually ends up pretty quickly disappointing players because the machines on offer are poor or not working. As a result AWP income quickly falls. The big difference is that we as the pub company are not actively managing the performance of the machines like we are in the rest of our tied machine estate but allowing the individual tenant to do it. The test has proven that a sole operator, unless gifted with specific machine expertise (which is rare), will under-perform a professionally organised group gaming machine operation. Our point is that the combination of a committed pub company with a fairer sharing of gaming machine income will result in greater value for the tenant/lessee than a freeing of the machine tie."

Q150 The financial difference to the lessee of the AWP income not being included in the divisible balance will vary on a pub by pub basis.

Assuming a hypothetical machine income of £5,000/year (split 50:50 between the tenant and the company) after rent (to the machine operator) and duty (to the Government). Under the current system £2,500 of that is taken into the P&L account and therefore forms part of the divisible balance on which the rent is arrived at. By removing the tenants' share from the shadow P&L the divisible balance is reduced by the same amount and is retained by the tenant.

By way of illustration and assuming a 50:50 split to the divisible balance between rent and retained profit this shows a net benefit to the tenant of £1,250.

	Before £	*After* £
Income	150,000	150,000
AWP income	2,500	
Costs	100,000	100,000
Divisible balance	52,500	50,000
Rent @ 50% divisible balance	26,250	25,000
Net profit	26,250	25,000
		2,500
Retained profit	26,250	27,500

FURTHER INFORMATION RE COURT CASE REFERRED TO BY MR HARRISON

We had no knowledge of this case at the time of the oral hearing but our understanding is that this was a statement made by a lawyer without instruction from the company concerned who would not have wished to see their Code put in this light since whilst it may not be legally binding under the current circumstances, the company would certainly have regarded it as an obligation. However, this situation will not apply to company codes complied in the future compiled as they will be under the new pub industry Code and as such binding on both parties.

With regard to company codes of practice in general and court cases — there have been some complaints but not many. Generally codes have been complied with and there has not been a court case arising from such circumstances. However the legal status of these codes now changes with the nature of the obligations placed on both parties as stated above. Signatures by both the pub company and the tenant/lessee will make company codes binding. As such we would expect a much higher level of compliance in order to avoid litigation with the codes being produced in evidence. This is a major benefit of the construction of the Code we have now entered into in partnership with the BII and FLVA.

8 January 2010

Supplementary memorandum from BBPA

LETTER FROM DLA PIPER TO BBPA

LEGAL CONSEQUENCES OF THE UK PUB INDUSTRY FRAMEWORK CODE OF PRACTICE AND INDIVIDUAL PUB COMPANY CODES OF PRACTICE FOR TIED TENANTED AND LEASED PUB

During the hearing of the Business, Innovation and Skills Committee "Pub Companies: follow up" on 8 December 2009 you promised to let the Committee have an explanation of the legal consequences of the new Framework Code of Practice (FCOP). This letter sets out our view of the legal position.

The FCOP reflects an agreement between various parties to observe and carry out certain functions in relation to the letting of pubs. Those parties are the BBPA as an organisation, the members of the BBPA (insofar as they are concerned with the letting of pubs), the BII (who will undertake certain tasks under the FCOP) and the FLVA. The agreement between the parties is legally binding in the sense that any such contract would be. The effect of the FCOP is therefore that, as between the contracting parties, all BBPA members concerned with letting pubs are obliged to comply with its terms, one of which is an obligation to produce individual company codes of practice.

These companies' individual company codes must reflect the terms of the FCOP. They must then obtain accreditation for their codes from the BII, and that accreditation must be maintained. The introduction of a code and the maintenance of accreditation are requirements of eligibility of membership of the BBPA, and non-compliant members can be expelled.

Individual company codes are necessary first because companies must be given the freedom to compete by going further than the FCOP requires; and secondly because the FCOP cannot be directly relied upon by individual tenants or lessees, whose contractual relationship is with the company.

Company codes will be signed by the pub company and the individual tenants or lessees, provided, of course, those tenants or lessees are prepared to comply with their terms. Tenants and lessees cannot be compelled to enter into this agreement. As well as new tenants and lessees, existing tenants and lessees will be invited to sign to the company code. In view of the fact that company codes will include obligations on the part of the tenant or lessee, the codes will constitute a legal contract between the parties, again enforceable in the way that such arrangements are usually enforceable.

If, therefore, a company fails to comply with its own code, aggrieved tenants or lessees would, in principle, be able to complain to a court of law or other tribunal, such as an arbitrator if appropriate. However, an aggrieved tenant or lessee would first be able to make complaint to the BBPA, the BII or the FLVA, who would then consider the status of the relevant company's BII accreditation and BBPA membership. Such a complaint may itself resolve any difficulty.

These arrangements should, therefore, secure access to the benefits of the FCOP for all tenants and lessees of BBPA member companies. Whilst the arrangements do not cover companies who are not members of the BBPA the BBPA believes that non-member companies will appreciate the value of a BII accredited code, and are therefore likely to fall into line.

Finally, a particular question was also raised concerning upward only rent review clauses. We understand that it has been suggested that any lease containing such a clause may need to be amended by way of a Deed of Variation. The cost of this would not be necessary given the agreement that will exist between the company and the tenant/lessee based on the company code. Should the lessee want the additional protection offered by a Deed of Variation it is not unreasonable that such a cost be met by that licensee.

8 January 2010

Supplementary memorandum from BBPA

BIS COMMITTEE FOLLOW-UP INQUIRY INTO PUBCOS—ORAL EVIDENCE SESSION 8 DECEMBER 2009 (QUESTION 134)

It has been brought to my attention that my response to a question from Mr Clapham has been considered to be misleading. I am therefore happy to offer my apology to you and members of the Committee. I certainly had no intention of being misleading.

Mr Clapham asked me whether I thought the PIRRS website had been removed as a result of "pressure being exerted" and my response was intended to inform the Committee that this was certainly not the case. Whilst I was aware that there had been some difficulty with the website, I was not fully aware of the whole sequence of events. I hope I can now provide clarity.

The PIRRS website was not removed and it remained in place whilst the difficulty was resolved. The only feature of the website that was removed was the list of valuers and this was taken off-line when it was discovered that not all of the valuers, who had been placed on the list, had complied fully with the requirement to list any conflict of interest. This was confirmed by Mr Karl Harrison in his evidence (Q.185) which stated that he had raised a complaint with Mr Neil Robertson of the BII who then addressed the problem.

I do believe that such teething problems are almost inevitable in any new venture and my use of the term "a technical problem" was only meant to convey the fact that the problem did not affect the operation of the scheme. The scheme is of course now fully functional and able to resolve difficult rent review disputes that otherwise might not be resolved amicably in a cost-effective manner.

I trust that this provides a clearer explanation of the matter and may I repeat once again my fullest apology if my response was misleading.

BENCHMARKING

May I also take this opportunity to clarify the BBPA's position with regard to benchmarking.

As you will know the industry framework Code requires companies to advise prospective tenants/lessees about the availability of benchmarking studies (including the ALMR study). At the time of the BIS Committee inquiry, the BBPA did not consider the ALMR benchmarking study to be properly representative, as it collected data from only managed pubs and also from clubs and wine bars, which while perhaps useful as comparators, did not provide information of much use to traditional tenants or leaseholders.

The ALMR has recognised the limitations of its current survey and we are in discussions with them and others as to how to make the benchmark more representative and useful to the industry as a whole.

When Alistair Darby and I were answering questions at the Select Committee hearing on 8 December, we were looking at benchmarking which will help the RICS to establish guidance in the setting of FMT. For this to work we would need information from tenanted and leased pubs to reflect the average costs of running these pubs which will inevitably have different cost centres to those of managed pubs and other licensed premises. We need to consider how we might canvass for and collect data from the tenanted/leased sector and whether or not such data is indeed collectable or reliable.

BBPA will be meeting with RICS later this month and the issue of benchmarking will be on the agenda. We are also continuing discussions with the ALMR. We are more than willing to make progress on this once we have a chance to examine the best and most practical way to do this in a cost effective manner.

We believe that the complexities of benchmarking within the pub sector have been under estimated: this is an issue that cannot be resolved hastily without wider consideration.

I hope this is useful.

15 January 2010

Supplementary evidence from BBPA

Here is our response on the issue of further evidence in relation to Brulines:

The Code requires companies to provide a protocol on the use of flow monitoring equipment, where such equipment is installed. Annex A of the industry Framework Code details those matters that should be included in such protocols. We have not been prescriptive about what other evidence might be included since companies themselves will determine what is most appropriate in the circumstances. We would anticipate that such evidence might include the presence of products that are not supplied under the tying agreement, purchase evidence, third party evidence and pump clips/keg caps from non-supplied products. There might also be covert intelligence, for example CCTV, which companies may or may not wish to include in their protocol.

5 February 2010

Memorandum submitted by the British Institute of Innkeeping (BII)

RICS' Pub Industry Forum Report and Recommendations

BII fully supports the recent RICS report and its recommendations. RICS has long been accepted as the key professional body in terms of rent setting and rent review and BII will expect pub company codes to abide by guidelines set out in the RICS code.

BBPA's Agreement with BII and the FLVA

BII has called for fairer rent setting, greater transparency and more protection, training and support for new and existing entrants. BBPA, whilst unable to address the full Business and Enterprise Committee (BEC) report agenda, was able to address certain aspects and felt able to make some improvements in the areas of transparency and protection/support for both new entrants and existing lessees/tenants. As these improvements are a step forward, BII welcomed them, and agreed to monitor them through the BII Benchmarking and Accreditation Services (BIIBAS) scheme and company codes of practice.

BII must stand up for what is, or could be, good for the industry, and these new commitments will make life much better for new entrants as well as improving the rent review position for existing lessees. We will hold BBPA members to this commitment through a public website which will make visible pubcos' performance against their new codes, once they have been benchmarked. This will help prospective lessees make an informed choice about leases and who to take a lease from.

BII's signing of the agreement has prompted much debate within the industry, mostly played out through the trade media. However, we stand firm by our decision as we believe the improvements will benefit the industry as a whole.

There are many who feel that the industry agreement contains actions that are merely good practice and they should be happening anyway. BII can sympathise with that view but the reality is they are not happening now and probably would not happen systematically unless confirmed in writing. Hence, we wanted the commitment detailed in a binding agreement which not only captures that best practice but indeed goes further in many areas.

We are now working with the BBPA in order to translate the signed Heads of Terms into a new Framework Code of Practice. We are aware through ongoing communications with the pub companies that they are in the process of working on their individual codes of practice and incorporating the new commitments.

The BIIBAS scheme will become even more crucial as the BBPA has made it compulsory for all its members to have their codes accredited by the middle of 2010. BIIBAS is currently being strengthened and we are introducing a series of measures to increase availability, transparency and monitoring of codes.

We see that the more effective BIIBAS is, and the more we can help to prepare newcomers to the industry, the better life will be for everyone. However, in extreme cases where tenant/landlord relationships have reached a major breakdown, the newly introduced Pubs Independent Rent Review Scheme (PIRRS) will be available to help negotiations reach a satisfactory conclusion.

The Pubs Independent Rent Review Scheme

PIRRS is another cross industry initiative which has been established by the ALMR, BBPA, BII, FLVA and GMV. The scheme is currently available in England and Wales and operates by providing a transparent, legally binding, capped fee alternative to rent review arbitration.

The scheme must be opted-into by both Landlord and Tenant, who, in applying to use the scheme, must agree to differ from the current terms of their rental agreement via a Deed of Variation. The tenant then selects an independent Valuer from the PIRRS panel to proceed with their case.

The independent Valuers have each been nominated by one of the establishing board organisations. The Landlord must accept the Tenant's chosen independent Valuer. Once the case is passed to the Valuer by the PIRRS administration team, the capped fee is paid by both Landlord and Tenant directly and the PIRRS personnel have no further involvement in the case. The scheme's processes and procedures are evaluated post case closure.

The PIRRS is currently piloting its first case and aims to begin accepting cases from 1 December 2009. The scheme will also launch in Scotland as soon as possible.

The formation of the Independent Pubs Confederation (IPC)

BII was not able to sign the IPC's manifesto document but it does welcome the organisation's creation and the focus it will bring. BII's remit is narrower than that pursued by other groups in the IPC. That said, there will be times when BII members' interests and industry interests are best progressed through a common voice and in those instances it is right for BII to support. We will also work with the IPC in campaigning on common issues such as health, anti-social behaviour and mandatory conditions.

The Future

As a professional body, it is right that BII is the first stop for the fresh-faced coming into the industry. We are currently working with industry to develop two new qualifications; namely an introductory training unit to ensure newcomers fully consider their legal and operational responsibilities even before they've signed on the dotted line and a unit to ensure all BDMs/BRMs are trained to a minimum acceptable standard. This will give newcomers the chance to take on a tenancy or lease fully aware of what they are signing up to and ensure a consistency of support across the industry from BRMs/BDMs. Both initiatives address key points raised by the BEC report. Furthermore, BII will be here to coach and guide them through every step of their career in licensed retail.

BII sees this as the complete professional framework of support: introductory training for those considering coming into the trade; a portfolio of qualifications and support services to assist their every need throughout their careers; benchmarking and monitoring of pub company codes of practice through BIIBAS; and PIRRS to step in as a last resort if a problem develops and negotiations reach an impasse.

One Further Point

With the recent announcement of the new rateable values, licensees up and down the country are being hit with further increases to their overheads. Some BII members have reported rate increases in excess of 100%, and even higher rises have been mentioned on the trade press online forums. We are putting in place a widespread package of support for BII members, including a roadshow of events, a Q&A and live forum available via our website and an expert helpline for people to call with their individual queries.

We mention this because it is just one of the many economic pressures imposed on operators in the industry. It should not be forgotten that they also have the imminent VAT increase to accommodate.

20 November 2009

Supplementary memorandum submitted by the British Institute of Innkeeping (BII)

Background

BII have accredited company codes since 2007 through a scheme known as BII Benchmarking and Accreditation Services (BIIBAS). Currently seven codes are accredited, including Punch Taverns, but not currently including Enterprise Inns who have recently revised their code. We expect Enterprise to come forward shortly for re-accreditation. The accreditation process has focused on perceived reasonableness and clarity in how companies operate, and monitoring has been mainly reactive, involving responding to complaints from tenants that companies have not followed agreed procedures. Broadly, about a third of complaints are found to be out with the terms of reference of the scheme, often because they relate to technical aspects associated with rent setting. Of the remainder, most are found to be genuine breaches, but in the vast majority of cases, companies act on our recommendations, to the advantage of the tenant, and we are able to record these as resolved breaches. There have been two unresolved breaches this year. In these cases the tenant receives a letter to that effect, which they can then lever during rent review, or also potentially

through the media. In future these will be publicly noted. A considerable amount of related case work happens through the BII Licensees support helpline. Only one code has been rejected outright, but others have withdrawn following suggestions of changes.

DEVELOPMENT

As part of my initial review of BII's activities, I undertook a review of the accreditation process and concluded that the BIIBAS scheme was valuable, but had the potential to work harder for the tenants and the industry more generally. I was impressed with the time that went in to researching and responding to individual complaints, and the fairness of the conclusions. Whilst by its makeup, constitution, and work programme, BII is not fully independent, I saw what I felt were impartial, balanced and sophisticated judgments. However, I also felt that it could be improved, especially in the areas of transparency and holding pub companies to account. The steering committee agreed at its meeting on 30 July 2009 to strengthen the scheme with tighter monitoring and clearer reporting of outcomes. Critically, it agreed to make clear to existing and prospective tenants how companies are complying. A package of measures has been debated by the BII council and will be discussed with the BIIBAS steering group on 6 January. Separate to our inhouse review, there has been a wider industry negotiation process, an outcome of which was an agreement between BII, BBPA and the FLVA. This will have a knock on effect to individual company codes which we think will raise the bar for all. As BIIBAS code accreditation is now a condition of BBPA membership we will see more codes, and the importance of clear and consistent monitoring is increased.

THE FUTURE

To strengthen the whole process we plan three changes: public reporting of overall company compliance, refreshing the governance with new chairs and committee members, strengthening licensee representation, and a sharper accreditation and monitoring process which crucially, will include both proactive sampling as well as reactive responding to complaints and the ability to remove accreditation of codes.

Monitoring

There will be a new online and telephone process for registering complaints. A service level agreement will set response times, investigation and follow up arrangements. The complainant will be kept informed of progress. All complaints will remain confidential, with only summary information publicly reported.

However, following the BESC inquiry and report, we are planning a new more proactive approach, where we will undertake a sample survey of lessees/tenants in order to ascertain broader satisfaction levels and elicit good practice and lower level concerns. Summary feedback will be published, and recommendations made to individual companies. An annual report will summarise all activity, outcomes and issues and will be made available to all those concerned with the industry and it is our intention to publish this information online. The accreditation process itself will broaden its focus to include the new industry agreement and subsequent BBPA code.

Reporting

A new website will list all companies with codes and display them. We will then report and track all complaints, investigations, breaches, resolutions and where applicable, accreditation removal, in an open and transparent way. We are considering a section where companies can get credit for positive innovations in their codes. Prospective lessees/tenants (or their professional advisors) will be able to view this site before concluding the deal on a pub

Governance

BIIBAS consists of two main committees, operating under clear codes of conduct. The steering group, consisting of eight members from across industry, which sets policy, will be chaired by Johnny Johnston, a very experienced businessman, licensee and lessee and member of BII council, with no current company connections. The accreditation committee, with 10 members, which reviews specific codes, will be chaired by James Brewster, chief executive of Licensed Trade Charity and Licensed Victuallers School. James is an experienced business man from the catering and hospitality industry, who understands commercial issues and is not specifically connected to pubcos, tenants or the BII. The committee membership will be broadened to ensure it is more representative, including the IPC voice.

Removal of accreditation

We also intend to strengthen our response to non-compliance. Persistent code breaches will result in removal of accreditation. This is likely to be measured as both repetition of a particular non compliant practice or, that the cumulative picture exceeds an agreed ratio, benchmarked with other industries. Initial research suggests a figure of between 2% and 5% to be normal

7 December 2009

Supplementary memorandum submitted by the British Institute of Innkeeping (BII)

BII Benchmarking and Accreditation Services (BIIBAS)

The BIIBAS Steering Committee have been active in agreeing new processes, procedures and policies designed to accommodate the changes brought about by the BBPA Framework Code of Practice. This includes a strengthened Benchmarking Committee, new and more formal procedures for dealing with allegations of breaches, more transparent reporting of breaches and a systematic approach to sanctions including withdrawal of accredited status for repeat offenders.

- *The Benchmarking Committee* has the responsibility of accrediting individual Pub Company codes. The make up of this committee is being strengthened in terms of numbers (11 to 20) but also in terms of the mix of licensees, pub company personnel and industry representatives. The Steering Committee (responsible for the overall management of the scheme) has agreed that the make up of the committee will be as follows:
  - James Brewster (Chief executive of The Licensed Trade Charity) (Independent Chair)
  - Bernard Brindley (Vice Chair)
  - Seven lessees/tenants
  - Seven Industry representatives
  - Four Pub Company representatives
- Karl Harrison has been invited to join to Benchmarking Committee and he has accepted.
- A quorum of the committee is five which will include members from each category.

In the following ways, the accreditation process will be more rigorous than was previously the case.

- *Dealing with Breaches and Sanctions.* A key enhancement of the scheme is that once a code has been accredited it will be available on the BIIBAS website for all to see.
- All allegations of breaches will be logged.
- The website will also publicise a record of all allegations against each accredited code and will detail which ones have led to a satisfactory resolution and any which have not.
- Where, in the opinion of the Benchmarking Committee, there have been major unresolved breaches, these will be flagged up and will count towards withdrawal of accredited status. The Pub Company will then have to reapply for accreditation and the Benchmarking Committee will need to see evidence regarding improvements in their systems to enable them to proceed.
- To clarify, the following table indicates the number of major unresolved breaches in any one calendar year which will trigger withdrawal of accreditation:

Up to 100 pubs	:	3
101—250 pubs	:	10
251—500 pubs	:	10
501 to 1,000 pubs	:	15
1,001 to 2,000 pubs	:	20
Above 2,000 pubs	:	25

- Fees for accreditation have been agreed which are on a sliding scale to accommodate smaller Pub Companies
- Initial assistance will be given to all applicants to the scheme. The Scheme Secretary (a permanent member of BII staff) will offer to visit each applicant to discuss the production of a code and to explain how the scheme works. BIIBAS will also ensure codes are in an appropriate state before submitting to the accreditation process with the Benchmarking Committee.
- Non BBPA members will be encouraged to apply for accreditation of their code of practice. The same rules will apply to them in terms of accreditation, breaches and sanctions.
- Current Formal Breach Resolution – in 2009 we dealt with eight formal allegations of breaches of accredited codes of practice of which four were upheld as breaches. Of these two were resolved to the satisfaction of BIIBAS and the lessees. Two others are the subject of ongoing dialogue with the relevant Pub Company.
- As soon as BIIBAS is alerted of an allegation of a breach, a record is raised as investigations are carried out.
- BIIBAS will be adding to its resources to meet the demand as many more codes will be accredited within the next few months.

How Good Is My Landlord

— The BIIBAS Steering Committee felt that we should allow the new processes and policies of the BIIBAS scheme to become established during 2010 and that in the second half of the year we would undertake an independent lessee/tenant survey which would determine how well the pub companies were abiding by their codes of practice. The results of such a survey would be published on the BIIBAS website.

PIRRS

Since fully launching on 1 December 2009 the Pubs Independent Rent Review Scheme has received 36 enquires. Nine of these have progressed to applying to participate in the scheme, with two of these cases now fully underway. None have yet reached final resolution via the PIRRS. Nine cases who have originally explored the option of resolving their dispute via the PIRRS with their Landlord have now resolved their dispute.

Evidence from alternative arbitration scheme indicates that out of 30 enquires only one case would fully enter into the scheme.

We instructed our in-house lawyer to investigate the legal implications of the scheme and are pleased to say that she concurs with the view that the PIRRS scheme is indeed binding on both landlord and tenant. Neither party can deviate from the agreement once they have signed up to the PIRRS scheme. Obviously if the tenant defaults on the post PIRRS rental agreement the landlord would have the ability to forfeit the lease. This reflects normal practice.

Other Issues

BII Income

Around 4% of all BII income comes from our Corporate Members plus some additional sponsorship for specific events from time to time.

The BII Business Support Helpline is well established and on average takes around 15 calls per month. This is a member benefit and is not directly related to the BIIBAS scheme.

Inevitably however, the helpline receives calls covering a wide variety of issues. This is resourced by our industry consultants and is widely used by our members. Through the help offered, we signpost members to other sources of information or assistance and we also liaise with the Pub Company on our member's behalf when appropriate. This has been welcomed by both members and Pub Companies in resolving issues of contention.

Our experience indicates that around 65% of all calls to the helpline are in relation to rent debt issues. In this respect PIRRS is a welcome initiative (please see notes above). Other areas raised were: buying out of tie issues; business rates; agreement renewals; repairs; and buying a pub.

Compulsory Initial Induction Training

We recognise that in this industry there is a good deal of movement of licensees between pubs and pub companies. We feel it is entirely reasonable that where a new lessee/tenant of a pub company who has current experience of running a lease or tenancy may attract a waiver to such training.

Benchmarking

We recognise that this is an important issue and we will join the Committee and seek to improve the data re single operators.

2 February 2010

Memorandum submitted by Brulines Limited

Summary

1. Pub Companies utilise Brulines Monitoring Systems as part of their efforts to manage tied compliance and provide Licensees with information which can be used to improve operating performance. The purpose of the system is to identify variances between draught product delivered to the Licensees premises by the Pub Company and the volume of these products dispensed by the Licensee. Licensees are not "fined" for buying outside the tie but charged "liquidated damages" as provided for in the commercial agreement with the Pub Company.

2. Licensees utilise Brulines Monitoring Systems to monitor performance in their pubs on a range of variables which add real value to the bottom line. Multiple operators use the information both from a "pub company" perspective and an "individual licensee" perspective

3. Brulines has two systems: the 1st generation system (the majority of our installations in licensed premises) is a basic system requiring the processing of volume data to differentiate and separate beer and water volumes. The 2nd generation system automatically differentiates between beer, water and cleaning fluid.

4. Following a comprehensive assessment by Trading Standards and LACORS which required Brulines to submit all its operating procedures and equipment, Brulines was informed on 30 September 2009 that its equipment is not prescribed under section 11 of the Weights and Measures Act 1985 thus is not required to be passed as fit for use in trade. However, this does not mean that Brulines is unregulated. Under Section 17 of the Act there is an obligation on Brulines to ensure that the equipment being used is neither "false nor unjust."

5. Stockton Trading Standards, Brulines principal point of contact, has confirmed that contrary to the point made by Mr Harrison in the BIS Committee meeting of 8 December, Brulines has not been asked to submit its equipment for further testing, voluntarily or otherwise.

6. The flow-meters used by Brulines are accurate and reliable at measuring liquid flow to a high degree of repeatability over a sustained period of time, and are already in use in Weights and Measures approved dispense systems. Due to the unique properties of each beer line, Brulines calibrate each flow-meter *in-situ* using vessels calibrated by Tees Valley Measurement to Weights and Measures approved standards. These same vessels are used to verify the calibration as part of any investigation into a negative volume variance.

7. Titan Enterprises Ltd the manufacturer of the flow-meter, possess substantial expertise in calibrating flow-meters to the standard required for Weights and Measures approved dispense. They have described the SGS report as being based on "assumptions and poor science" and noted that in its laboratory testing, SGS mistakenly tested Titan's 800 series flow-meter and not the 300 series used by Brulines. If nothing else this casts serious doubt on the rigour with which testing was conducted by SGS.

8. Mr Clarke's expertise has often been relied upon as a source of what we believe is unfounded criticism of Brulines Dispense Monitoring System. In his evidence to the Committee on 8 December Mr Clarke made a statement regarding the accuracy of the system being up to 33 or 40% inaccurate. Brulines has provided evidence in Section 5 demonstrating that Mr Clarke's statement was erroneous, perhaps due to his lack of understanding of how the system functions. Mr Clarke also volunteered that nine out of ten buying out admissions were purely due to Brulines data and a signed confession from the tenant. Analysis of the last three months volume and compliance data demonstrate that only one in five investigations into volume variances result in a formal signed admission from the Licensee and that corroborating evidence was sought and provided. 32% of the admissions comprised packaged product which does not rely on the accuracy of Brulines data but is evidenced by the presence of foreign stock on the premises.

1. Brulines Group plc and Director Overview

(i) Brulines Group plc is an Alternative Investment Market ("AIM") listed company employing 257 people across two operating divisions at its Headquarters in Stockton-on-Tees and regional office in Dunfermline, Scotland.

(ii) As an "AIM" listed plc Brulines complies fully with the rules of the London Stock Exchange and is fully up to date with the submission of audited financial accounts under these rules. The Auditor of Brulines Group is Grant Thornton UK LLP through their Leeds office.

(iii) Brulines Group is focused on the provision of real time monitoring systems and data management services for the UK's leisure and petrol forecourt sectors. Since its admission to AIM in 2006, the Group has grown both organically and through a series of strategic acquisitions to give the Group access to key markets. The Group operates two divisions comprising five key products. These are presented in the following section.

(iv) Brulines has seven Directors (five executive, two non-executive) who between them have substantial experience of the beer industry and personal profiles reflecting the responsibility and accountability required of plc Directors.

(v) Brulines is a trade member of the ALMR and several of its senior management team are members of the BII. Brulines also sponsors and participates in industry initiatives which aim to help tenants and freeholders improve their business performance through using the data available to them and provide support to the Cask Marque organisation in their drive to improve sales of cask ales.

2. Brulines Operating Divisions

2.1 *Leisure Division*

Dispense Monitoring (DMS)

The Group's core product, DMS, is widely used by owners and operators in the UK licensed on-trade, especially the tenanted/leased pub sector, where the system is usually used to monitor the volume of tied beers dispensed against the volume delivered. Flow-meters connected to draught dispense lines send data via an on-site communication panel to a secure central database. Liquid volumes by beer tap, draught wine or post mix are tracked thereby helping customers to maximise sales, service and quality as well as managing their costs. DMS is installed in over 21,000 pubs in the UK.

i-draught

A more recent and rapidly growing product offer is i-draught(TM), an extension of the Group's DMS, which scrutinises the quality of products running through beer lines in a bar; measuring volume, temperature, flow rate and liquid type (*eg* beer, cleaning fluid or water) at the point of dispense. i-draught is the first system to provide effective measurement of true yields on draught products. Actual dispense volumes can be compared with till transactions to identify losses from products given away, pilferage and wastage. i-draught measures the precise temperature of every drink as it is dispensed, the time taken to dispense each drink, and automatically identifies the liquid allowing customers to know exactly when and how effectively lines are cleaned. Customers can stay in control through accessing their information on a secure web site.

Gaming and Machine Data Services

The acquisition of Coin Metrics in May 2007 was a strong strategic fit with Brulines' existing Machine Insite business which already provided gaming machine data management and consultancy services to operators within the pub, club and leisure markets. Brulines currently manages data from 8,500 gaming machines across 6,000 sites specifically within the pub marketplace. Customers benefit from management and development of their machine income stream as well as analysis and verification of the data from the collections undertaken from the machine as well as state-of-the-art real-time data capture and reporting systems that deliver improved machine profitability and operational security.

Vending Telemetry

The Group's subsidiary Vianet is a Global provider of telemetry solutions and data applications to the vending industry. Vianet provides data and services for all vending management needs with the aim of optimising machine profitability and return on investment

2.2 *Forecourt Services Division*

UK Petrol Data Forecourt Services

The Group's wholly-owned subsidiary, Edensure, supplies key management information to independent, multi branded owner, and supermarket petrol forecourt operators in the UK which helps reduce loss of fuel and improve profitability. Edensure provides petrol retailers with an unrivalled level of accuracy in the monitoring and management of their wet stock, using the most sophisticated statistical analysis techniques available worldwide. The principles involved are widely accepted in the petrol forecourt industry and broadly similar to those used in beer dispense.

3. Benefits of the System to Licensees

(i) The data from both the basic Dispense Monitoring and advanced i-draught system can be used by Licensees to increase operational efficiency, improve beer quality and ultimately improve the profitability of the business.

(ii) Although relatively limited, the data from the basic Dispense Monitoring System, which Licensees can access on Brulines secure website via a link from the Pub Company, can be used to support the following actions:

(a) Comparing dispensed volume against till sales to verify whether all drinks dispensed reach the Till.

(b) Monitoring line cleaning frequency to help maintain serve quality.

(c) Evaluating sales by brand enabling the reduction of unnecessary taps or brands.

(d) Utilising the hot spot report to assess and implement staffing rotas to ensure the correct amount of staff are on duty at the right time.

(e) Monitoring success levels of promotions and product launches.

(f) Remote assessment of the above to verify whether operational actions are being taken in their absence.

(g) Verified draught trading performance to assist negotiations with Pub Companies for investment, rent and business support

(iii) The recently launched and more advanced i-draught system offers a more comprehensive suite of information and can be linked to the EPOS data from the Till. In addition to the Dispense Monitoring System above the Licensee can:

(a) Identify the cause of product and Till yield variances which adversely impact profitability (*eg* wastage through over pouring, faulty equipment, staff training needs; pilferage).

(b) Monitor the temperature of all beer lines and associated equipment to ensure beer is being served to the correct specification.

(c) Receive alerts regarding potential equipment issues so that any fault can be rectified before there is an adverse impact on the operation.

(d) Assess the thoroughness and frequency of line cleaning to ensure that quality of serve is optimal.

(e) Assess individual tap performance and remove underperforming taps to save costs.

(f) Receive data online every 15 minutes.

(iv) In Appendix 9, a recent article published in the *Morning Advertiser* outlines the benefits of i-draught and provides a sample of case studies from Licensees who have benefited from using the information.

(v) Without Brulines data a lot of licensees would not be able to obtain this level of transparency as the majority do not have till systems or operational systems that allow this level of analysis.

4. Brulines has been the Subject of a Recent Investigation by Trading Standards

(i) Following their recent investigation into Brulines, Trading Standards and LACORS concluded that Brulines' equipment is not prescribed under Section 11 of the Weights and Measures Act 1985 thus is not required to be passed as fit for use in trade.

(ii) This confirmation of the status of Brulines' licensed premise flow monitoring equipment follows a comprehensive assessment by Trading Standards and LACORS of the equipment and methodologies employed by Brulines to help manage tied compliance, and effectively means that under the Weights and Measures Act of 1985 Brulines is not required to have any item of equipment used in this process "stamped".

(iii) However, this does not mean that Brulines is unregulated. Under section 17 of the Act there is an obligation on Brulines to ensure that the equipment being used is neither "false nor unjust."

(iv) Brulines was informed of this decision by LACORS by its principal point of contact in Stockton Trading Standards on 30 September 2009.

(v) Trading Standards undertook certain accuracy tests under controlled conditions on the Brulines equipment. Whilst the tests undertaken were successful, Trading Standards instructed Brulines not to put this information in the public domain as they cannot be seen to accredit the system. However, it is noted they have referred to this testing in a recent press story which Brulines are aware of:

> "David Kitching, Stockton Council's Trading Standards and Licensing Manager said 'Stockton Trading Standards has, under controlled conditions, tested equipment used by Brulines and found it to be accurate at that time" *(Teesside Evening Gazette: 26 November 2009)*

(vi) Stockton Trading Standards has also confirmed that contrary to the point made by Mr Harrison in the BIS Committee meeting of 8 December, Brulines has not been asked to participate in further testing of its equipment, voluntarily or otherwise. This is confirmed in the correspondence received from Trading Standards which can be found in *Appendix 8 (not printed here)*.

(vii) Even if as has been suggested the meter were calibrated in the factory under Weights and Measures legislation "for use in trade", any calibration setting would be rendered unusable once the meter was installed in the beer line as each beer line is in itself unique. This is due to the variety of conditions present in individual beer dispensing systems, and principally as a result of the different liquids and pressures present in each beer line making it a unique entity. To overcome this problem of uniqueness, Brulines calibrate each line *in situ* using vessels calibrated by Tees Valley Measurement to Weights and Measures approved standards. An example of the calibration certificate held for each vessel can be found in *Appendix 4 (not printed here)*.

(viii) Titan Enterprises Ltd, the manufacturer of Brulines flow-meter, has provided a statement in support of Brulines submission. This can be found in *Appendix 2 (not printed here)*. The statement provides a detailed summary regarding the accuracy and reliability of the flow-meters used by Brulines and, based on Titan's substantial experience and expertise of manufacturing and calibrating flow-meters for use in Weights and Measures approved dispense systems, explains why calibration in the factory for "trade use" would lead to greater inaccuracy rather than improved accuracy.

(ix) Brulines has co-operated fully with the investigation by Trading Standards, and as a result of informal observations made by them has made several changes to further improve its operating procedures.

(x) Brulines accept that the statements in Sections v and ix above in no way constitute approval of its system by Trading Standards.

5. Brulines Equipment and Methodologies

5.1 *Purpose*

(i) Pub Companies utilise Brulines Dispense Monitoring System as part of their efforts to manage and control tied compliance and provide their Licensees with information which they can use to improve operating performance.

(ii) The purpose of the system is to identify variances between draught product delivered to the Licensees premises by the Pub Company and volume of these products dispensed by the Licensee. Where a negative variance is found this will normally merit further investigation.

(iii) Where Brulines is contracted to do so, its Volume Recovery Service ("VRS") (as explained in Section 5.2 below) will further investigate the negative variance and where required furnish this and other supporting evidence to the Pub Company to estimate the liquidated damages owing as provided for in its commercial agreement with the Licensee. Brulines do not issue "fines" or any other sort of "toll" or "levy".

(iv) Brulines earns its revenues entirely from the sale of hardware and support services. Brulines is not remunerated or incentivised on the number of buying out admissions or level of liquidated damages.

5.2 *Volume Recovery Service—Customer Account Managers*

(i) Brulines VRS Customer Account Managers ("CAM's") visit the Licensees of Pub Companies contracting the VRS service to review negative variance data. This is initiated whenever possible through a discussion with the licensee.

(ii) 34 CAM's work for Brulines with individuals often being recruited from either Her Majesty's Armed Forces or Police Service as the qualities required of a CAM (see point v below) are generally found in individuals who have been trained in the Services. Of the 34 CAM's currently working for Brulines, 21 were recruited from HM Armed Forces or Police Service.

(iii) All CAM's whether employed or self-employed, undergo a rigorous selection process and a minimum of one months training prior to commencing activities in the field. They are monitored closely by their Line Manager over the following six months. Every CAM is formally assessed in the field twice a year in respect of performance and procedural compliance.

(iv) The nature of the CAM role and the data under review can occasionally lead to a difficult discussion with a licensee although confrontation is very rare. The qualities we seek in any individual recruited to the role as a minimum are: highly diligent; disciplined; methodical; assertive (but never aggressive); and the ability to remain calm when difficulties arise. Brulines experience is that these are qualities often found in people with an HM Services or Forces background.

(v) Allegations of "intimidation" have been made against Brulines and its CAM employees, although it is noted that no evidence to support these claims has been forthcoming. If any evidence is provided to us we would take it extremely seriously and if the Committee has such evidence we would welcome the opportunity to address it.

(vi) Under the Health and Safety at Work Act 1974, Brulines is obliged to record all instances where a CAM is abused or assaulted in the course of his duties. To date in 2009 there have been nine recorded instances of unprovoked incidents.

5.3 *Equipment*

(i) Two different flow-meters are used by Brulines with the core component of both being manufactured by Titan Enterprises Ltd. The flow-meters are used due to them being highly accurate and reliable at measuring liquid flow to a high degree of repeatability over a sustained period of time. A statement from Titan Enterprises Ltd confirming this and the use of these flow meters for Weights and Measures approved drinks dispensing systems can be found in *Appendix 2 (not printed here)*.

(ii) The 1st generation flow-meter found in the dispense monitoring system installed in the majority leased and tenanted pub estates cannot differentiate between the type of liquid flowing *ie* beer, line cleaner or water. However, this does not mean that the data subsequently presented to pub companies contains all liquid which has flown through the meter as this is removed in the post processing of the data by Brulines Data Audit function. The methodology used to do this can be found in *Appendix 3 (not printed here)*.

(iii) The 2nd generation flow-meter is an intelligent flow-meter which can differentiate between liquid types and is used in Brulines i-draught system. Of larger Pub Companies, Punch Taverns has over 100 of these advanced systems installed in its leased estate, and Greene King Pub Partners has already installed 100 systems as part of a plan to install 600 by May. By mid 2010 Brulines expects to have around 1500 of these systems installed and in use.

(iv) The SGS report commissioned (we understand) by Fair Pint, casts doubt on the accuracy of the flow-meters. The submission by Titan Enterprises (*Appendix 2*) *(not printed here)* completely refutes both the SGS evaluation and methodology used to make this assessment as being based on "assumptions and poor science". In addition, in its laboratory testing SGS mistakenly tested Titan's 800 series flow-meter and not the 300 series used by Brulines, thus casting real doubt on the rigour with which testing has been carried out.

5.4 *Calibration*

(i) Brulines always calibrate each meter *in situ* under the same conditions as the beer is dispensed in the line. Each line in use in a pub is individually calibrated as Brulines do not use pre-set values. Due to the nature and environment of beer dispense, if the meter is not calibrated in this way the measurement results are meaningless. It is the view of Titan that "with varying installation conditions, calibration in situ is the preferred option for any calibration authority". This is confirmed in their statement in *Appendix 2 (not printed here)*.

(ii) Calibration is carried out using a specialised calibrated measuring vessel. The glassware used is manufactured by Aimer Products Ltd a specialist manufacturer of scientific measurement glassware, and each vessel is individually calibrated by Tees Valley Measurement to the highest accuracy levels required by weights and measures and local standards. A calibration certificate for one of the measurement glassware vessels can be found in *Appendix 4 (not printed here)*. Brulines holds a calibration certificate for each vessel used. Both companies were suggested as reliable suppliers by Trading Standards who use the same companies to supply and calibrate their measurement glassware and this suggestion has been acted upon by Brulines.

(iii) In respect of Brulines calibration process (for which the full company instructions are detailed in *Appendix 5 (not printed here)*) the following areas should be noted:

(a) Every meter is individually calibrated using the specialised calibrated measuring vessel on installation, or if the meter is replaced for any reason.

(b) Brulines do not rely on one measurement being taken; the calibration process requires that the calibration reading can be repeated to within the tolerance level set out in *Appendix 5 (not printed here)* before the calibration value is accepted. If the calibration cannot be repeated a new meter is installed in the line.

(c) If the volumes measured by the Brulines system appear unusual or show a change from their previous history a calibration check is carried out by a Brulines Engineer.

(d) If the site changes the type of product dispensed from the line and Brulines is informed of this (*ie* lager for keg beer), an Engineer will be despatched to check the calibration figure and recalibrate the line where necessary. If Brulines are not informed this will be picked up at the data audit by the Auditor as there will be product delivered for which there is no dispense data. The Auditor will then request a calibration check. In the event that the Auditor overlooks the change, the calibration verification conducted during an investigation acts as a failsafe.

(e) Before any dispense volumes measured from the Brulines system are used to calculate potential liquidated damages, the calibration values are checked and confirmed by a Brulines engineer or Customer Account Manager *(See further details in Section 5.7)*

5.5 *Data Auditing*

(i) Because the standard Brulines dispense meter does not differentiate between liquid types, Brulines have a rigorous audit process to ensure all volumes used in the line cleaning process are removed from beer dispense totals. These processes and procedures formed part of the comprehensive submission to Trading Standards and a full explanation of the process can be found in *Appendix 6 (not printed here)*.

(ii) When Brulines remove line cleaning volumes they remove all liquid flow every hour where cleaning is suspected. This means some beer volumes are also removed resulting in a process that always under-states the total volume of dispensed beer in favour of the Licensee. A full explanation of this process can be found in *Appendix 3 (not printed here)*.

(iii) Brulines displays the site line cleaning on its website. Therefore if a licensee ever has a suspicion that line cleaning has been missed they can check against this data, and if necessary contact Brulines with any concerns.

(iv) The meter installed in the water ring meter is not calibrated as it is simply one of the methods Brulines use to identify if line cleaning has occurred. It is not used to measure precise quantities therefore any volume measurement displayed by this meter is irrelevant to the overall volumes calculated.

5.6 *Opening and Closing Stocks*

(i) Brulines reports potential negative variances as a trend of beer delivered versus dispensed. To allow for stock movement the minimum assessment period for a variance is 12 weeks, although the norm is 18 weeks.

(ii) In addition, wherever there is a negative variance Brulines always review the prior weeks before any period in question to identify and allow for any stock build up. Brulines always takes the prudent view of potential stock movements, in favour of the Licensee, when assessing a negative.

5.7 *Negative Variance Assessment*

(i) Brulines have rigorous procedures once a negative variance is identified which include a calibration check of each line affected

(ii) Where the customer contracts the Brulines VRS service (which is in place for 16,300 of the sites currently managed by Brulines), Brulines CAM's visit sites with a negative variance and conduct an investigation into the variance. CAM's have to follow specific procedures, strict protocols and standards of behaviour in respect of the investigation as some investigations can be contentious and difficult. Brulines guidelines for their CAM's can be found in *Appendix 7 (not printed here)*.

(iii) Where a customer does not use the Brulines CAM service Brulines have explained the procedures they follow to all their customers and have recommended the customer uses a similar process and confirms the calibration on site via a Brulines Engineer before any damages claim is issued.

(iv) Whenever Brulines assesses a negative variance, and before any claim is pursued, a Brulines representative will check that the calibration value of the meter agrees to the uniquely registered calibration value.

(a) In the unlikely event the calibration check shows the value is out of the tolerance range and dispense volumes have been over-stated the negative variance is adjusted to the lower value.

(b) In the unlikely event the calibration check shows the value is out of the tolerance range and dispense volumes have been under-stated the negative variance is maintained at the previous lower value.

(v) All visits undertaken by Brulines are documented with the visit notes made available to the customer pub company on a secure web service.

(vi) Due to the minor uncertainties in cask beer measurement and in 100% detection of all line cleaning activity, Brulines will always take an even more prudent view on any negative variance that relates to cask dispense.

5.8 Non-Compliance with the tie—Statistics and Evidence

(i) It is noted that in the minutes of the Committee Session of 8 December 2009 references were made by Mr Simon Clarke regarding buying out admissions and the evidence used by Brulines. The Committee may therefore find it useful to note the following in respect of corroborating evidence used to assess non-compliance with the tie and the outcome of these assessments.

(ii) In relation to draught keg and cask beer, the level of buying out admissions relative to share of overall volume dispensed is articulated in Table 1.1 below. This supports the view that Brulines are significantly more cautious when reviewing and assessing negative variances on cask products.

Table 1.1

	Keg Beer	*Cask Beer*
Share of Dispensed volume	85%	15%
Share of Buying Out admissions that include each beer type	97%	7%

(iii) Based on the last three months data, a total of 6,259 customer's premises were visited by Brulines Customer Account Managers as a result of having a negative variance or other data trend requiring review. Of these, 2,368 (37%) were assessed as having a negative variance requiring further investigation which resulted in 1,381 (22%) admissions of buying outside the tie, the breakdown of which and be found in Table 1.2 below.

Table 1.2

Product Type or other reason	*Number of liquidated damages claims*	*%*	*Brulines system accuracy used in assessment*	*Other evidence used to support the claim*
Draught Keg and Cask Beer	1,251	90.5	Yes	Product order history Stock count Foreign stock in Cellar Best before and racking dates Photographic evidence
Packaged Products	441	31.9	No	Product order history Stock count Foreign stock in cellar or fridge Best before dates

Product Type or other reason	*Number of liquidated damages claims*	*%*	*Brulines system accuracy used in assessment*	*Other evidence used to support the claim*
Tampering with the system	52	3.7	No	Photographic evidence Flow-meter bypasses Secondary cellars Unauthorised dispense equipment

(iv) To assist understanding of the data in tables 1.1 and 1.2, one full admission of buying out by a Licensee may consist of draught cask, keg and packaged product. This explains why claims by product type do not reconcile to 100%.

(v) At the Committee meeting on 8 December Mr Clarke asserted that "nine times out of ten the corroborating evidence that is used to back the Brulines' evidence is a confession by the tenant which is usually obtained by using Brulines' evidence". The statistical evidence demonstrates that of the 6,259 sites visited by a Brulines CAM, only one in five Licensees (22%) signed an admission of buying outside tie and that in these cases further evidence of buying out was gathered to corroborate the data. Of the 987 who did not sign, the data and supporting evidence was passed to the Pub Company for review and action where appropriate.

(vi) 31.9% of buying out admissions did not even rely on Brulines data or its accuracy as these comprised packaged product which can only be evidenced by foreign stock found on the premises.

(vii) Licensees who formally agree with the results of the investigation and who sign the UTL (legal letter of undertaking), are provided with a letter itemising the details of the claim which will be used to assess and estimate the level of liquidated damages. If a site does not agree with the findings or the level of the suspected negative variance the matter is passed to the Pub Company for review.

6. Response to Specific Comments made by the IPC in the Committee Session of 8 December 2009

In relation to Q130 Chairman: "the accuracy of the raw data and the interpretation of that data, which is the crucial point because at the moment one cannot distinguish between beer and water, though we were told one could. The question then is: is that sufficient evidence for buying outside the tie? Here you say that additional prima facie evidence must be provided. What is the nature of the additional evidence that will be required?"

Mrs Simmonds: In the annex we talk about the nature of some of the evidence required which would be third-party information as well as other considerations, for example being absolutely honest as to whether there are other kegs and casks available from another brewery. There is a whole range of things put forward in the annex to be taken into account, not only the Brulines equipment.

Brulines Response: Clarification of what other evidence Brulines identifies to corroborate its estimate of liquidated damages can be found in Table 1.2 in Section 5.8 and in *Appendix 7 (not printed here)*.

In relation to Q195 Mr Hoyle: The BBPA has said that pub companies should develop a protocol on the operation of flow monitoring equipment. What would you like to see in such a protocol?

Mr Harrison: First, we have been doing some work on this with regard to Brulines which is pretty well the only flow monitoring device that is installed in the vast majority of tenanted estates. We have commissioned a report, which we have submitted to the Committee, from SGS which is the world's leading expert in verification instrumentation and certification. In its detailed report it concluded that the system was not fit for purpose, inaccurate and ought not to be put to the use that it is being put. Second, it is not true that LACORS and Trading Standards have approved this system.

Brulines Response: Titan Enterprises, a worldwide supplier and expert in the manufacture and calibration of flow-metering equipment, and the supplier of Brulines flow-meter, have called the methodology used by SGS to assess the accuracy of the flow-meter as being based on "assumptions and poor science". Additionally, that SGS apparently failed to test the actual meter type used by Brulines if nothing else casts serious doubt on the rigour with which the testing has been conducted. Brulines have never stated that the system has been approved by LACORS or Trading Standards, but simply that as a result of a comprehensive investigation and review it has been given a classification for use. Brulines have sought and gained clarification from Stockton Trading Standards that Mr Harrison has for whatever reason, misinterpreted the letter from Wendy Martin of LACORS which can be found in *Appendix 8 (not printed here)*.

In relation to Q196 Chairman: It is said they do not need to.

Mr Harrison: LACORS do not say that at all but that in their view—we have a letter from Ms Wendy Martin, their policy director—the system is likely to be in use in trade. We have taken leading counsel's advice, which we have also submitted to the Committee, that it is also in use in trade and as such probably falls under weights and measures legislation. LACORS have also suggested that Brulines ought voluntarily to submit their system for testing in government labs. That has not been volunteered yet and we believe that is because it is not accurate and does not work. What we do know about it is that it is inaccurate; it is possibly unlawful and we have been advised that it perhaps also falls foul of the Misleading Marketing Regulations

2008. We know that it is used largely for the intimidation of tenants; that is what happens on the ground and it continues to be the case. Mrs Simmonds did know about direct debits which were used to take money directly out of people's bank accounts because I told her personally when I met her some weeks ago. I spent about 15 minutes talking about Brulines and not much of it seemed to sink in, to be frank, but that is the case. We have done some work on it, so our view is that it is inaccurate; it is possibly unlawful; and it is used for intimidation.

Brulines Response: *Appendix 8 (not printed here)* contains the relevant extract from the letter referred to by Mr Harrison from Wendy Martin of LACORS. Also attached is a synopsis from the Trading Standards officer from the Home Authority for Brulines who is the case officer Brulines have dealt with throughout this process. This document highlights the following points.

— LACORS do not say the equipment is likely to be use in trade, they say it may be in specific circumstances, but each situation should be looked at on its own merits. The equipment is not prescribed and therefore does not require to be passed as fit for trade.

— Mr Harrison has incorrectly stated to the Committee that Brulines has been asked and has refused to submit its equipment for further testing and even goes as far to provide his hypothesis to the Committee as to the reasons for this. As the note from Trading Standards in *Appendix 8 (not printed here)* confirms, Brulines has not been asked to submit its equipment for further testing.

— The testing undertaken by Trading Standards under controlled conditions confirmed the accuracy of the system at that time. The testing undertaken by Slough was carried out using water on a system calibrated using beer. As stated previously in this document, this would result in a different calibration setting and underpins the reasons why the product must be calibrated *in situ* using the product the line will dispense.

— Brulines employ professional people to undertake their field investigation role and each operates under strict procedural guidelines and protocols. If any evidence of intimidation is provided to us we would take it extremely seriously and if the committee has such evidence we would welcome the opportunity to address it.

In relation to Q198 Mr Hoyle: But is there anything else to add?

Mr Clarke: Corroborating evidence would be necessary for any sort of action to be taken. The discovery of foreign barrels in a cellar is perfectly good evidence, but nine times out of ten the corroborating evidence that is used to back the Brulines' evidence is a confession by the tenant which is usually obtained by using Brulines' evidence. It is a self-fulfilling process. You could go to court with all this evidence about singing and dancing and nicely coloured graphs. Here is also a confession by the tenant. When faced with that information at the outset the tenant would consider that a nominal fine and confession would probably be better than the forfeiture of the lease which is what he is being threatened with.

Q199 Mr Hoyle: It is as draconian as that?

Mr Clarke: Absolutely.

Brulines Response: As noted in Section 5.8 the statistics and evidence do not support Mr Clarke's assertion.

Q200 Mr Hoyle: And the equipment is questionable?

Mr Clarke: I had Brulines' calibration two weeks ago in my pub, The Eagle. Obviously, you have had plenty of evidence about my pub before. It was a Brulines technician who undertook the calibration test. He dispensed 14 pints from eight of our pumps, I believe, and all the time it was going on the proceedings were live with HQ and an analyst sat in front of a screen and said that, yes, he had just pulled half a pint through a particular pump. When we got the final report three days later the system failed to record five of the 14 pints they had pulled. Bear in mind that this was when the pub was closed and other than us there was nobody else to interfere with the dispensing or anything like that. Their own technician and analyst were totally unhindered; we gave them free rein to do what they considered to be their job. The result was a 33% or 40% inaccuracy.

Brulines Response: There is a very straightforward explanation for this. The standard Brulines system consists of a primary control unit to which a maximum of 16 flow-meters can be connected. If a site requires more than 16 flow-meters (such as Mr Clarke's pub The Eagle) an expansion module is attached to which a further 16 meters can be connected. As this was a calibration (which Mr Clarke alluded to in his evidence) the live dispense data from the calibration is only visible in the Calibration Software used by the individual in the Calibrations team on the other end of the telephone. It is never visible to the Engineer which ensures that the accuracy of the calibration is independently verified.

During the calibration, nine pints were taken from lines with flow-meters connected to the primary control unit and five from flow-meters connected to the expansion module.

When the final report (which Mr Clarke refers to in his evidence) is produced, Brulines do not include the very small volumes from the calibration of flow-meters attached to the expansion board, which in this case is the five pints Mr Clarke has assumed are "missing". This only ever happens during a calibration and the

volumes involved are insignificant in respect of the overall dispense trend. By not including these volumes Brulines slightly under record the total beer volume dispensed which is in the Licensees favour. A record of all the beer dispensed is maintained in the raw data at Brulines which is how we are able to verify this.

The full reconciliation of the 14 pints means that Mr Clarke's resulting hypothesis that "nine out of 14 pints means a 33 or 40% inaccuracy" is therefore erroneous, and gives rise to concern regarding the authenticity of Mr Clarke's expertise of the system.

Q201 Chairman: That is why you have so much beer in your cellar?

Mr Clarke: We still have 2,000 gallons sloshing around in the cellar.

Brulines Response: Brulines are unsure over what exact period the 2,000 gallon surplus claimed relates, however there are various factors which can significantly affect the volume measured. This is why Brulines always initiates an investigation into any volume variances before any action is taken. In respect of The Eagle, a relatively unsophisticated review of the data and service records has identified the following.

- In 2005 following a CAM visit to discuss negative variances at the Eagle, it was accepted that Brulines may not have been detecting water flushed through the cask lines on the change of each barrel. Mr Clarke claimed it was his policy to flush the lines after every change. Brulines accepted Mr Clarke's explanation and sent him a formal written apology.
- Since this date Brulines have tried to be especially prudent in the assessment of line cleaning volumes on cask products at the Eagle and allowed for a volume of cleaning allowance on the slightest suspicion of cleaning on the cask lines. Based upon an analysis of a 12 week period in the 2008 dispense figures, Brulines removed a total of 125 cleans with an average volume of 20 pints each. Assuming three pints per clean would be beer (which would be normal industry beer wastage for a clean), this would equate to circa 1625 pints (203 gallons) per annum being removed from the beer dispense figures and would have added to any declared surplus.
- In June 2008, Brulines installed three flow-meters in three previously unmonitored cask lines at the Eagle. From the dispense figures it appears that the new lines were installed in February 2008. Over this 17-week period (based upon trading statistics at the pub) it appears that Brulines had not been recording circa 60 gallons per week, resulting in a total volume of just over 1,000 gallons that would have made up a large part of the surplus noted by Mr Clarke.
- In the recent Brulines visit on November 2009, the Brulines Engineer discovered that Mr Clarke was dispensing cask beer through one of the lines that was previously used to dispense his untied Cider dispense (previously two lines and now one). Brulines cannot be sure when this change happened but it appears from the data to be from May 2009. Analysing the data we estimate that over this 26 period, circa 18 gallons per week of dispense was being classified as cask beer resulting in a total surplus circa 470 gallons.
- Despite the efforts of Brulines to identify all cask line cleaning, Mr Clarke still maintained that some cleaning was being missed. From the beginning of 2009 under instructions from Enterprise Inns (the pub company) the data at The Eagle was subject to an intensive audit, and results were sent in detail each week to Mr Clarke. Our instructions were to remove line cleaning volume on every cask line every 76 pints. Based upon an analysis of a similar 12 week period in the 2009 dispense figures, Brulines removed a total of 201 cleans with an average volume of 25 pints each. Assuming the same average cask beer dispense of 136 gallons per week, this means there was an average line clean on each cask line every 8 gallons. On top of the beer removed during every clean (circa 4 gallons per week), if the clean was not carried out every keg change or if the product was delivered in any container larger than a nine-gallon size then a surplus will quickly amount.

The specific line cleaning regime calculated for The Eagle is at the insistence of Mr Clarke. Brulines does not carry out this methodology for any other sites and believe that accounting for this level of cleaning will inevitably lead to significant surplus such as those present for the cask lines.

7. Brulines: Debunking the Myth

Brulines is acutely aware that there are many "facts" or "opinions presented as facts" in the public domain. Some of these are presented below:

(i) Data provided by Brulines identifies Licensees who are "buying out". This is incorrect. The data initially provided by Brulines simply identifies a "negative variance" between what has been delivered and dispensed. Further investigations are carried out and evidence gathered before any allegation of buying outside the tie is made.

(ii) The data in Brulines reports used to identify buying out is taken directly from the flow-meter. This is incorrect. The volumetric data taken from the flow-meter is audited and subject to various measures including the removal of water and line cleaning volumes and stock balance verification as a minimum.

(iii) Brulines take the data in the report and apply a "fine" to the tenant for buying outside the tie. This is incorrect. Where Brulines Volume Recovery Service is contracted, each negative variance is thoroughly investigated with additional evidence of buying out being sought. Brulines do not

assess "fines" or "levies" but provide an estimate of liquated damages as a result of the Licensee's buying out under the terms provided for in the commercial agreement between the Licensee and the Pub Company.

(iv) Brulines system is "loaded in favour of the Pub Company". Brulines thresholds and processes are designed and agreed with the Pub Company to always give the benefit of the doubt to the Licensee.

(v) Brulines will charge a Licensee even if there is a discrepancy of a few pints. This is incorrect. There are agreed minimum thresholds below which Brulines will not pursue the investigation of a negative variance. Variances are always assessed over a minimum 12-week period but more normally an 18-week period.

(vi) Brulines receive a share of the liquidated damages charged to Licensees as a result of buying outside the tie. This is 100% incorrect. Brulines generate revenue through the sale of hardware and services which are entirely unrelated to the number or level of liquidated damages charged or recovered a Pub Company.

(vii) Brulines have no legal right of entry to the premises. Brulines have legal right of entry to premises under the terms provided for in the commercial agreement between the Pub Company and the Licensee.

30 December 2009

Memorandum submitted by CAMRA, The Campaign for Real Ale

1. Introduction

1.1 CAMRA, The Campaign for Real Ale is a consumer organisation which campaigns for real ale, well run pubs and the interests of consumers. CAMRA has over 105,000 individual members and is wholly independent from the brewing and pub industry.

1.2 Since the publication of the Business and Enterprise Committee (BEC) report on 13 May 2009 ("the BEC Report"), there has been much activity by the pub companies but little delivery of meaningful change.

1.3 CAMRA took part in an industry mediation process initiated by the Association of Licensed Multiple Retailers (ALMR). It is our view that the pub owning companies did not enter mediation with any intention of agreeing meaningful substantive change.

1.4 The British Beer and Pub Association (BBPA) have since agreed a new Framework Code of Practice on the Granting of Tenancies and Leases with the Federation of Licensed Victuallers Associations (FLVA) and the British Institute of Innkeepers (BII). This agreement fails to deliver any improvement to the financial situation of existing tied pub businesses and is entirely non-legally binding.

1.5 Following the BEC Report, CAMRA used its power as a designated body representing consumers to issue a super-complaint to the Office of Fair Trading (OFT).[1]

1.6 CAMRA welcomes the Royal Institute of Chartered Surveyors (RICS) Pub Industry Forum Report and Recommendations, the result of an investigation into pub companies. We particularly welcome RICS' endorsement of the key principle that a tied tenant should be no worse off than a free of tie tenant.[2]

2. Background

2.1 The operation of the beer tie in the highly concentrated local markets appreciably restricts and distorts competition, causing substantial consumer detriment in high prices, lack of amenity and pub closures, preventing tied lessees from buying beer on an open market and foreclosing the market for small businesses. Urgent reform is required to deliver a sustainable future for Britain's community pubs.

2.2 CAMRA does not, however, believe that the tie should be abolished due to its valuable role in ensuring the survival of regional and family brewers, preventing domination of the UK pub market by the four largest global brewers and in providing low cost entry into pub ownership.[3] Furthermore, abolition of the tie would be contrary to the EC Treaty.

2.3 We submitted written evidence on the background and effects of the beer tie to the previous BEC inquiry into pub companies, and invite the Committee to refer to it again for further details of CAMRA's position on the tie. The points that we raised in the initial submission remain valid and none have been sufficiently addressed by industry.

2.4 CAMRA urges the Committee to recommend to Government that they overturn the OFT's decision and take immediate action to ensure that the Competition Commission conducts a full market investigation into the UK pub market.

---

[1] The super-complaint is available to read in full online at: http://www.camra.org.uk/media/attachments/305998/Super%20Complaint.pdf

[2] The RICS Report is available online at: http://www.rics.org/site/download_feed.aspx?fileID=4517&fileExtension=PDF

[3] CAMRA evidence to the BEC Inquiry into Pub Companies, Point 7

3. Developments since the BEC Report

3.1 Following mediation, the BBPA announced that it had agreed a new Framework Code of Practice on the Granting of Tenancies and Leases with FLVA and BII. This document categorically does not represent a solution to the problems facing the pub sector.

3.1.1 The agreement was rejected by all other parties to mediation including the IPC[4] because it did not offer any reform that is not already required by law or that does not represent best practice to which the industry ought already be adhering.

3.1.2 For instance, the agreement states that "The Parties agree that, as a matter of principle, contracts should be fair and reasonable and comply with all legal requirements".[5] That such principles were previously in question surely signifies the extent of the failures in the industry and the urgent need for intervention.

3.1.3 On restrictive covenants, the agreement states that "Individual pub companies must make their policy on restrictive covenants clear". This is both insulting and meaningless to licensees, as of course companies could simply continue to impose anti-competitive restrictive covenants while merely announcing their plans to do so.

3.1.4 Of the two signatories to this document, the BII is a training charity, constitutionally does not represent the interests of lessees and receives funding from pub owning companies; and the FLVA represents only a small number of tied pub businesses. Both of these organisations have signed a non-binding agreement that does nothing to deliver benefit to existing tied pub businesses. It is worth noting that groups collectively representing over 25,000 pub businesses declined to sign the BBPA document.

3.2 The BII have also recently announced their Independent Pub Rent Review Scheme (PIRRS), which will establish a panel of surveyors, approved by pub owning companies, to settle rent disputes. CAMRA is deeply concerned that pub businesses signing up to PIRRS will forfeit their legal rights, and believes that PIRRS is open to manipulation by large pub owning companies who it seems will have clear power of veto over the surveyors that pub businesses can appoint. It is further worth noting that PIRRS specifically excludes the involvement of RICS. PIRRS will only have credibility if pub businesses are free to engage any qualified surveyor who is a member of RICS.

3.3 CAMRA is a founding member of a new umbrella organisation, the Independent Pub Confederation (IPC) which will provide a united voice for pub lessees, small brewers and consumers and which will work to effect change on many issues including tying agreements and the rental valuation model.

3.3.1 CAMRA believes that the formation of the IPC represents a significant step forward in ensuring that the voices of lessees and consumers are heard, and we look forward to taking a full and active role in its development.

3.4 However, while CAMRA welcomes the recent media and political spotlight on unfair and anti-competitive practice in the pub sector, the changes that have been promised have not yet been delivered and we fear they will not be unless there is intervention by Government and the Competition Commission.

4. The Use of Restrictive Covenants in the Pub Sector

4.1 The use of restrictive covenants by pub companies is one example of a serious failure that severely restricts and distorts competition in the market.

4.2 Restrictive covenants can be used by the seller of a pub to prevent the purchaser from operating the premises as a pub. The impact of this is to reduce competition within a locality thereby allowing higher consumer prices in remaining pubs and maintenance of market foreclosure or absolute barriers to market entry to small brewers and other suppliers to pubs operating in that locality.

4.3 The BEC report concluded that: "We believe it is for the market to decide whether a pub is unviable and not for a pubco to restrict a building's use. We therefore recommend that the Government makes the use of restrictive covenants to prevent the continued use of premises as a pub illegal".[6]

4.4 Even the OFT acknowledged that "the use of restrictive covenants on the sale of a pub has the potential to harm consumers… [they] can act as a barrier to market entry for pub operators, which can limit competition within a particular area, potentially leading to higher prices and reduced choice and quality for consumers".[7]

4.5 After this damning indictment of the use of restrictive covenants in the pub sector, some pub owning companies including Punch Taverns, Enterprise Inns (which has imposed restrictive covenants in around 20% of pub disposals since 2004[8]) and Marstons announced a temporary cessation of their use. However, without Government intervention to ban restrictive covenants it is likely that they will return to their use when the political spotlight moves on.

---

[4] Independent Pub Confederation – see point 3.3 below

[5] BBPA, FLVA and BII agreements, Point 5. Available online at: http://www.fairpint.org.uk/downloads/BBPA_BII_FLVA_FINAL_AGREEMENT_2009_Signed.pdf

[6] The BEC Report, paragraph 176

[7] OFT Response to CAMRA's super-complaint., point 6.4. Available online at: http://www.oft.gov.uk/shared_oft/super-complaints/oft1137.pdf

[8] OFT point 6.7

4.6 Furthermore, some pub owning companies such as Thwaites are continuing to use restrictive covenants in the sale of their pubs, which has led to pub closures and consumer detriment in East Lancashire and across the UK.

5. Summary of CAMRA's Super-complaint to the OFT

5.1 In July this year CAMRA submitted a super-complaint to the OFT stating our concern that restricted and distorted competition in the UK pub market, due to the unfair operation of the "beer tie" and other exclusive purchasing obligations, is artificially inflating the consumer price of beer, reducing consumer amenity in pubs and increasing the rate of pub business failures. The complaint principally related to those companies who impose a "beer tie" on 500 or more pubs (around 1% of the UK pub market).

5.2 The complaint argued that a lack of competition at the wholesale level of the pub market was harming consumers by reducing the ability of individual pub businesses to compete effectively on price, choice and quality as well as establishing barriers to market entry for small brewers and other small suppliers to the pub sector.[9] The complaint cited the following as evidence of clear harm to consumers:

- higher prices in tied pubs of between 7p and 23p a pint;[10]
- reduced investment in pub staffing and maintenance;
- restricted choice of beer in pubs, especially locally brewed beers, due to tie agreements; and
- the forced loss of pubs due to the use of restrictive covenants by pub owning companies to enhance their local market power.

5.3 The complaint requested that the OFT conducted a full market study to assess the scale of consumer detriment and following this agreed legally binding undertakings with the pub companies in lieu of reference to the Competition Commission. If it were not possible to agree legally binding undertakings the complaint requested the referral of supply ties in the pub market to the Competition Commission for a market investigation.

6. The OFT's Response to CAMRA's Super-complaint

6.1 The Committee will be aware that the OFT responded to CAMRA on 22 October, rejecting the super-complaint in full and refusing to act on our recommendations as set out above.[11] In their response, the OFT claimed that they had "not found evidence of competition problems that are having a significant impact on consumers".[12]

6.2 CAMRA considers the OFT's response to be wholly inadequate and believes it to contain serious failings. It was based on insufficient reasoning and lacked detailed analysis. Indeed, the OFT even noted that they have deliberately "not undertaken a detailed analysis of agreements or conduct" in the sector.[13]

6.3 The OFT have vindicated BEC's fear that the OFT would not deliver a satisfactory outcome, despite acknowledging the serious concerns raised about the UK pub market in the BEC Report. The OFT's rejection of CAMRA's complaint means that the Government are now empowered to use Section 132 of the Enterprise Act 2002 to refer this issue to the Competition Commission for a full market investigation. Without CAMRA's complaint there would not have been a recent decision for the Government to overturn.

7. Failings in OFT Response

7.1 The OFT relied on selective data provided to them by the pub companies and the BBPA, the very companies that CAMRA hoped the OFT would investigate; while paying little regard to the evidence and experiences of individual licensees.

7.2 The OFT accepted assertions that higher wholesale prices for tied pubs is fully compensated for by countervailing benefits, including assertions that they provide support to tied pubs worth between £6–8,000 a year. The OFT have made no effort to establish what these benefits are worth, if anything, to tied tenants.

7.3 The OFT acknowledges that tied tenants are worse off than free of tie tenants, as on average tied pubs would be between £19,000 and £21,000 better off each year if they were able to buy beer at open market prices,[14] but does not accept that this will lead to consumer detriment through poor facilities and loss of amenity due to lack of investment in pubs, and lack of consumer choice.

7.4 The OFT found, through a comparison of tied and free pubs that tied pubs were on average eight pence a pint more expensive.[15] However, their analysis excluded managed pubs, where prices are significantly lower, which in our view demonstrates the inadequacy of their reasoning.

---

[9] Other suppliers would include providers of Technical Services, Technical Services Equipment, Wholesalers, Insurance Companies and AWP machine providers.
[10] CAMRA Prices survey 2009
[11] View the response online at: http://www.oft.gov.uk/shared_oft/super-complaints/oft1137.pdf
[12] OFT p6
[13] OFT 8.10
[14] OFT 5.51
[15] OFT p10

7.5 The OFT failed to appraise themselves of the complex issues at play in the UK pub market, as illustrated by their bizarre conclusion that the "pub companies' commercial interests would appear to be aligned with the interests of their lessees".[16]

7.6 The OFT additionally appears to have mis-directed itself as to what constitutes "reasonable grounds" to make a referral to the Competition Commission, by setting the bar to referral considerably higher than in other comparable cases such as their referral of the Groceries Market in 2006.[17]

7.7 It is CAMRA's view that the OFT has yet again failed in its Enterprise Act duty to ensure competition works effectively at all levels of the market, adopting an incredibly narrow definition of consumer detriment and failing in its duty to protect the consumer.

7.8 For these reasons, CAMRA does not accept the OFT decision, and is currently considering a number of routes to having it overturned. These options include:

— lobbying Government to overturn the decision;

— lobbying the European Commission to instruct the OFT to reconsider;

— issuing a legal challenge;

— issuing a further super-complaint; and

— seeking an independent expert review/ investigation into the OFT's response.

8. Conclusions and Recommendations

We urge the Committee to include the following recommendations in its report:

8.1 That, given the failure of the OFT to sufficiently address legitimate concerns over the potential anti-competitive effects of the tie as operated by large pub owning companies, the Government must overturn the OFT's ruling and use Section 132 of the Enterprise Act 2002 to refer this issue to the Competition Commission for a full market investigation. This is in line with the original recommendations of the BEC Report.

8.2 That the Government should instigate a review of the remit and efficacy of the OFT in protecting consumers in the pub sector following their repeated reluctance to properly investigate legitimate concerns.

8.3 That it should be made unlawful for a pub to be sold with a restrictive covenant in place preventing any purchaser from continuing to run the pub as a pub.

8.4 That the Government give legal backing to the proposed RICS Code of Conduct so that it can have a real impact in protecting tenants and consumers.

8.5 That the Government repeal the Land Agreements Exclusion and Revocation Order 2004, which will force companies to self-assess their beer tie arrangements to ensure that they are acting competitively.

8.6 That the Government support CAMRA's call for the European Commission to disapply the benefit of the Block Exemption[18] (under article seven of the Regulation) from any company with more than a 5% share of the UK pub market.

18 November 2009

Memorandum submitted by The Calveley Arms

I have been watching with anticipation at the many reports referring to Pubcos and yet no action has been taken by the Government to end this practice of squeezing the tenants with the beer tie and high rents. I am an Enterprise Inns tenant and have asked for assistance from Enterprise through the recession. I have not received any financial or management assistance whatsoever, I first requested assistance in July 2008 they did offer a small rent reduction for three months but only on the basis that I signed a full tie agreement with them when costed out I would have been in the region of £6–7k worse off a year. Where is the sense in that, not surprisingly I did not sign and hence no assistance from them.

The beer tie means I pay Enterprise on average for a barrel of beer somewhere in the region of £100 to £110 per barrel of nine gallons which on the open market I can purchase for as little as £58 per barrel, now where is the fairness in that? If the wholesale prices were controlled we would be able to retail at realistic and competitive prices to our customers. This would encourage them to come back to pubs instead of sitting at home drinking cheap beer purchased from the supermarkets. The large supermarkets have already seen off the independent petrol, newsagents, greengrocers, butchers retailers on the high street now they are having a go at ridding the traditional English Pub. When will the Government stop this unfair trading of huge corporations? This surely contravenes the EEC competition laws.

---

[16] OFT p6

[17] Competition Commission Inquiry into the Groceries Market, 2006. Available online at: http://www.competition-commission.org.uk/inquiries/ref2006/grocery/index.htm

[18] The Block Exemption is the term given to the exemption of certain exclusive purchasing and non-compete agreements (such as the beer tie) from competition law.

I do hope my comments above will stir you to investigate further and make recommendations to the Government and Peter Mandelson to bring an end to this unfair practice soon before more of us lose our livelihoods and indeed all our possessions and families. To date so much misery has been brought about, it must stop now.

27 October 2009

Memorandum submitted by Charles Wells Ltd

Charles Wells Ltd is a privately owned Company which has been operating a brewery and pub business for over 130 years.

We are a member of the British Beer and Pub Association (BBPA), British Institute of Innkeeping (BII), Independent Family Brewers of Britain (IFBB) and Association of Licensed Multiple Retailers (ALMR).

We have been closely involved with the BBPA revised code of practice and would like to make the following comments:

- We recognise that the Select Committee raised important issues which needed to be addressed in a constructive manner and we have been working through the BBPA to this end.
- We fully support the BBPA's response to the Department for Business, Innovation and Skills (DBIS) (Lord Mandelson) on 9 July.
- As a Member of the BBPA we are committed to supporting and funding the Pub Independent Rent Review Scheme which has been recently launched which provides a low cost rent resolution facility for our tenants and lessees.
- The BBPA on our behalf and with our assistance has engaged in meetings with a wide range of licensee representatives and groups, followed by a mediation process. We fully support the agreement that arose following the mediation.
- We fully support the revision of the industry framework code and are revising our own code in accordance with the timetable set out in that agreement.
- Our own company code of practice, which is currently accredited by the BII, is being revised and will continue to form part of the agreement between ourselves and prospective tenants/lessees and a copy of the code will be provided to our customers before they sign a tenancy/lease agreement.
- We are in discussion with the Royal Institution of Chartered Surveyors' (RICS) Pub Industry Forum group to clarify their recommendations.

The trade press has been full of comments regarding the revised code of practice and whilst we are in full agreement with the BBPA's revised code we do think that it could be more specific about the differences between FRI Lease agreements and the three year Standard Tenancy agreements operated by the majority of the IFBB members.

As a Member of the IFBB we believe there are significant advantages for many Licensees in choosing a three year Standard Tenancy agreement form an IFBB member and the IFBB have submitted a report to the Business, Innovation and Skills Committee which clearly sets out these advantages. However both types of agreements have their place in the market and Charles Wells operates both FRI Leases and three year Standard Tenancy agreements, under which the majority of our customers choose to operate their business.

16 November 2009

Memorandum submitted by Simon Clarke

SUMMARY OF THE MAIN POINTS

The pub industry is a modern day "Easter Island". The pubcos, like the Rapanui people, over exploited their islands natural resources, are over exploiting the resources of tied tenants resulting in the collapse of a finely balanced system and the extinction of British pubs at a rate of seven a day. Eventually the Rapanui died of starvation at the expense of the natural resources and species of their island leaving only "moai", the statue monuments of their past. The islanders had no foresight that their actions would end in their ultimate demise and no one to advise or control their destructive nature. Sadly, the pub industry is incapable of policing itself and government should intervene to help preserve its future.

A number of initiatives have taken place which give the appearance of significant changes in the industry and a willingness to self regulate. The formation of a much needed voice for tenants, the Independent Pub Confederation (IPC), a position formerly falsely claimed by the British Beer and Pub Association (BBPA) who, in reality, represent the interests of major pubcos and brewers. The Royal Institution of Chartered Surveyors (RICS) report, clarifying that their existing valuation guidance, if undertaken correctly should result in the tied tenant being no worse off than the free of tie tenant and acknowledging the possibility of

perceived conflicts of interest within their Trading Related Valuations Group (TRVG) and the BBPA revised code of practise, which claims to offer the solution to all the industries ills but in reality is little more than an effort to avoid government intervention in exchange for a few insignificant and unenforceable "good housekeeping" measures.

Personal Introduction

I am a tied publican and chartered surveyor. During the BESC inquiry I presented a number of submissions, five of which were published in Volume II, more than any other individual contributor, and I gave verbal witness evidence to the Committee on the 18 November 2008.

I wholly endorsed the findings of the Committee and since publication have joined the Fair Pint Campaign and represented their interests on many occasions, most recently the industry mediation and All Party Parliamentary Beer Group meeting earlier this month.

I believe I am the only surveyor to have been called to give two presentations to the RICS during their in-house Pubco Forum, prompted by the criticism they received in the BESC report. I was pleased to find the subsequent RICS report reflected and addressed many issues raised during my presentations, although I consider I may not have been the only party to raise these issues.

Factual Information

The Committee will receive copious presentations from parties regarding the "progress" of the industry since the publication of the BESC report in January 2009. I considered it may be helpful to the Committee members to have a summary of the initiatives and developments and my opinions of their consequence and effects.

— *Mediation*—At the invitation of the Association of Licensed Multiple Retailers (ALMR), industry representatives gathered to mediate terms that would prove the industry has the ability to reform itself without government intervention. The mediations failed to agree a mediated document and therefore overall was a failure. The BBPA produced a 'post' mediation agreement which was only endorsed by the British Institute of Innkeepers (BII), as the agreement addressed the tertiary issues of transparency and codes of practice, and the Federation of Licensed Victuallers Associations (FLVA). The FLVA has been the subject of considerable criticism over perceived conflicts of interest Martin Caffrey, former Enterprise Inns regional manager, is now operations director and Dennis Griffiths (President), and Alan Jane (executive committee member) have recently launched a new company running failing pubs for Punch and Scottish & Newcastle Pub Enterprises.

Mediation had some helpful consequences but its primary aim, to reach a settlement, that would show the industry is capable of self regulation, failed.

This was *not* a pubco initiative.

— *Independent Pub Confederation (IPC)*—The BESC indicated they were surprised that there was no one body representing the interests of tenants. There are many groups representing tenants interests but no particular one can match the power and resources of the pubco and BBPA.

Following the industry mediation attempts it became clear that no agreement would be reached between the parties that truly represented tenants and those representing the pub owning companies. The only real success of the mediation was the identification of common ground and consolidation of views of the tenants bodies and the ultimate formation of the IPC which now represents around 25,000 licensees and 100,000 consumers.

The parties within the IPC have found common ground on many issues and have issued their "manifesto" for the Committee's consideration. Whilst there may be differing views on the future of the tie, there is a unanimous consensus and agreement with the BESC recommendation that *"…the tying of beers, other drinks and ancillary products should be severely limited to ensure competition in the retail market is restored".*

You will note the IPC manifesto addresses significant issues which were highlighted by the BESC whole hearted support for the recommendation that *"…the pubcos should offer lessees a choice between a free of tie lease and a tied one".* The IPC have called for this offer to be made on new lettings, rent reviews and lease renewals.

Whilst, the formation of the IPC will hopefully fill a much needed void in the industry and offer a voice to all tenants be they free or tied, it only serves to fulfil one of the many BESC recommendations and is a tenants initiative driven by the pubcos failure to offer or agree any significant terms at mediation.

This was *not* a pubco initiative.

— *The Royal Institution of Chartered Surveyors (RICS) report*—I am assuming the report has been seen by Committee members and will be submitted as evidence in the forthcoming meeting on the 8 December 2009.

To summarise:

(A) The report indicates the RICS plan to set up their own code of practice (although there may be some difficulty in enforcing this against non members).

(B) A database of trading information which will help provide benchmarking and guidance for rental valuation increasing transparency.

(C) Rewording of the guidance to restrict further misinterpretation by parties for their own ends.

(D) An acknowledgement that, rightly or wrongly, there may be a perception of bias within the TRVG, some surveyors being seen to have a bias towards pubco landlords' interests, a proposal to make new appointments being recommended.

(E) Perhaps most significant and reassuring to tenants is the report's statement that with the correct interpretation of the RICS guidelines all the lease terms should be considered and with the appropriate correct treatment of wet rent (tie) the tied tenant should be no worse off than if they were free of tie.

The BBPA, pubcos and their representative surveyors have demonstrated their dissatisfaction with the final statement above, (E), and have refused to incorporate the principle, that the tied tenant should be no worse off than if they were free of tie, in their post mediation agreement or their revised code of practice, despite it being considered as universally accepted by the TISC 2004 and the foundation of EU and domestic law. There is a great deal of concern that the pubco will use every effort to persuade the RICS to reverse or confuse this statement in order to enable "business as usual" and continue charging excessive unrealistic rents to service their debt burden.

This report has yet to be put into effect but should go some way to resolving some of the issues of transparency and hopefully rental valuation. It should be added the RICS have undertaken this exercise following the BESC criticism and should be commended for their efforts thus far, the implementation of their report's findings needs to be undertaken as a matter of urgency.

This was *not* a pubco initiative.

— *BBPA post mediation agreement*—the "pub code" got off to a bad start. The code, intending to offer greater clarity and transparency, was presented to the All Party Parliamentary Beer Group (APPBG) in secrecy, behind closed doors. Representatives of the IPC were not permitted entry and whilst the IPC accepted the invitation by Greg Mulholland MP to an open debate of the issues affecting the industry the BBPA refused. The BBPA failed to publish their agreement, however one of the signatories, the BII, considered the industry should be allowed the opportunity to consider its contents and published it on their website.

Whilst apparently lengthy and comprehensive, the document does little to address the real issues and recommendations raised by the BESC. If the contents of the agreement could be enforced then they may be helpful but since members of the BBPA can simply resign their membership, like Greene King have done recently, it forms nothing more than good practice guidelines and is seen by the tenant groups to address nothing more than the low hanging fruit. There is no mention of reform of the tie and moreover an implication that the, so-called, "countervailing benefits" can be incorporated in rental valuations. These "benefits" are purely discretionary, can be withdrawn at any time and are not legally enforceable terms of lease contracts and as such, in accordance with the RICS guidance and the law, not capable of valuation.

Whilst a pubco initiative, as a tenant I have no reassurance from the BBPA agreement and see it as little more than an attempt to avoid the scrutiny of a full and proper Competition Commission investigation.

The BBPA document is seen by tenant groups to be a demonstration of clear and present danger rather than a clear and transparent future.

— *Enterprise Inns recent announcement to offer free of tie to new and existing tenants*—I believe this is a last minute effort to show willing to the BISC and draw fire from the criticism of the companies accounts announced the same day.

Importantly, despite the headline, the offer is only to release wines, spirits and minerals from the tie, many tenants are not tied on these products anyway. The average British pub turns over around 200 barrels and around 70% of the entire turnover will be on beer products. Release from any tie should be encouraged but Enterprise Inns have neglected to mention that the release comes at the price of additional rent.

Any change in contractual terms should be accompanied by a rent review to "open market rental value" not a mandatory increase determined by the pubco.

Committee Recommendations to Consider

There have been some positive outcomes since the BESC report was published, the only ones of consequence initiated by parties other than the pubcos. I hope the Committee can see through the smoke and mirrors of the BBPA agreement and appreciate little has changed that will halt the accelerating pub closure and tied tenant business failure rate. The collective initiatives should be seen as a buoyancy aide but even the combination of them all can not be considered as a rescue package.

Many factors affect the pub industry but the operation of tie agreements remains the fundamental influential factor contributing to business failure. The BESC 2009 heard evidence demonstrating that tied products are in many cases around twice as much as the same product free of tie. The MMC 1969 report

demonstrates clearly that historically there was practically no difference between tied and free of tie prices. The purpose of the tie was to ensure the distribution of a brewers particular product, not as a source of additional revenue, the reverse now applies.

The RICS can resolve the misinterpretation of their rental valuation guidance but there remains no control whatsoever over the price that pubcos can dictate on tied products, what they lose on the roundabouts they will gain on the swings.

I respectfully ask the Committee to refer the entire matter of the relationship between the pubcos and brewers and their tenants to a body who have no vested interest in defending their earlier position, I consider the Competition Commission remain the appropriate body to consider such a matter as the OFT have demonstrated they remain reluctant to address the real issues.

18 November 2009

Supplementary memorandum submitted by Simon Clarke

BRULINES

SUMMARY OF THE MAIN POINTS

The BESC report recommended (paragraph 98) that "given the impossibility of distinguishing between beer dispensed and sold, beer run off and disposed of preparatory to serving, and water used to clean the lines, we believe pubcos should not be allowed to rely on data from Brulines equipment to enforce claims against lessees accused of buying outside the tie."

On publication of the BESC report, James Dickson, Brulines Chief Executive, stated the following:

> "…it was considering legal action over claims made in the report questioning the accuracy of its equipment. However, MPs are covered by Parliamentary privilege. At best, it's irresponsible. At worst it's scandalous. They are very lucky to have that after writing this trash. But I take heart from the fact that very little credibility will be given to them, given the current furore over their expenses."[1]

In another article, Brulines, said that the report was a "misrepresentation" of its products and that no member of the BEC had sought clarifications from it on either of the claims made. The company said: "The BEC inquiry appears to have relied upon one specific example (and some unstated others) and assume that this is representative of 22,000 public houses. The report's findings in relation to Brulines and dispense monitoring were ill informed, one sided, misleading, and unrepresentative."[2]

Brulines were specifically referring to the submissions of David Law. Members of the Committee may recall that individuals who had offered written submissions were asked if those submissions could be forwarded to parties for response. Contrary to James Dickson's implication that Brulines were not afforded the opportunity to respond to the submitted allegations of inaccuracy, unjust and inappropriate use of their equipment, the BESC Volume II evidence actually contains their response, via Enterprise Inns, Ev 113 confirming they were given and took the opportunity to comment.

As one might expect, from a company founded by Derrick Collin who was convicted of conspiracy and blackmail at Ipswich Crown Court in 1986, the response in Ev 113 was misleading.

The equipment and overall system continue to provide misleading and inaccurate information, as demonstrated most recently by a Brulines calibration visit to the Eagle Ale House. In summary the only dispense between 10 and 11 o'clock on 13 November 2009 was by a Brulines technician who was in direct telephone contact with the analyst at head office. The technician dispensed from four product lines, it was acknowledged by the analyst but the system failed to record the dispense, a false reading of 33% inaccuracy. The difference between Brulines dispensed and delivered beer figures is currently 700 gallons over an 18 week period, over 20% difference over what has been delivered. A negative variance of around 200 gallons over the same period would attract suspicion of buying out and, other than their word a, licensee would have no defence.

The Fair Pint Campaign has obtained an expert's report into the Brulines equipment, concluding that the equipment is materially inaccurate and as such is not fit for the purpose to which it is put by pub owning companies, and the opinion of counsel in relation to the use of Brulines equipment by pub owning companies and its promotion by Brulines plc. which concludes that criminal offences may have been committed by some of the parties involved and that "consideration should be given to making a complaint to the Office of Fair Trading over the practice considered in this Advice, a practice that has caused so much understandable consternation among lessees."

Finally, I have received an email from Wendy Martin, Director of Policy for LACORS, on the issue of the Brulines equipment which indicates there are concerns, a methodology of testing has been established, but appears not to have been published to Trading Standards authorities and is denied by Trading Standards in Stockton-Upon-Tees, and that Brulines are failing to voluntarily cooperate with LACORS and provide equipment for type approval testing.

BRULINES OVERVIEW

The pub owning companies, and brewers that operate tied leases, are continuing to employ a system and equipment supplied by Brulines plc. for the purposes of monitoring the dispense of draught products (beer, lager and cider) by pub tenants. In most cases the lease provides the landlord with the power to enforce the installation of such equipment on the premises. The lease normally further grants the landlord rights to enter the premises on reasonable notice to inspect the equipment and makes it a breach of the lease for the tenant to interfere with the equipment.

Reports from Brulines are used by pub owning companies to accuse tenants of "buying-out"—purchasing tied products from sources other than the nominated supplier of the landlord. The accusation is often conducted in an aggressive way using electronically enhanced information from Brulines plc. to threaten the tenant with legal action unless a "fine" (usually of an arbitrary quantum) and an administrative charge are paid, and a "confession" signed. The landlord will often present the evidence obtained from Brulines as compelling evidence against the tenant that will persuade a Court of the tenant's breach rendering it hopeless for the tenant to offer a defence or to go to the cost of doing so. The letters and draft "confessions" from pub owning companies are worded in such a way as to imply that remedies against the tenant, such as judgement in the courts or forfeiture of the lease are mere formalities when of course the landlord would need to properly make out their case in the court in the usual way.

In the last BESC report the Committee were rightly critical of these procedures and the company, Brulines plc., who supply the equipment and data. Your Chairman attended on site at the Eagle Tavern to inspect the equipment for himself and to witness its inaccuracy. Since that time The Fair Pint Campaign has obtained an expert's report into the Brulines equipment from SGS, the world leader in inspection, verification, testing and certification. The work in preparing the report was carried out Dr Phil Mark, SGS's National Manager for Engineering and Instrumentation in the UK. The report concludes that the equipment is materially inaccurate and as such is not fit for the purpose to which it is put buy pub owning companies.

Furthermore The Fair Pint Campaign has obtained the opinion of counsel in relation to the use of Brulines equipment by pub owning companies and its promotion by Brulines plc.

On its website The company says the following:

> "In the early 1990s we created a business concept that would considerably benefit owners and operators within the UK Licensed on-trade, and especially the tenanted pub sector, to turn information into profit.
>
> Our core product, Dispense Monitoring, records the exact volume of liquid that passes to each fount at any minute, of any hour, on any day. It recognises the brand performance of draught beers, ciders, lagers, spirits and post mix— and helps you maintain an effective line-cleaning regime.
>
> All of this has proven to be so successful, we now have systems in over 22,000 pubs and manage data from more than one in three pubs within the UK."

The assertion of accuracy is not supported by the findings of Dr Mark of SGS and the opinion of counsel is that criminal offences may be being committed by Brulines plc. It is also notable to observe that the equipment supplied by Brulines plc. is not generally used by any companies other than those owning pubs for leasing under tied arrangements where the equipment supplied by Brulines is used in connection with revenue protection. Indeed, even pub owning companies such as Punch Taverns only use Brulines in their tenanted estate and not in all their managed estate. The equipment is inaccurate and not reliable for other purposes as claimed.

The legal opinion states that the use of Brulines to fine tied tenants means that it is probable that the equipment is "used for trade" and therefore falls under the terms of Section 7 of the Weights and Measures Act 1985.

The Fair Pint Campaign has received a letter from Wendy Martin, Director of Policy for LACORS on the issue of the Brulines equipment. Ms Martin is of the view that:

1. The equipment is in some cases being used "in trade" and that if so enforcement action could be taken in relation to its use. This would concur the opinion of Mr Gary Grant

2. That Brulines has developed a method of testing the equipment in conjunction with its home Trading Standards office in Stockton-upon-Tees. Following contact with Stockton-upon-Tees, Trading Standards they seem unaware of any accepted testing method. In the absence of details I am requesting it from LACORS. Ms Martin seems to have doubts about this new agreed testing regime and confirms that it does not include the effects of external influences or the accuracy of the equipment. This is also of concern in the light of the report Fair Pint have received from SGS.

3. That the accuracy of the equipment is in doubt and that Brulines should submit it to the National Measurement Office, part of the Department of Business, Innovation and Skills, Brulines has yet to comply with the LACORS request.

4. If Brulines plc does not submit its equipment for testing then LACORS would consider pressing the NMO for a change in legislation to require approval of this equipment regardless of its use in trade or otherwise.

Fair Pint are this week submitting to Ms Martin the report from SGS and also the opinion received from Mr Gary Grant with a request that further action is taken and a report published by LACORS. Ms Martin may wish to comment further before the Committee reconvening on the 8 December 2009 and I will ensure any progress is reported.

It is the understanding of the Fair Pint Campaign that the BBPA, along with the BII and the FLVA is attempting to agree a protocol for the use flow monitoring equipment in tenanted pubs. Fair Pint understand that Brulines plc. is not a party to such a protocol and that the document does not include reference to the accuracy of the equipment.

Fair Pint are concerned about the agreement between the BBPA, the BII and the FLVA on the use of the flow monitoring equipment. The agreement totally disregards the concerns expressed by the Business and Enterprise Select Committee about the accuracy of the equipment its inability to distinguish between the flow of beer down the line compared to water used for cleaning or even gas from kegs.

The agreement between the BBPA, the BII and FLVA seems to totally ignore the fact that tenants have legal rights to challenge accusations made by pub owning companies about buying out of the tie and that questions of breach of contract or forfeiture of leases should properly be decided by the courts not by pub companies applying rules that they have written.

Given the clear inaccuracy of the equipment, Fair Pint believe that Brulines cannot be relied on to police the contractual obligations of tied tenants. Fair Pint believe that action needs to be taken to prevent the use of Brulines information to fine or otherwise punish tenants for breach of contract unless the equipment is capable of certification under the terms of the Weights and Measures Act 1985.

The findings of the experts report and legal opinion commissioned by the Fair Pint Campaign corroborate the concerns about the use of the Brulines equipment as a means of contractual enforcement originally reported by David Law and demonstrated to the committee at The Eagle Ale House in 2008. The methodology of it's use by pub owning companies is, at best, highly questionable and it is the view of counsel now that criminal offences may be being committed in relation to the claims of Brulines plc. in marketing the equipment and also in relation to Weights and Measures legislation.

Fair Pint believe that the equipment is not fit for purpose at this time and should be removed from the premises of tied tenants with immediate effect.

Committee Recommendations to Consider

Urgent LACORS investigation of the accuracy and appropriate use of the Brulines system.

Urgent guidance to be provided to all Trading Standards authorities to enable appropriate action and enforcement of powers to implement fraud proceedings and forfeit the equipment where it is used unjustly or falsely.

20 November 2009

Supplementary memorandum submitted by Simon Clarke

FACTUAL INEXACTITUDES

In accordance with the Chairman's suggestion I have prepared a short supplementary submission to tie up a few "loose ends" and address information which was requested by the committee in more detail or which, given the constraints of time, we were unable to raise during the evidence sessions.

It was clear from the previous hearing and subsequent report that the Committee took a dim view of being misled. Mrs Simmonds' witness statements contain a number of "terminological inexactitudes".

At the BISC witness hearings, in answer to Q106, Mrs Simmonds, whilst discussing the industry mediation, indicated "…to go completely free of tie was not an option we were prepared to discuss even in mediation, although we were absolutely clear that we would discuss the operation of the tie at the time." Mrs Simmonds was not at the mediation, all the IPC witnesses were. We are bound by the confidentiality agreement not to discuss the content of the mediation. In order to preserve, my confidentiality obligation, I am unable to comment but the article entitled "Talk of the beer tie was banned from mediation" from *"The Publican"* magazine published 19 November 2009, I believe will be sufficient to demonstrate that Mrs Simmonds was mistaken.

1. In answer to Q126 Mrs Simmonds denied knowledge of Brulines and direct debit withdrawals, such practices only weeks before she had discussed with Karl Harrison, as he confirmed in answer to Q196.

2. The issue of upward only rent reviews being "a thing of the past". In answer to Q91, Mrs Simmonds indicated that the practice of enforcing upward only rent reviews had ceased in 2005. IPC verbally presented (Q165 & 166) evidence, that as recently as 17 November 2009, Punch Taverns lawyers are still disputing that rents should be capable of going down. Punch Taverns lawyers are maintaining that the terms of the lease are all that matters and that the codes of practice and conduct are not legally binding and are unenforceable. I am advised by the tenant in this case that a full transcript can be obtained if the Committee are in any doubt of the accuracy of the above information. I would remind the Committee that even if the BBPA enforced the removal of upward only rent review clauses, members could simply resign from the BBPA and continue to implement the upward only rent review clause as before.

3. On the issue of Brulines, I have previously submitted but would like the Committee to consider the most recent email from LACORS which, together with my previous Brulines submission, confirms, contrary to Mrs Simmonds contention (in answer to Q127) that Trading Standards have not considered whether Brulines equipment should, or should not, be prescribed under the weights and measures regulations, as it is on an individual basis these decisions should be made. Brulines may have had their system tested but, it would appear, not by LACORS or Trading Standards, moreover LACORS have requested equipment to be submitted for testing by the National Measurement Office but thus far they have declined. The email confirms that "there is no valid testing regime", I interpret that to mean, contrary to Mrs Simmonds assertion in answer to Q127, there is no agreed protocol to which the equipment should be subjected.

4. Some of Mrs Simmonds *faux pas* may have been due to inexperience in the role (three months), she may have received inaccurate information from BBPA members, who have misled her as they previously misled the Committee, or perhaps she had an urge to answer questions rather than honestly stating she simply did not know. In any event, these economies with the truth do nothing to offer credibility to the BBPA's assurances for tenants. The IPC membership have long experienced the empty promises of the pubcos voiced through their mouthpiece the BBPA, the assurances are unacceptable and demonstrate that an independent statutory solution, capable of genuine enforcement, is required if these companies are to be allowed to maintain a tied tenanted business model.

21 December 2009

Supplementary memorandum submitted by Simon Clarke

VALUATION SUBMISSION

As requested I have prepared an additional submission to address a few specific issues raised.

The Committee are aware there are two main financial issues which, above all else, are considered to be the main roots of the problem facing tied tenants;

(A) Rents

(B) Tied products prices.

(A) Rents

1. With fairly recent activity in rental valuation over the past six months there have been some developments that I believe warrant the Committee's attention, which will have a bearing on the issue of rents.

2. It has long been considered by tenant groups, now all under the umbrella of the Independent Pub Confederation (IPC), that tied rents have been artificially high, thereby allowing pub owning companies, operating tied pub estates, to charge inflated rents whilst at the same time sometimes extortionate tied product prices. The Committee will have received copious submissions indicating, beyond all reasonable doubt, that tied tenants are paying considerably more than free of tie tenants for the same products, in many cases double. The principle *"that the tied tenant should be no worse off than the free of tied tenant"*, put simply, means that if a pub owning company wishes to charge extra for the supply of tied products then, in return, the rent should be lowered to compensate for the financial loss suffered by the tenant.

3. The Royal Institution of Chartered Surveyors (RICS) has guidance which was believed to encompass this principle and ensure fairness prevails. Unfortunately, the valuation guidance has been misinterpreted by some and as a result tied tenants have been disadvantaged financially often leading to financial ruin and bankruptcy.

4. In an attempt to arrest this misinterpretation, the RICS held a "Pubco Forum" after which they offered a report which importantly stated:

> "4. Valuation Guidance
>
> The content of Valuation Information Paper No.2 (*The capital and rental valuation of restaurants, bars, public houses and nightclubs in England and Wales*) was the subject of much debate during the Forum hearings. It is clear that the guidance within the paper is relied upon within the industry in calculating rents. The Forum heard that there was some confusion in the interpretation of the guidance with the paper. For example in the treatment of the valuation of the wet rent, where it is clear to us that most lease agreements require a valuation largely on the terms of the lease. This follows the principle of the tied tenant being no worse off than the non tied tenant; a position which is arrived at with a correct interpretation of RICS guidance."

5. The importance of this statement alone is significant. The RICS have not indicated that their guidance was wrong but rather, if interpreted correctly, the tied tenant should be no worse off than if they were free of tie, a principle previously denied, or ignored, by many of the pubcos and their surveyors.

6. Another fundamental development was the *"Brooker case",* a High Court case, which, amongst many other things, extinguished the myth that the net profit before rent (divisible balance) should be split 50:50 between landlord and tenant. It has long been maintained by some surveyors and pubcos that the 50:50 split is set in stone. The RICS confirmed in its report that the RICS does not and has never endorsed any particular split.

7. Importantly, in their report the RICS expressly indicated that they believed the *Brooker* case was "significant" and David Rusholme reiterated their view during the BISC witness hearings. The case highlights the historic manipulation of the RICS guidance so it should come as no surprise that the pubcos, and their surveyors, are still attempting to belittle the judgement as insignificant in the trade press and courts.

8. Judge Hughes concluded that the reasonably competent tenant (be they tied of free of tie) would consider a number of facts and matters before making an offer, eg state of the market, smoking ban etc. Importantly, given the tenant in the case was tied, they would consider one additional fact, *"…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. The fact of the partial tie provides a second level of profit for the landlord and this wet rent provides the tenant with an additional margin for negotiation."*

9. *Judge Hughes, in "Brooker", concluded the net profit before rent was £51,000 and that given the facts and matters that a reasonably competent tenant would consider, the rental bid would be £18,000, a split of the net profit before rent of 65:35 in the tied tenants favour.*

10. Had the property been free of tie, the tenant would have received the discounts available in the open market leading to a higher gross profit and the free of tie rent would have been higher to reflect the absence of the onerous tied lease terms. There would have been no second level of profit for the pubco from tied products.

11. The RICS report said that the recent *Brooker* case had provided "timely guidance". A "select" few have sought to befuddle the judgement, an Enterprise Inns spokesman was quoted in the *Morning Advertiser* saying *"This is a matter of fact and is not a decision of principle or law and, as such, does not bind the outcome of any other lease renewal or rent review."*, implying it is a one off and should not be relied upon. It seems the majority, surveyors, lawyers, tenants representation bodies, have universally accepted that Judge Hughes interpreted the RICS guidance correctly, and effectively penalised the pubco for over charging on tied products, by reducing the rent, to redress the balance. Given this was a High Court case, there is no escaping the fact that the principles of the judgement will be relied upon in future.

12. The problem that remains is for the RICS to effectively incorporate this timely case law into their revised guidance to ensure the ambiguity can no longer be abused to over inflate tied rents.

13. Those who might seek to continue the practice of "misinterpreting" guidance will have to rely on other means to overcome the hurdle of clarity, offered by the RICS and, indeed, those surveyors acting for tenants (like David Morgan) have already seen attempts to muddy the water once again from some pubco surveyors and valuers.

14. It seems the pubco surveyors wishing to maintain business as usual are seeking to rely on the following, and I consider you will have received submissions from those parties ;

15. *"COUNTERVAILING BENEFITS"*—It will be claimed that these benefits outweigh the detriment of the tie. As the Committee hopefully have already understood, only terms, be they beneficial or onerous, that are contained within the lease can be included in the valuation process. I would dispute that some of the benefits claimed by pubcos are indeed "benefits", many are time-consuming and of no real benefit at all to the tenant. However, let us assume there are some benefits, as they are described by pubcos, essentially they are discretionary, if the pubco sells their freehold interest then the new owner may not continue those purported benefits and therefore they should not be quantified in the rental valuation process. The issue of countervailing benefits is that *if they are not contractual, they are not in the lease—then they are not a matter for rent review at all.* RICS confirms that the review should be strictly based upon the terms of the lease.

16. The pubcos attitude towards this issue was effectively demonstrated in the Punch Taverns v George Scott case (which I have already submitted but append herein for ease of reference Appendix 1) (*not printed here*). Benefits are no different to the codes of practice, they cannot be "legally" expected. Punch's lawyer stated *"Punch Retail Charter sets out standards that Punch applies in relation to its business. It does not have contractual effect or amending the lease. Rent review provisions are in the lease.* Punch's code (or charter as they call it) is not part of the lease, the same applies to so-called benefits. A property contract such as a lease—a deed—cannot contain implied terms, such as the pubcos Area Manager being a benefit at review. Pubcos rely on the Law of Property (Miscellaneous Provisions) Act to exclude anything other than the terms of the contract when it suits them, tenants should be able to rely on the same legislation in the context of "benefits". The lease contracts usually contain an "entire agreement clause" to this effect, effectively excluding any other informal agreements be they written or verbal. Pubcos tend to rely on this clause to prevent tenants, who may have been gullible at the outset, from seeking to use pre-contract oral representations at a later date. A pubco may renege on benefits or their code with no fear of legal repercussion.

17. I have read once again the BESC evidence Volume II and it seems to me that, on the issue of countervailing benefits, the pubcos have said a number of contradictory statements in this regard. On the one hand we are told that tied rents are similar to free of tie rents because of countervailing benefits counterbalancing detriment of tie, then we are told that a lower tied rent is a countervailing benefit and last but probably not least we are told that tied product prices are higher than those available to free of tie to counterbalance countervailing benefits.

18. Basically, it looks like double/treble counting of "countervailing benefits" if indeed any exist at all. The so-called countervailing benefits are in exchange for a higher rent (even though a lower rent is supposed to be one of the benefits) and, at the same time, pubcos explain that product prices are higher to pay for the countervailing benefits. Surely if the higher product prices are paying for the countervailing benefits then they should not then be used again in the argument to increase rents.

19. *"OPEN MARKET"*—this will be the last refuge for those abusing the guidelines. Much effort will go into convincing the Committee, and RICS, that despite the profits method valuation, surveyors must adhere to the terms of the lease which require the surveyor to consider what happens in the open market. What the lease *actually* requires is that we consider the open market position *assuming an "average competent tenant"*, or as the RICS guidance outlines, a reasonably efficient operator. Clearly, there has been much inflated bidding in this industry from ill informed tenants and that evidence is not indicative of an open market, with competent tenants. The important point to make is that a competent tenant *would not* over estimate turnover and gross profit and *would not* under estimate costs. Inflated bids for new lettings demonstrate incompetence and should not be relied upon as open market evidence.

20. The *Brooker* judge made reference to this and was not prepared to accept that high bids ultimately leading to business failure were appropriate for valuation purposes.

21. The RICS are forming a panel of surveyors and propose more discussion on this area to ensure one door is not closed and another opened as an unintended consequence.

22. In paragraph 76 of the judgement in "Brooker" the Judge Hughes stated *"Mr Wonnacott (the lawyer for Enterprise Inns) suggested that if the market generated over—optimistic bids, then that would represent a true reflection of the market for present purposes, even if such bids would end in business failure and surrender prior to expiry of the term. That submission may be correct when economic circumstances are favourable but it is certainly not the present position. There is no such optimism in the market at present."*

(B) Tied Product Prices

23. Herein lies the age old problem that we seem to be revisiting time after time, committee after committee.

24. If the RICS are able to close the loopholes of abuse of the valuation model the problem remains that the pubco may simply increase the price of tied products to ensure the same "overall" income is received.

25. The rent is capable of regulation by contracts and the law, the tied product prices remain utterly unregulated.

26. From my BISC submission 1;

> "As we have seen, in the MMC report 1969, the difference between tied and free of tie product pricing was diminimus, in some cases there was no difference at all. Many factors affect the pub industry but the operation of tie agreements remains the fundamental influential factor contributing to business failure. The BESC 2009 heard evidence demonstrating that tied products are in many cases around twice as much as the same product free of tie. The MMC 1969 report (Appendix 6: http://www.competition-commission.org.uk/rep_pub/reports/1960_1969/fulltext/052appendices.pdf) demonstrates clearly that historically there was practically no difference between tied and free of tie prices. The purpose of the tie was to ensure the distribution of a brewers particular product, not as a source of additional revenue, the reverse now applies."

27 *The RICS can resolve the misinterpretation of their rental valuation guidance but there remains no control what so ever over the price that pubcos can dictate on tied products, what they lose on the swings they will gain on the roundabouts.*

28. In order to genuinely overcome all the efforts to bypass the law or abuse the RICS guidance the Committee's original recommendation, *to offer a free of tie option to tied tenants at review, renewal or on taking a new lease*, remains by far the most influential. The option is not complex, does not require abolition of the tie and should be relatively inexpensive for a tenant to instigate as compared with legal action.

29. A fair tied rent is something that the BBPA may try to accommodate in their codes of practice, however, in reality rent is, or should be, controlled by the law and terms contained within a legally binding contract such as the lease.

30. This "option" kills two birds with one stone. Just as with the enforcement of the codes of practice, by offering tenants a free of tie option where the pubcos/brewers have a genuine incentive to ensure that the benefits they offer outweigh the burden of their ties, the existence of a free of tie option would encourage continued efforts by pubcos to ensure they are offering a fair and reasonable tied rent to their tenants otherwise they risk losing their tie agreements in exchange for free of tie agreements in which they are unable to benefit in any way from the product ties.

Naturally, should you require copies of full transcripts of *Brooker* and the RICS report I have them readily available and can email them as attachments upon request.

31 December 2009

Memorandum submitted by Paul Davies

AN ELECTRONIC ENGINEER LICENSEES' THOUGHTS ON THE BRULINES SYSTEM

As an electronic engineer and pub licensee with many years of experience in the design and use of measurement and data recording systems, I feel I must express my real concern over the accuracy of the Brulines cellar monitoring equipment that is extensively used by all of the major Pub Companies.

In this paper I will show that:

1. Brulines equipment is significantly inaccurate because it cannot compensate for the variable amount of gas contained in "real ale".
2. Brulines equipment consistently over-estimates the quantity of "real ale" flowing through it.
3. Because of these inaccuracies, pub licensees are being wrongfully accused of buying beer out of tie. This is both unfair and potentially ruinous for many licensees.

The equipment in question is used as a deterrent, and as evidence in the enforcement of the beer tie. Brulines operate, on behalf of pub companies, a Volume Recovery Service (VRS) which in theory recovers profit that has been lost by the pubcos through licensees buying out of tie. This data is used to identify buying out, and to calculate the fine imposed in pursuit of the VRS. I also believe that this data is used by the pub companies as the basis for rent calculations as well as an extra source of revenue via the VRS.

My thoughts on the system are as follows:

The Brulines system is a flow monitoring system designed to measure, via flow meters, the volume of liquid dispensed. Whilst this type of system, when properly calibrated, will have a reasonable accuracy (1.5%—Titan 800 series Flow meter manufacturers data http://www.flowmeters.co.uk/datasheet-flow-turbine-800.htm) for keg dispense systems, it will be far from accurate for hand pull cask beers—"real ales"—with the cask vented to atmosphere.

The problem arises when the beer degasses in the line. This produces a combination of beer and gaseous CO_2. This is referred to as Two-Phase flow and is a most complex subject that has defied accurate measurement by simple methods. Degassed beer in the line exhibits three forms of two-phase flow; *slug flow, bubble flow and churn flow*, all of which require different techniques for accurate measurement. Whilst

calibration will produce a close result, the variable nature of cask conditioned beers and the variable amounts of CO_2 in the line will produce inconsistencies that a single calibration, which Brulines use, cannot cope with. Frequent calibration would be required to achieve an approximation of volume dispensed.

Accurate flow measurement of two phase flow with a simple turbine flow meter is not possible. Any deviation from the physical condition of the fluid at the time of calibration, will make that calibration invalid. The Brulines system uses a simple flow meter which registers gas flow as well as liquid flow. No further method is employed to determine gas, water, beer or any other fluid flowing in a cask ale line. Even water passing through the pipes when the barrel is being changed is counted!

On Their Website, Brulines state: "*Dispense Monitoring, records the exact volume of liquid that passes to each fount at any minute, of any hour, on any day*". This statement is simply wrong. No measurement system is exact; there is always an uncertainty of measurement and an associated error. For example, the type of flow meter used has an error of 1.5% of flow, according to Titan, the manufacturers. This error is measured using a stable fluid such as water under laboratory conditions, it may be more when used in the field.

Simple turbine flow meter systems, such as Brulines, do not take into account variables that can affect volume measurement. Therefore there will be errors. Temperature and pressure are two such variables, human error is another. The system cannot differentiate between gas, beer, water or any other liquid, making the results far from exact.

The design of this system is poor and has a most fundamental flaw: *it cannot determine the direction of the flow*. The flow meter gives the same pulsed output in both directions. This can be particularly relevant when the hand pull equipment is old, and the non return valve is not working effectively, allowing beer to flow back down the pipe towards the barrel turning the flow meter.

With these flaws in the measurement technique and design, the results of the Brulines system will always give a higher dispense than is actually the case. To substantiate this assessment, a comparison was made with Brulines data available from their website and data available from our own Electronic Point Of Sale (EPOS) system which counts pints sold. The EPOS data is secure and cannot be tampered with; the data may be required for VAT, Inland Revenue and accountancy audits.

Five random weeks in my own pub were chosen, and the data for those weeks compared. This is what was found:

Week beginning	*EPOS Data (Gallons)*	*Brulines Data (Gallons)*	*Percentage difference*
15-12-2008	166.38	£194.4	+16.8%
29-12-2008	181.88	192.1	+5.6%
09-03-2009	147.5	160.1	+8.5%
20-04-2009	107.91	148.3	+37.4%
15-06-2009	75.31	83.3	+10.6%

Although the EPOS system does not account for drip tray contents, this is insignificant in comparison to the size of the difference between Brulines and our EPOS data: a maximum of two gallons per week. We do not suffer pilfering, our stock taking figures and EPOS system would show if pilfering happens and we have good trusted staff.

As can be seen, Brulines consistently overstates the amount dispensed. This data is used to determine infringements of the Beer Tie, and from this data, it can wrongly be assumed buying out has taken place. What is more, if I am correct, this data is also used as a basis for rent calculations, the assumption being that the Brulines data is correct and is the real volume of beer sold. This could result in significantly higher rent in every Public House that has a Brulines system. The CEO of Brulines has been quoted in a *Publican* article:

> "Some pubs might understate the level of their business in order to secure a lower rent and a system like Brulines can give data that tells people, owners, what's actually going on,"

This statement supports my assumption on the use of this data for rent calculations.

Further data integrity and Brulines process concerns:

The data is collected automatically and is relayed to head office automatically. It appears on the website some two weeks after it is collected and made available for use by the operator. I have tried to use this data and it is of little or no value. The data is two weeks old and does not tally with other data available from our EPOS system and stock taking.

The two week delay, I find is very suspicious. What has been done to the data in that time? How good is the audit trail to ensure the collected data has not been corrupted? From my experience of such remote systems, it is possible that the data may be corrupted at any point in the data trail. It is even possible to inject false figures into the data logger remotely unless stringent security measures are in place to ensure data integrity and recovery should there be system failures or errors.

Are Brulines an ISO (International Organization for Standards) registered and approved Company? They do not advertise that they are. ISO approval to the relevant standard would ensure the quality of their systems through independent audit. What approvals do Brulines have? I suspect none. In which case, the only verification of the system is Brulines own with an obvious reluctance to admit to any failings. It is suggested by this passage in the same *Publican* article, that Brulines have no approvals.

> "Brulines, which also supplies petrol forecourt data and vending machine analysis, was still seeking a form of national recognition for its systems through talks with trading standards officials, Dickson said."

Trading Standards have denied any such talks.

Without approvals, what recourse is there for licensees to question the accuracy of the data?

The collection of data and the operation of VRS by the same company is incompatible with good practice. The temptation to tamper with the data is always a possibility, especially when Brulines profit from monies recovered by the VRS and there is an absence of independent validation. There is no protection for the licensee from collusion between the two departments.

In conclusion, the Brulines system is a far too simple measurement system that has serious design flaws—so serious, in my opinion, that any data from it should be deemed invalid. For a system to be used with such certainty, much greater accuracy is required. A +1.5% error in measurement over twelve months would result in a possible accusation of 12 x 9 gallon containers being bought out of tie and an approximate £5,000 fine. (This is based upon our use of 7200 gallons of beer annually and known fine values.) From the specifications available to me, an error of 1.5% would be the very best the system would be able to claim, it would be significantly higher for hand pull cask beer lines.

In this paper, I have just been dealing with errors in the flow meter used to produce a signal proportional to volume. I have not taken into account the errors that will be present in the calibration, signal conditioning, recording and processing equipment that is used to produce the final figures. Errors that are cumulative and add to the overall uncertainty of measurement which should be quoted as a total percentage error for the whole system.

Many people have been accused, fined and even lost their livelihood because of this system, the data it generates and the belief that Brulines are infallible.

I and many others have contacted Trading Standards with our concerns but due to a bad interpretation of the law they have chosen to do nothing. This leaves all licensees with this system installed in their pub unprotected and vulnerable to exploitation.

One thing is certain: it is impossible, at present, to find a measuring system that gets anywhere near the required accuracy for the measurement of real ale. The devices used by Brulines do not even have the required accuracy for keg beers.

Would it be too much to ask the pub companies to return to the system that existed for many, many years—the mutual trust between Landlord and licensee respecting each other to adhere to agreements?

18 November 2009

Memorandum submitted by Enterprise Inns Plc

I am pleased to respond to the invitation by the Business Innovation and Skills Committee (the "Committee") to submit a report, in advance of the oral evidence session due to take place on 8 December 2009, identifying the progress that has been made since the publication of the Committee's report on Pub Companies (the "Report") in May.

Enterprise Inns plc ("ETI") notes that the Report highlighted areas of concern which required clarification and made a number of other observations. ETI recognises that more can be done in order to further demonstrate ETI's commitment to fairness, sustainability and mutually beneficial business relationships with its licensees and welcomes the opportunity to address these concerns in a constructive manner.

Following publication of the Committee's Report, ETI wrote to the Secretary of State, Lord Mandelson, on 24 June 2009, providing detailed commitments which seek to address the concerns raised by the Committee and setting out indicative timescales over which these commitments would be delivered.

Furthermore, as a member of the British Beer and Pub Association ("BBPA"), ETI fully endorses the response provided to Lord Mandelson by the BBPA on 9 July 2009 on behalf of its members and is committed to the implementation of the proposals made.

ETI supported the participation of the BBPA, on its behalf, in dialogue with a wide range of representative groups throughout the summer of 2009. In addition, ETI underwrote a significant proportion of the costs associated with the industry mediation process during September 2009.

ETI was disappointed that all the parties to the mediation process were unable to find mutual agreement on the wide-ranging initiatives, protections and standards under discussion. However ETI is fully committed to the implementation of the Industry Agreement (the "Agreement") that was reached between the BBPA, the Federation of Licensed Victuallers' Association ("FLVA") and the British Institute of Innkeeping ("BII") and to the further development of the industry framework Code of Practice (the "Code") which is proposed by the Agreement.

ETI is committed, by virtue of its membership of BBPA, to the implementation of all aspects of the Code and expects to achieve or exceed all of the standards required well within the proposed timeframe.

ETI is pleased to provide an update in respect of the following commitments made to Lord Mandelson on 24 June 2009, modified as appropriate to reflect the developments that have occurred in the meantime.

Licensee Protection/Balance of Power

1. ETI believes that individual tenants and lessees would benefit from the existence and availability of a national, independent, professional body to provide business advice, legal support and representation in relation to commercial dealings between individual tenants and landlords, local authorities and enforcement agencies. Such an organisation might be similar in constitution and capability to the FLVA and the BII. *Update: ETI has offered to provide financial support to facilitate the establishment and ongoing operation of a national, independent body to offer this essential service to licensees. More than ever, ETI believes that the lack of such professional advice has exacerbated the perception of unfairness between landlords and lessees. This offer of financial support therefore remains available.*

2. ETI recognises that clarity and transparency of the assumptions on which profit assessments are based is essential. Therefore ETI will review and expand its existing level of disclosure, in order to meet or exceed any minimum industry disclosure standards that might be agreed in the future. *Update: ETI already provides summary data and assumptions at the time of letting or rent review, but will launch an entirely new and enhanced standard of disclosure no later than the 31 March 2010.*

3. ETI already insists that, where possible, licensees take independent legal and financial advice before entering into any substantive agreement with the Company. To provide additional licensee protection, ETI will in future ensure that all licensees, whether upon new let or at assignment, will be unable to enter into a binding lease or tenancy agreement (excluding tenancies-at-will) without a business plan which has been formally signed-off by the licensee and a qualified trade accountant (on behalf of the licensee). There will be no exceptions and no waiver to this condition. *Update: The standards and necessary documentation associated with this commitment are being developed in conjunction with a panel of established trade accountants, such that this enhanced standard of mandatory protection will be in place for all new lettings and assignments no later than the 31 March 2010.*

4. ETI has always accepted that arbitration may be prohibitively expensive for some licensees and has therefore been a longstanding supporter of the principle of a low cost, independent, binding resolution mechanism in the event of dispute at the time of rent review. ETI has reaffirmed its commitment to utilise the low cost mechanism being developed by the three trade organisations the BII, the Association of Licensed Multiple Retailers (ALMR) and the BBPA. *Update: ETI remains totally committed to this principle, has provided advice and support towards the establishment of the Pub Independent Rent Review Scheme ("PIRRS") and is making this facility available to all ETI tied licensees, with immediate effect.*

5. ETI is currently reviewing and updating its Code of Practice for the Operation of Tied Tenancies and Leases, which governs the manner in which all aspects of the Company's activities are carried out, the expectations that ETI has of its business partners and the expectations that they should have of ETI. When this review is completed, ETI will submit the revised Code of Practice to annual revalidation under the BII accreditation scheme, to include an evidence-based audit of compliance with the commitments made. *Update: ETI's revision of its own Code of Practice will now encompass all aspects of the industry framework Code and will be completed, implemented and submitted for accreditation by the BII within the proposed timeframe. ETI's revised Code of Practice will be issued not only with all new agreements, but also to all existing agreement holders and will clearly set out the commitments which will be binding upon both parties.*

Commercial Terms

6. ETI already provides discounts on the supply of tied beers and ciders to approximately two thirds of its tenants and lessees. In future, ETI will offer a range of discounts, up to £150 per barrel, on all tied beer and cider purchases for every new agreement and will instigate a rolling programme whereby all licensees may, at their discretion, opt for a new agreement on these terms at the time of their next rent review.

Update

ETI will implement this development for all new agreements by the end of March 2010, and will then commence a rolling programme whereby all licensees may, at their discretion, opt for a new agreement on these terms at the time of their next rent review.

7. The majority of the ETI estate is already free-of-tie for the supply of wines, spirits and minerals and ETI already offers a free-of-tie option on all new agreements. In addition, ETI will instigate a rolling programme whereby existing agreement holders may, at their discretion, opt for new free-of-tie wines, spirits and minerals terms not later than the time of their next rent review.

Update

ETI has already implemented this development for all new agreements and is on target to instigate the rolling programme for all existing agreement holders by the end of March 2010.

8. Although over 1,700 ETI lessees are already free-of-tie for gaming machines, it is ETI's belief (supported by the conclusion of TISC 2004) that the tie for the supply of gaming machines enhances quality for the consumer and increases earnings from machines. It is therefore ETI's intention to continue to offer new agreements with a full tie for gaming machines. ETI already offers "royalty-free" AWP machine-share options in all new agreements and will also instigate a rolling programme whereby all existing agreement holders may, at their option, opt for a new agreement on these "royalty-free" terms at the time of their next rent review.

Update

ETI is currently reviewing this area in light of the Industry Agreement in relation to gaming machines and is committed to the implementation of these recommendations not later than March 2010.

Confirmation and Clarification of Existing Policies

9. In relation to insurance matters, ETI already provides, upon annual renewal, a summary of cover to every agreement holder against which a competitive quote may be sought. ETI will maintain its existing guarantee to reduce the insurance recharge to any agreement holder who can secure equivalent cover at a lower cost.

Update

No further action required.

10. In relation to Upward Only Rent Review ("UORR") clauses, notwithstanding ETI's policy to ignore such clauses, ETI has already committed to remove, at a tied licensee's request and cost, any UORR clauses by Deed of Variation. In addition, ETI will issue a side letter to every tied agreement holder (at no cost and to be appended to the lease) confirming its policy to ignore UORR clauses for as long as all other terms and conditions of the lease remain in place and for as long as ETI (or any ETI group company) continues as a party to the lease.

Update

ETI has implemented this commitment in a letter to all ETI tied tenants and lessees dated 17 August 2009.

11. In accordance with its current practice, all ETI tied agreements that are subject to RPI indexation of rent are adjusted on an upwards or downwards basis regardless of the terminology of existing lease clauses. To provide additional reassurance to lessees, ETI will issue a side letter to every tied agreement holder (to be appended to the lease) confirming that, where such indexation applies and notwithstanding the terminology of existing lease clauses, all RPI adjustments may be upwards or downwards.

Update

ETI has implemented this commitment in a letter to all ETI tied tenants and lessees dated 17 August 2009.

Restrictive Covenants

12. In relation to disposals of pubs to other parties, ETI will not impose restrictive covenants preventing the continuing use of the premises for licensed purposes.

Update

ETI implemented this commitment with immediate effect from 24 June 2009 and can confirm that, since then, no restrictive covenants have been imposed.

Quality of Regional Managers

13. ETI is committed to having a team of highly trained, committed Regional Managers ("RM"), who are the key interface with licensees and already invests significant sums into training. To provide further confidence in this area, ETI will support a BII initiative to create a range of relevant qualifications and accreditations for RMs and will ensure that every ETI RM has achieved a minimum qualification standard.

Update

ETI has worked extensively with the BII in pursuit of this objective and expects the BII to instigate the relevant training and qualification regime during 2010.

Since making these firm commitments to Lord Mandelson and as a direct result of concerns raised by the Committee, ETI has recognised that further clarification would be beneficial in relation to the treatment of "tenants' improvements" at the time of rent review. Following consultation with the Royal Institute of Chartered Surveyors ("RICS"), ETI will publish its policy in respect of the treatment of "tenants' improvements" and will provide this guidance to every new and existing agreement holder such that there can be no doubt about the application of this policy at the time of rent review.

In line with its commitment to mutually beneficial relationships, ETI has already instigated a programme of consultation with representative groups of licensees to ensure that all of the above commitments and developments satisfy the company's commitment to fairness.

In conclusion, I regard these developments as significant commercial changes which are relevant to the ongoing success of ETI and its licensees. I believe that this series of commitments will address many of the concerns of the Committee and will far exceed the standards and expectations proposed within the framework industry Code of Practice. Furthermore, I believe that these developments clearly demonstrate the flexible, competitive and constantly evolving nature of ETI's business model within the leased and tenanted pub sector.

18 November 2009

Supplementary memorandum submitted by Enterprise Inns

Thank you for taking the time to meet with me last week. I found our discussions very constructive, open and frank, and I was reassured by your insightful observations on a number of the parties involved in this industry debate.

You asked me quite specifically about the status of Codes of Practice, particularly in relation to their enforceability and therefore the degree of protection that is afforded to signatories. Enterprise's position on this is that we regard the commitments and obligations contained within our Code of Practice as being binding on both parties, and we expect the specific detail of those obligations to be taken into account by a court, an independent expert, an arbitrator, or indeed any other mediator or review body were we to find ourselves in dispute with an Enterprise tenant or lessee.

We make our commitments clear and expect at all times to be able to demonstrate that we have upheld them. In a large organisation such as ours, gthere is a risk taht we may fall short of the standards I expect. When we are made aware of such occurrences, our first task is to correct any shortfall and our second is to review our internal controls to ensure that we understand how such a shortfall occurred and how we may prevent a reoccurrence in future.

I thought it may be helpful to provide some of the wording which is contained in our new Code of Practice which is in the final stages of drafting. This revised Code takes account of all of the elements of the industry framework Code of Practice agreed between the BBPA, BII and FLVA and we expect to submit it for appraisal and accreditation by the BIIBAS scheme in the new few weeks.

The following two sections of our draft code deal specifically with your point about the binding nature of the Enterprise Code.

Conclusion

This Code of Practice aims to clearly describe the basis of our initial and on going relationship. Our overriding aim is for both parties to enjoy a mutually profitable, respectful and honest working relationship based on a shared commitment to abide by the responsibilities and ways of working that feature throughout this Code.

The requirement of each party to sign this Code at the outset of our business relationship is an indication of the importance we place on strict adherence to both it spirit and content. It is not designed to replace the conditions set out in your lease or tenancy agreement, which is binding throughout the term and will always take precedence over this Code, but it is intended to play a pivotal role in the conduct of our future business relationship.

We regard this Code of Practice as a binding agreement between us and in the event of any dispute or disagreement between us, we expect the content of this Code to be taken into account by any mediator, review body, independent expert or arbitrator, including in the unlikely event that court action may be required to resolve matters between us.

In addition to this binding status, the Enterprise Code of Practice is accredited by the BII. Failure by Enterprise to adhere to its responsibilities and obligations may lead to the imposition of sanctions by the BII, including the possibility of removal of accreditation if we persistently fail to deliver any of our commitments.

COMPLAINTS

If you have any concerns or cause for complain or feel the provisions outlined in this Code of Practice or the Industry Code have not been followed, you should first contact your Regional Manager, who will seek to resolve the problem as quickly as possible. If you are still unhappy or can't reach agreement with your Regional Manager, you should escalate the matter to your Divisional Director, Managing Director (Operations) or ultimately the Chief Operating Officer. In the event that you continue to believe that the company has failed to adhere to its responsibilities or obligations under this Code, you may submit a complaint in writing, providing full details of the circumstances of your grievance, to the BII who will investigate matters on your behalf.

We also spent some time discussing the role that the GMB now appear to be seeking in the pub industry and the deeply disturbing and seriously irresponsible advice that GMB is prepared to publish. We now have several examples of GMB's attempted intervention in matters between us and individual lessees.

The most sinister of these activities relates to the existence of a "secure" website, access to which is restricted to individuals who have been "security screened". We have been shown copies of some of the information which GMB is publishing, from lessees who were at first inquisitive but now feel that they are at risk of being misled and are concerned as to the validity of the "advice" being given.

There are three specific issues to which I would draw your attention, all of which incite tenances and lessees to breach their lease agreement.

1. GMB have issued a template letter to some of our lessees which claims that, by refusing to supply beer for which we have no prospect of being paid, we are in breach of the terms of their lease and this gives lessees the right to buy outside of the tie without fear of recourse or subsequent forfeiture. This advice is in direct contradiction of the clearly specified terms of every lease.

2. GMB have issued an advisory note directing licensees to refuse access to appointed agents such as the staff of flow-metering companies. I realise that the use of flow-metering equipment is a matter which your Committee has sought to clarify, but I am again horrified that the GMB advice is in direct contravention of the specified terms contained in each lease.

3. In an extraordinary sequence of events, GMB appear to have advised one lessee to claim back several months of rent under a Direct Debit Indemnity which the lessee's bank had not alternative but to honour. After several weeks of procrastination and correspondence with the lessee under the advice, we are informed, of the GMB, we had no alternative but to instigate forfeiture proceedings upon which all monies were immediately repaid. The lessee concerned has told us that he believes that he was unwittingly used as a "pawn" by the GMB to further their own agenda.

All of this GMB activity is being widely promoted under an impression which I believe is being falsely given. I have attached a GMB recruitment flyer which states that—"Parliament has given tied tenants legal immunity in trades disputes when we are members of an independent and registered trades union. There is no doubt in our minds that pub tenants need to use this immunity to free themselves of the yoke of the pubcos and GMB agrees with this."

I have also attached a copy of a memo issued by the Unite union *(not printed here)* which makes it clear that the GMB advice is flawed and false.

A number of other parties, in particular the BII and FLVA, have made public their view that tenants following this advice may be putting their livelihoods at risk. I am also aware that the highly regarded trade advisor Phil Dixon (a former union fire-brand himself) is publishing his view that the GMB stance on these matters is both suspicious and dangerous. Anything your Committee can do to highlight your concerns as to the advice being provided by GMB would, I believe, be extremely valudable to tenants and lessees.

I hope that my observations on the binding status of our Code of Practice are helpful, and I hope that you will be able to use the benefit of your Committee's status to provide timely guidance and advice to licensees who are potentially at risk of following GMB advice.

Finally, I enclose a recently completed report from Investors in People *(not printed here)*. It may surprise many members of the Committee that Enterprise Inns has recently beeen awarded Gold Status, the highest possible award from the Investors in People organisation.

16 February 2010

Memorandum submitted by Bilgin Ersin

OFT failed to see the true facts and OFT also fail to see that the consumers are paying higher for beer and beer products in ALL PUBS and not just in leased and tenanted pubs under the control of Pub Companies, because we have no later alternative but to charge higher prices because of the very high rent and we have to pay the highest prices for beer in the UK Beer Market. See attached charts *(not printed here)*. At the same time, Pub companies like Whitbread and Weatherspoon know all this and they market the beer they sell accordingly and just below, hence making very large profits and the end result is, customers paying more and more, and more leased and tenanted pubs under the control of mainly Punch and Enterprise and others are closing down.

I have no alternative but to charge higher than free and managed pubs where the cost of the beer is not an issue because all free and managed pay the lowest price for beer in the UK Beer Market and they sell cheaper than leased and tenanted pubs and they are very happy with the present situation.

If I can buy my beer cheaper, my selling price will be cheaper to my customers and I will be competing with other pubs and the free houses in the area, the standards in my pub higher than managed houses and the quality of food is far superior, however, I am unable to do this because my rent is too high and I am paying the highest prices for beer in the UK Beer Market thanks to "Beer Tie".

Furthermore, the managed pubs like Weatherspoon, Whitbread, M&B etc are not closing down pubs week in week out but keep on opening more and Weatherspoon this year opened 40 new pubs during the worst recession in out time.

However, in the tenanted and leased pub sector mainly under the control of Punch and Enterprise, the pubs are closing at the rate of 30–50 per week.

All the expansions in the managed pub sectors are increasing at the expense of the tenanted and leased pubs which are mainly under the control of Punch and Enterprise and we are all under the contractual obligation to buy from them directly and we are all paying the highest prices for beer in the UK Beer market thanks to "Beer Tie".

All managed Pub Companies are very happy with the current situation and they also know that there is no competition from other Pub Companies which lease and tenant pubs like Punch and Enterprise and the managed Pub Companies also do not want the "Beer Tie" to be investigated by the Competition Commission,

The managed Pub Companies are selling the beer they bought very cheaply just below the price of the beer sold in the leased and tenanted pubs and they are also making very high profits from the sale of beer, thanks to "Beer Tie".

It may appear on the surface that there might be competition but if fact it is more like "Cartel" & "Price Fixing" by all Pub Companies, the biggest being Punch and Enterprise and the small fishes like Weatherspoon, Whitbread, M&B etc. and they all do not want the "Beer Tie" to be investigated by the Competition Commission.

Only people which can and will understand the "Beer Tie" and how the Pub Companies work is the Competition Commission and BEC recomendations must be referred to the Competition Commission without further delay.

The other alternative if it is at all possible is that an amendment to the Beer Orders Act that "Beer Tie" prices cannot be any higher than what is readily available in the UK Beer Market leaving aside the buying power of the Pub Companies and the rent, as recommended recently, the leased tenants should not be any worse off than free of tie pub, this way there will be competition.

I am more than willing to come and see you or anyone else and explain anything else which needs to be clarified in any shape or form.

The constant spin by the Pub Companies through various bodies like BBPA etc in their back pockets, are clouding everything and it is a deliberate ploy by all the Pub Companies to stop the "Beer Tie" to be investigated by the Competition Commission.

Many people like myself never hear of or had any dealings with BBPA or any of the other bodies with the exception of Fair Pint, are all "mutton dressed as lamb" or "wolf in sheep clothing". All these bodies with the exception of Fair Pint are in the back pockets of the Pub Companies and none of them can be trusted.

Recently, all these bodies, with the exception of Fair Pint, are openly fighting among themselves and most of the time contradicting each other because they all want to remain in the back pockets of the Pub Companies where most of their money comes from.

This is my 7th year in my pub and I had no contact from any of these bodies who are supposed to be on my side other than Fair Pint and as you are fully aware, the Fair Pint was formed recently.

The Pub Companies were given a chance five years ago and during that time Punch have done everything to destroy me in order to get me out of my pub so that my pub can be developped, which has cost me £ 70K and I am struggling.

As recommended in the recent BEC Report, this must go to the Competition Commission and just like Mr Luff said and I quote " But the pubcos have proved rather slippery and elusive customers in the past in terms of their relationship they have with their tenants" etc, etc.

The mediation has broken down because Pub Companies are not prepared to change whatsoever and they cannot based on these Pub Companies were created to charge high rent all the time and to charge the highest prices of beer all the time which the "Beer Tie" gave the Pub Companies the power to be able to do it.

The BBPA and all the other bodies with varied initials are in the back pocket of the Pub Companies.

RICS said that tied tenants should not be any worse off than free of tie tenants. However RICS is now saying that they will not be rushed into anything and they will take their time to come up with whatever, which I am sure will have to be approved by the Pub Companies.

BBPA is now saying that RICS will be assessing the whole package when it comes to tied and free of tie tenant and not just isolated elements.

All I say to that is "What Package". I pay the highest prices for beer in the UK Market, my rent is very high, I am unable to compete with anyone because of the conditions imposed on me, I have no dealings with the Pub Company whatsoever, I am forced to accept very short shelf life beer from the Pub Company at full price which is the highest price for beer in the UK market, my expenses are constantly going up, all the pub company wants to do is to make sure they can take every penny they can out of me in any way they can before all costs and expenses, I work all the hours under the sun and pay all the bills etc, etc while the Pub Company makes the highest profits thanks to the "Beer Tie".

All the conflicting so-called new guidelines which suppose to improve everything with the Pub Companies are a waste of time, window dressing and more spin which is controlled by the Pub Companies.

All the ideas and suggestions are created by the Pub Companies through BBPA and others to stop the "Pub Companies" and the "Beer Tie" being investigated by the Competition Commission.

Only people which can and will understand the "Beer Tie" and how the Pub Companies work is the Competition Commission and BEC recomendations must be referred to the Competition Commission without further delay.

The other alternative if it is at all possible is that an amendment to the Beer Orders Act that "Beer Tie" prices cannot be any higher than what is readily available in the UK Beer Market leaving aside the buying power of the Pub Companies and the rent, as recommended recently, the leased tenants should not be any worse off than free of tie pub, this way there will be Competition

17 November 2009

Memorandum submitted by The Fair Pint Campaign

Introduction

About The Fair Pint Campaign

The Fair Pint Campaign is a membership organisation that campaigns for the interests of tied tenants. The campaign has a membership of nearly 1,000 tenants. We are funded entirely from membership donations.

Fair Pint provided both written and oral evidence to the Business and Enterprise Select Committee's inquiry on pub companies. We welcomed the Committee's view that the balance of risk and reward between pub owning companies and tied tenants is unfairly skewed towards landlords and the fact that despite bearing most of the risk, tenants do not receive a fair share of the benefits.

Fair Pint is a founding member of the Independent Pub Confederation, which is a united voice for publicans and consumers. We believe that the IPC will be a very positive influence on the industry which has for too long being dominated by the property and brewing interests represented by the BBPA.

We believe that the agreement between the BBPA, the BII and the FLVA is a totally inadequate response to the problems highlighted by the Business and Enterprise Select Committee, and shows unwillingness by the industry to consider change which would rebalance the relationship between tied tenants and pub owning companies in any significant way.

The OFT's reasons for their rejection of CAMRA's super-complaint showed that the Select Committee was correct in its judgment that the OFT would not be a able to scrutinize the pub market in a satisfactory way. They have failed to understand the industry and how the unbalanced relationship between tied tenants and pubcos highlighted by the Select Committee leads to clear consumer detriment.

Fair Pint believes that developments in the industry since the publication of the Business and Enterprise Select Committee report strengthens the case for Government intervention in the sector. The major pub owning companies have shown that they are unwilling to take any steps to significantly alter the balance of risk and reward between landlords and tied tenants.

We believe that the Committee ought to repeat its recommendation that Ministers refer the pub sector to the Competition Commission with a view to freeing up competition in the market by rebalancing the relationship between tenants and pub owning companies including action to prevent companies being able to use supply ties in an exploitive way.

MEMORANDUM

RICS' Pub Industry Forum Report and Recommendations

1. Fair Pint welcomed the criticisms of the RICS in the Business and Enterprise Select Committee's report on Pub Companies. Fair Pint agreed with the Select Committee's conclusion that RICS had failed to take serious action to ensure that the system of setting rents was not unfairly biased against lessees.

2. Members of the Fair Pint Campaign made representations to the RICS Pub Industry Forum, which was established in light of the criticisms of the organisation by the Select Committee. We welcome the conclusions of the forum, which made it clear that change was needed to increase the transparency of the rent setting process and to reduce conflict in the sector.

3. The conclusion that the correct interpretation of the RICS valuation guidance should follow the principle that tied tenants should be no worse off than the non-tied tenant was particularly welcome. We believe that the neglect of the legal principle that tied tenants should not be financially worse off than free of tie tenants has been one of the main causes of the problems faced by the leased pub sector. It has allowed the tie to be used as a way to extract more income from tenants than could be extracted from dry rents alone, leaving tied tenants significantly worse off than free of tie tenants and forcing thousands of tenants' out of business every year.

4. The forum also made other clarifications of RICS guidance which if implemented in full could reduce the extent of over renting in the sector. It made it clear that the practice of dividing estimated profits in a 50:50 split between the landlord and tenant was not based on RICS guidance which sets down no fixed percentage for the profits split. It went on to say that the conclusions of the Brooker case, which concluded that the state of the pub market made a split of 65% of profits for the tenant and 35% of profits for the landlord was more equitable split in the current market, provided "timely guidance" on the setting of rents in the current climate.

5. As the Select Committee stated in their report, rental calculations are often skewed by an over-estimation of potential profits from a pub and an underestimation of the actual costs of running a pub leading to an unrealistic divisable balance. We therefore welcome the proposal to increase the transparency in rent calculation, making it clear which items will be rentalised and to clarify the treatment of tenants' improvements.

6. Transparency will, however, only lead to more equitable rent calculations if the assumptions of profit and costs are realistic. We therefore welcome the forum's support for a new national database of trading information which would allow benchmarking of costs and allow better analysis of the rental difference between tied and non-tied tenants.

7. Fair Pint drew the attention of the Business and Enterprise Select Committee to the membership of the RICS's Trade Related Valuation Group (Ev 235). The TRVG membership consisted of Chartered Surveyors who had significant financial links to pubcos. We welcome the conclusion of the Pub Industry Forum that the perception of bias in the group ought to be addressed through new appointments to the group. We believe that new appointments should include people who represent the interests of tenants.

8. Whilst we welcome the fact that the pub industry forum responded positively to the criticisms of the Business and Enterprise Select Committee, the conclusions of the forum will only begin to make a difference to the practice of valuation once they are fully reflected in valuation guidance and the makeup of the Trade Related Valuation Committee. Until the changes are fully implemented it is too early to say how effective the changes will be in addressing the concerns raised by the Business and Enterprise Select Committee about how the system of rent valuations are skewed against the interests of tenants. We are aware that the BBPA and some of its members are already seeking to undermine the content and implementation of the RICS report but we have received assurance from the RICS Director of Valuation that a working group is to formed to move ahead with the report's proposals.

9. RICS guidance only binds Chartered Surveyors. Most rent calculations are undertaken by Pub Company Business Development Managers who are not Chartered Surveyors. The basis upon which rents are calculated is often the amount that the pub owning company can get away with rather than a proper use of available guidance. In many cases the aspirations of the pub owning company in relation to rent first ascertained and then the calculation made to fit around that ambition. Clearly this is the wrong approach. Changes to the RICS valuation guidance will only make a difference if they are incorporated into the rent setting practice of pub companies. We are therefore concerned that the BBPA's agreement with the BII and the FLVA makes no mention of the conclusions of the Pub Industry Forum and the central principle that tied tenants should be no worse off than free of tied tenants.

BBPA's agreement with BII and FLVA to revise its Framework Code of Practice on the Granting of Tenancies and Leases.

10. The BBPA's agreement with the BII and the FLVA to revise its Framework Code of Practice is an inadequate response to the issues raised in the Select Committee's report. The agreement does little more but to reiterate the current status quo and in some cases the agreement is suggesting changes which would reduce the rights of tied tenants. None of the main groups representing tied tenants accepted the agreement because of the inadequacy of the agreement in response to the problems in the market and the conclusions

of the Select Committee's report. Attention needs to be drawn to the fact that both the BII and the FLVA have significant financial links with the major pub owning companies. Neither of these organisations have sought to negotiate the terms of the agreement. They have simply signed the document that was presented to them by the BBPA as a *fait accompli.*

Fair Pint has produced a full commentary on the agreement which is attached as Appendix 1 *(not printed here)*.

11. Pub owning companies promised to strengthen self-regulation and codes of practice in response to the 2004 Trade and Industry Select Committee report. As the Business and Enterprise Select Committee discovered, those codes of practice have been totally ineffective in curbing the exploitive behaviour of pub owning companies.

12. The agreement fails to address the key recommendations of the Business and Enterprise Select Committee's report. The issue of supply ties, which was central to the recommendations of the Business and Enterprise Select Committee, isn't addressed in the agreement which is limited to the setting of rents and the administration of leases. As well as failing to address the main issues raised by the Select Committee's report the agreement even fails to address many of the recommendations of the Trade and Industry Select Committee's Report in 2004, for example on the issue of AWP tie. The current agreement does nothing more than potentially commit BBPA members to explaining how they will treat machine income in the rent review process.

13. It is important to note that even if implemented in full the agreement would only make changes for those who are signing up to new agreements or negotiating changes of terms. It will make no difference at all to the problems faced by existing tenants and the survival prospects of their pub businesses.

14. The agreement contains no detail on how it will be implemented or any powers of enforcement if companies choose not to apply the code. The BBPA and not the individual pub companies are parties to the agreement meaning that companies can avoid having to abide by the agreement by simply resigning from the BBPA. For example, Greene King which has recently indicated its desire to leave the BBPA will not be bound by the agreement.

15. The lack of any real concession from the pub companies, or indeed any direct involvement, in this agreement shows that they are unwilling to voluntarily put their own house in order or respond fully to the recommendations of the Select Committee.

16. We are concerned about the protocol which has been agreed between the BBPA, the BII and the FLVA on the use of the flow monitoring equipment. We believe that the protocol totally disregards the concerns expressed by the Business and Enterprise Select Committee about the accuracy of the equipment and its inability to distinguish between the flow of beer down the line compared to water used for cleaning or even gas used for dispensing drinks or air.

17. Fair Pint have instructed SGS a leading technical certification company to provide an independent assessment of the accuracy of Brulines equipment which makes it clear that the accuracy of the variances recorded by the equipment is questionable and is open to manipulation.

18. Fair Pint has instructed a leading counsel to provide an opinion on the legality of Brulines Equipment. The opinion makes it clear that for the equipment to be used to fine or otherwise punish tied tenants for alleged breach of contact the equipment ought to be totally accurate and it is clear that it is not.

19. The opinion states that the use of Brulines to fine tied tenants means that it is probable that the equipment is "used for trade" and therefore falls under the terms of Section 7 of the Weights and Measures Act 1985

20. Fair Pint have produced a separate submission which sets out our concerns about the use of Brulines and which includes the independent assessment from SGS about the accuracy of the equipment and a summary of the counsel's opinion on the potential illegality of the equipment.

21. The agreement between the BBPA, the BII and FLVA seems to totally ignore the fact that tenants have legal rights to challenge accusations made by pub owning companies about buying out of the tie and that questions of breach of contract or forfeiture of leases should properly be decided by the courts not by pub companies applying rules that they have written.

22. Given the clear inaccuracy of the equipment, we believe that Brulines cannot be relied on to police the contractual obligations of tied tenants. We believe that action needs to be taken to prevent the use of Brulines information to fine or otherwise punish tenants for breach of contract unless the equipment is certified under the terms of the Weights and Measures Act 1985.

The Independent Pub Rent Review Scheme (PIRRS)

23. The fact that the majority of the lessees earn very little income from their pubs means that in most cases they are unable to bear the costs of taking legal action against their landlords or engaging a chartered surveyor or a solicitor to act for them in rent disputes. This means that in most cases pubcos do not face significant challenge from their tenants when setting levels of rent. This is not a healthy state of affairs and does not result in an efficient rental market in the pub sector. Indeed it has been seen that pub owning

companies have not retreated from using the potential cost of arbitration as a threat to dissuade tenants from challenging higher rents at review. Fair Pint have therefore welcomed the attempt to reduce the expense of resolving disputes over rental valuations.

24. It is clear however that the new scheme will only apply to disputes over rent valuations and will not provide a solution to the number of other disagreements which tied tenants have with pub owning companies, for example over the operation of supply ties and the prices charged to tied tenants for products and services.

25. We are concerned that the establishment of the register of appropriately qualified Chartered Surveyors led to number of Chartered Surveyors appearing on the register stating that they have no conflicts of interest despite the fact that they work for major firms who frequently act for pub owning companies. We understand that the scheme has now been withdrawn whilst the register is reviewed in light of our concerns We are now of the view that this problem will have weakened confidence in the PIRRS scheme amongst tenants. It is unfortunate that the PIRRS scheme cannot be genuinely independent. It is partly sponsored and paid for by the BBPA and its members. Given their track record it seems unlikely that they will resist seeking to influence the register of surveyors or the methodology used.

26. Even though the PIRRS may reduce the cost of disputing a rent review, unless the tenant has the expertise to represent themselves they will still have to engage professional advisers, meaning that despite establishment of the PIRRS most tied tenants will not be able to afford to challenge unfair rent reviews.

27. It is too early to judge how effective the body will be in increasing the ability of tenants to challenge their landlords at rent review. In the event that the RICS properly implements the findings of its recent report so that its guidance in relation to rental valuation in the pub sector is fair and lawful then it may be that the current contractual mechanisms for resolving rent reviews through a third party will suffice and PIRRS will be less necessary.

The Formation of the Independent Pub Confederation

28. The lack of a strong representative voice for publicans has had a negative effect on the industry. The fact that the structure of the industry and the operation of supply ties has resisted challenge for so many years is due to the fact that the for many years the public face of the whole sector has been presented by the BBPA which is the trade association representing brewers and pub owners not pub operators.

29. Fair Pint was set up to give tenants who lacked a voice in the debate over the future of the industry the ability to draw attention to the damage being done to their businesses through the operation of supply ties and to press for change.

30. We are a founding member of the Independent Pub Confederation. We believe that the development of the IPC umbrella group which has drawn together groups representing publicans, small brewers, and consumers is a very positive development, which will help to strengthen the say that operators have over the future of the industry.

Fair Pint fully agrees with the IPC's list of areas in which we would like to see Government intervention:

- The repeal of the Land Agreements Exclusion Order
- A reference to the Competition Commission for the pub sector
- Government intervention into the market to give tied lessees the ability to chose to change their agreement to free of tie ones either at their next rent review or when leases are renewed and to allow tied tenants to buy a guest beer free of tie
- The limitation of ties, so if beer is tied wines and spirits and other ancillary products and services can't be.
- The removal of the AWP tie
- The extension of the terms of the Unfair Contract Terms Regulations to small businesses
- The removal of upward only rent reviews from leases via a deed of variation
- The consideration of a statutory code of practice on the industry
    - Steps to ensure the calculation of rents using the profits method includes an income for the tenant or a manager as a normal cost of running a pub

The OFT's Response to the CAMRA Super-Complaint

31. We believe that the nature of the OFT's response CAMRA's super-complaint shows that the body has failed to understand the operation of the pub sector and supports the view expressed by the Business and Enterprise Select Committee that the OFT would not be an appropriate body to investigate the pub sector.

32. It is difficult to see how the OFT can judge that the market is operating in a healthy and competitive way when demand is falling but prices are rising.

33. The OFT's response seems to accept without question the assertions of pub owning companies on issues such as the value of countervailing benefits available to tied tenants and the real value of their support for tenants who are facing financial difficulties.

34. The OFT's view that the operation of the system of valuation and rent setting doesn't impact on consumers is extraordinary given the real problems in the current system, highlighted by the select committee. As the report pointed out, rent calculations are skewed against the interest of tenants leading to an significant amount of over-renting, which reduces tied tenants' profitability which has to be made up either through increased prices to consumers or a reduction of investment which will affect consumer amenity.

35. Price differentials between the actual price of beer on the open wholesale market, compared to the price which tied tenants are obliged to buy beer at can be over 100%. It is extraordinary that the OFT judged that these huge price differences do not lead to higher prices in pubs.

36. The OFT did state that there is a price differential of about 8p a pint for a typical pint of larger between the tied and untied sector. It is concerning that the OFT did not consider that this price differential has an impact on consumers. It claimed that consumers are compensated for this price differential by the extra amenity often provided by tied pubs. As the Select Committee highlighted the reality is that most tied pubs are struggling financially and have very little money for investment, which means that the OFT's assertion that tied pubs are able to offer significantly better surroundings is bizarre.

37. The estimate that the price differential between tied and untied pubs is only 8p is significantly skewed by the fact that the OFT decided to leave large managed chains such as the J.D.Wetherspoon, Mitchells & Butlers chains out of the comparison. There justification for doing this is far from clear although the OFT seems to believe that these companies operate in a different market. This would come as a surprise to anyone familiar with the pub sector, not least those managed chains themselves. The real difference in price between the tied and the united sector is therefore significantly higher that the OFT's estimate and up to 80p per pint or more.

38. We believe that the weakness of the OFT's report shows that the organisation was more concerned with justifying its previous refusals to investigate the market rather than serving the needs of consumers. We find it difficult to understand how the OFT arrived at such far reaching conclusions as it did without carrying out a market study.

19 November 2009

Supplementary memorandum submitted by the Fair Pint Campaign

A response to the BBPA's; *"UK Pub Industry Framework Code of Practice for Tied Tenanted and Leased Pubs".*

Introduction

1. The Business and Enterprise Select Committee's Report on *Pub Companies* published in May last year found alarming evidence indicating there may be serious problems caused by the dominance of the large pub companies. The Committee highlighted the imbalance in bargaining power between pub owning companies and tenants as one of the major causes of the problems in the tenanted pub sector.

2. The BBPA promised to respond to the concerns of the Committee with what they claimed would be a robust code of practice.

3. The details of the BBPA's framework code of practice, which BBPA members will be expected to incorporate into their own codes of practice have now been published. It does nothing to rebalance the economic relationship between tied tenants and their landlords. As the Select Committee showed in their Report last year, the abuse of this relationship has led to tenants facing unsustainable costs for tied products combined with levels of rent, and a means of reviewing it, which make it practically impossible for tenants to make a profit from their businesses.

4. Pubcos already have codes of practice and these were promised to be strengthened in response to the criticisms of the industry in the 2004 Trade and Industry Select Committee report. However, these codes of practice have not prevented the kind of exploitative behaviour which was highlighted by the Business and Enterprise Select Committee's report last year.

5. The BBPA code is therefore a wholly inadequate response to the criticisms of the sector made by the Select Committee given that it totally ignores the key areas of the Committee's concern. The fact that the BBPA has chosen to respond to the Select Committee with a set of proposals which would more or less leave the status quo untouched shows that the BBPA's biggest pubco members are totally unwilling to consider any meaningful change in the structure of the industry. Their primary concern appears to remain their ability to extract short-term income from their pub estates in order to meet their debt obligations.

6. Even in the limited number of areas where the framework does seek to improve on the status quo the value of the commitments are limited because the framework and the codes of practice of which it will form part are not independent, not enforceable, and have no meaningful sanctions in place to deal with transgression.

Commentary on the Framework

7. Rather than a new code of practice this is merely a framework which members of the BBPA will be expected to incorporate into their existing codes of practice. Most of the bigger pub owning companies have codes of practice which, as the Select Committee's report highlighted, have not effectively protected the rights of tied lessees. Even now there is continuing evidence that pubcos "disown" their codes of practice whenever it suits them to do so.

8. The BBPA document states that because the code of practice will be agreed by both lessee and landlord the code will be binding and *may* be used in evidence in court. We are concerned about the lack of clarity on this point. Rights and obligations between lessees and their landlords are set out in the lease, which will remain the primary agreement. We therefore believe that any change to the legal obligations of either party should be enforced by a deed of variation to the lease.

9. As well as setting out obligations for landlords, the framework seeks to impose obligations on tenants. For example, those related to the assignment of leases. By restricting the freedom of lessees to sell their interests, the framework seeks to impose new onerous conditions on lessees. In return the lessee gets nothing from the landlord apart from the promise to fulfil obligations which they should be doing anyway. Because of these additional, and onerous, obligations on tenants it is likely that many will be advised not to sign the code and as such the BBPA's members will be able to step away from their obligations. This is a step backwards.

10. The BBPA document states that the code of practice is not capable of being altered unilaterally and that future revisions will be carried out after consultation with representatives of tenants and lessees. The obligation is only to consult and it is clear that tenants' representatives will not have a veto. The two groups mentioned in the document, the British Institute of Innkeeping (a training provider) and the Federation of Licensed Victuallers Associations are not representative of all tenants and are financially linked to BBPA members. It is highly questionable as to whether they should be in a position to agree things which might place new obligations on tenants.

11. The BBPA framework might only be changed after consultation, but there is nothing in the document which suggests that individual company codes of practice, of which the framework will form a part, cannot be changed without consultation.

12. We are very concerned that as the framework code of practice will absorbed into each company's individual code of practice, there is a risk that companies will include other onerous obligations on tenants as part of their codes. Lessees will have to consider very carefully what they are agreeing to and would be wise to seek legal advice before signing the new codes of practice. However, if lessee refuses to agree to sign the code of practice the landlord will not be obliged to fulfil his obligations, which would undermine the effectiveness of the BBPA framework still further. (repeat of earlier but worth leaving in to reiterate this key point.).

13. We believe that any code of practice should be fully independent. It should be mandatory on all pub owning companies and not on tenants and should include meaningful sanctions for those who breach it. The BBPA framework meets none of these requirements.

Pre-Entry Requirements

14. Improving the training of people of people entering the tied pub sector forms a key part of the framework document. We agree that people should only enter any business agreements once they have attained a good understanding of what is required to run that business and a full understanding of what they are committing themselves. For too long the BBPA and its members have marketed their business model as a "low cost entry" scheme. Experience and cost normally form sensible barriers to entry to any normal, commercial sector.

15. However the Select Committee's report highlighted that the major problems faced by tenants were due to the imbalance of the relationships between pub companies and their tenants not the knowledge and capability of tied publicans. A focus on the training required for those entering the industry seems to be a long way from addressing the key concerns of the Select Committee which was the way in which pub companies run their businesses. We say that training is important in any sector but fear that it is being used cynically in this case as a distraction from the main issues.

16. The problem that most tied publicans face is that they enter an agreement with a pub company where the implication is that agreement will be one of partnership. Only when they have signed up to the agreement do they realise that the power of pub companies to increase the price of tied products almost at will, and to manipulate the rent valuation system, means that their business becomes unviable. Pre-entry training,

honestly and comprehensively delivered, might persuade some people not to take a tied pub, but it will not bring to an end the power of pub companies to use the tie to increase their profit from beer and other product sales after agreements have been entered into—forcing once viable businesses into failure.

17. The requirements on pre-entry training are of little value because the requirements can be waived at the company's discretion. The criteria set down for waiving the requirements, which are if the pub company believes that the potential tenant is in a position to rely on their own judgement seems broad enough to potentially include most new entrants into the market.

Terms of Business

18. The framework sets out requirements about the information pub companies are obliged to supply about terms of business.

19. Pub companies are obliged to supply a price list and to explain which products are tied and which are free of tie, as well as the discounts which will be available to tenants. These seem to be requirements which are so basic as to be meaningless as it is difficult to consider how companies could have a commercial relationship with their tenants without providing this basic information .

Insurance

20. The framework obliges pub companies to price match like for like any insurance policies, which are identified by the tenant/lessee.

21. We don't believe that this will prevent pub companies overcharging for cover. Getting a comparable lower quote will be difficult for tied tenants as brokers will know that tied tenants are not free to purchase cover. There is also scope for companies to make the requirements of insurance so restrictive to make it impossible for tenants' to find cheaper quotes.

22. We believe that tenants should be able to purchase their own cover with the only restriction that the cover fulfils a number of basic requirements set down by the landlord and that the landlords interest in the property is noted in the policy.

Amusement machines

23. The framework document states that pub companies need to provide basic information about AWP machines. The document sets out that details of how the landlord/tenant share of the machine income will be assessed should be provided to the tenant.

24. The fact that BBPA member companies have not even being willing to consider getting rid of the AWP tie, which can't be justified for any other reason other than it affords pub owning companies the opportunity to extract more income from their estates, is disappointing. It shows that pub companies are unwilling to even make the smallest changes to the relationships with their tenants which could in anyway improve the fairness of the division of pub profits.

25. We believe that the machine tie should be scrapped. This was the recommendation of both the Trade and Industry Select Committee report in 2004 and the Business and Enterprise Select Committee report last year. We believe, that the AWP market is an area of the pub sector which believe could easily operate in a free and fair way.

Improvements

26. The document states that companies' codes of practice need to describe their policy with regard to opportunities for improvements and refurbishment and the implications for rent, but sets out no obligations about what these polices ought to be.

27. The requirement simply lays out the legal principles which are clearly accepted in property law. It is not a concession. Even at the present time, with the BBPA promising changes, Fair Pint continues to receive evidence of BBPA members trying to "land grab" at rent review, regardless of the law and regardless of the clarification that has been issued recently by the RICS.

28. Companies will be required to develop a protocol setting out the terms under which flow-monitoring equipment may be installed and any further prima facie evidence available

Protocol on Flow Monitoring Equipment.

29. Annex A to the document *(not printed here)* sets out in general terms what pub company protocols on flow monitoring equipment could contain. These are only suggestions, as there seems to be no requirements for protocols to address each of the issues or requirements about how companies should go about ensuring fairness in the use of such equipment.

30. The Select Committee's report and a report conducted by an independent laboratory for Fair Pint have made it clear that the accuracy of flow metering equipment is questionable. Despite the claims of pub companies, it was made clear that the flow meter could not distinguish between beer and water used to cleanout lines.

31. The BBPA's members use flow monitoring equipment as evidence for where a breach of the tie is suspected and to levy charges on tenants. We believe that this use of the equipment falls under the definition of use in trade and therefore should comply with weights and measures legislation with its accuracy being certified by Trading Standards. If not it should be removed from tenants' premises or used only for information purposes for the operation of the premises by the tenant.

32. Pub Companies should acknowledge the fact that leases do not give them the power to levy fines on publicans for alleged breach of supply contracts. Charges should not be taken from tenants' bank accounts in contravention of the rules governing the Direct Debit scheme. Oral and written evidence to the Committee confirms that the Brulines system is certainly inaccurate, possibly unlawful and certainly being used to intimidate pub tenants.

Pub Premises

33. The framework sets out obligations for landlords to provide basic information about the pub premises and the obligations under repairing leases, but this is meaningless as the obligations go no further than things that competent landlords would be expected to provide anyway.

Rent Assessment

34. The document describes the role of the RICS in drawing up guidelines for rent assessments. Surprisingly, the document seems to seek to place obligations on RICS which is not a party to the agreement.

35. The agreement states that the rental assessment ought to be based on the law and that the tenant ought to be told how the rent is assessed. We believe that it is reasonable to assume that rent assessments should be carried out in a lawful way and that basic information ought to be supplied to lessees in any case. Therefore, this is no change from the status quo

36. In response to the 2004 Trade and Industry Select Committee report, pub companies promised to update their codes of practice to ensure the assumptions used in rent calculations where realistic, but, as the Business and Enterprise Select Committee discovered in their report last year, this didn't happen. The lack of sanctions to this framework means that there is every reason to believe that these promises will be not be ignored again.

The position of AWP income in rental valuations

37. Whilst the fact that the code of practice makes it clear that AWP income ought to be above the divisible balance. This would end the totally unfair practice of

38. Tenants being forced to surrender up 50% of the AWP profit to their landlord as part of the machine tie and 50% again of that remaining profit given that the income is included in the divisible balance. We believe that the only fair way to deal with AWP income is to end the machine tie entirely, which was the recommendation of both the 2004 Trade and Industry Select Committee and the Business and Enterprise Select Committee last year.

Taking account the cost of tied products

39. The framework creates an obligation on companies to use the relevant tied price for products when assessing the fair maintainable trade and the divisible balance, should ensure that rent assessments take account of the cost of tied beer when assessing rents. However, the lack of detail on how other costs are calculated means that rent assessments will still be open to manipulation. The agreement makes no mention of the principle that the tied tenant should be no worse off than a free of tie tenant. This should be the legal basis for assessing tied rents and has been accepted by the RICS. The failure to include this principle in the framework to be adopted as part of pub companies' codes of practice leaves the possibility open for pub companies to overcharge for rents. This will mean that tenants will have to bear the cost of dispute resolution by a Chartered Surveyor if their pub company chooses to ignore this principle.

40. We welcome the removal of upward only rent clauses, but we believe that these clauses should be removed by deed of variation rather than simply a pledge not to enforce it. In this way tenants can be sure that the arrangement will be binding on a pubco's successors in title. It has come to our attention recently that some pubco leases include provisions whereby only the pubco can initiate a rent review. It is meaningless of pubcos to offer an end to upwards only rent reviews if the effect of other clauses that are not amended is that a rent review does not have to take place at all.

41. We believe that RPI indexation should also be removed from leases. Apart from the exceptional period last year, RPI tends to increase. The increase in general consumer prices is totally unrelated to the performance of pub businesses. We believe that all rents should be allowed to rise and fall depending on an accurate assessment of the profitability of the pub and the application of the principle that tied tenants should be no worse off than if they were free of tie.

42. There is nothing in the agreement which makes it clear that when rents are set the costs of running a pub should include the right of tenants to earn a salary from their pub businesses or the right for them to pay a salary to a manager if they don't run the pub themselves, the cost of either being rightly deductible from the divisible balance.

Disclosure and Transparency

43. The framework document states that the pub company will provide a shadow profit and loss account in all good faith based on reasonable assumptions and drafted by a properly competent individual.

44. There is a lack of clarity about what responsibility the pub company bears if the assumptions used by the pub company turn out to be inaccurate.

45. We welcome the suggestion that tenants' attention ought to be drawn to benchmarking reports. Whilst this might help some inexperienced tenants, this information is already freely available to all tenants.

46. The document states that the same kind of profit and loss account should be provided at rent reviews and lease renewals, as well at the commencement of new tenancies. However, as explained above a clear outline of the assumptions used for setting rents were promised in response to the Trade and Industry Select Committee Report in 2004, but this didn't seem to change the behaviour of pub companies and the way in which they set rents.

Rent Review

47. We welcome the fact that the document makes it clear that rent review clauses will be capable of upward and downward reviews. However, the document isn't clear that this should mean the removal of RIP indexation in rent reviews, which are upward only rent review clauses in all but name.

48. The pledge to ensure that goodwill is disregarded in line with RICS guidance and most contractual arrangements is welcome, but this is a basic requirement which should be accepted already. This is not a concession.

The Pub Independent Rent Review Scheme

49. We have welcomed the principle of the PIRRS scheme, but it is important that the scheme is fully independent and has the trust of tenants.

50. The fact access to the PIRRS scheme will be made available to tenants is welcome, but we are concerned that the PIRRS scheme is already being subverted by pub companies with the addition of a new appeal mechanism which pub companies can use if they are unhappy with the outcomes. The current drafting in relation to the PIRRS scheme makes it clear that the pubco will retain an option to revert to arbitration if unhappy with the outcome of the PIRRS scheme but that would not be an option for the tenant. See below:

> 22. Irrespective of the terms of the lease the landlord grants the tenant/lessee the right to elect for a referral to the PIRRS scheme and agrees to be bound by the expert valuation delivered through the PIRRS scheme. This will not remove the right to arbitration but the tenant/lessee will waive such a right if the option to refer to the PIRRS is taken.

51. The idea of the PIRRS scheme is to give quick and affordable resolution for tenants who are in dispute with their landlords. We are concerned that the new powers of pub companies to appeal findings against them will means extra costs for tenants and many will be unable to afford to challenge these appeals.

Business Support

52. The framework sets out a number of examples of business support which can be available to tenants, such as access to training, licensing advice, business management advice, brand promotion, maintenance of dispensing equipment, outlet promotion and signage, procurement benefits, rating advice. A footnote to the document makes it clear that these are just examples and pub companies are not bound to provide the support listed.

53. In most cases the support has to be paid for and could be purchased on the open market at a lower cost. Some of the examples of support are available to free of tie tenants at no cost from drinks suppliers who are keen to market their products in pubs.

54. We believe that so called countervailing benefits cannot be counted as such unless they are agreed explicitly to by the landlord and lessee as part of the lease, and the value of the support is quantifiable. In most cases, examples of support are of little value to tenants or are actually onerous conditions especially where publicans are obliged to purchase suport from their landlord which is freely available elsewhere.

Material Changes/Exceptional Circumstances

55. The document sets out the requirement that company codes will establish as protocol for dealing with requests for assistance from any competent tenant or lessee arising from business difficulties beyond their control.

56. Most pub companies already include this in their codes of practice, but it is still very difficult for tenants to access meaningful support in these circumstances. The requirement sets out no obligations for companies to provide support or any definition of what a competent tenant might be. This gives pub companies plenty of leeway to ignore these requirements.

Assignment of Leases

57. Surprisingly, this section seeks to impose obligations on tied tenants who are not party to the agreement. The agreement is between the BBPA, the BII and the FLVA. These bodies only represent a small proportion of tied tenants. We do not believe that this agreement should place obligations on publicans.

58. The framework seeks to impose a new duty on lessees when the wish to assign their lease. The intentions behind this is to ensure that all entrants to market can be said to have demonstrated an understanding of how tied pub businesses work. However, the requirements on the assignor will come at a cost. This has the effect of skewing the economic imbalance between tied tenants and pub owning companies yet further against the interests of publicans as their freedom to leave the sector by assigning their leases will be restricted.

59. The document requires that the assignor must ensure that the assignee has complied with pre-entry training and has obtained qualified professional advice. Whereas the document allows pub companies to ignore these requirements at their digression, it is unclear that assignors will have the same rights.

60. The proposals conflict with contractual obligations and common law. The landlord has an obligation not to unreasonably withhold or delay license to assign. The current view of the Court is that once a proper application for license to assign has been received then the landlord should give a decision in days rather than weeks. It will only be reasonable to withhold consent for reasons recgonised readily in the Court or stipulated in the lease. If the license is withheld unreasonably then the tenant may apply to the Court for a declaration and the damages may be awarded against the landlord if the tenant has suffered a loss due to the landlord's unreasonable delay.

Dilapidations

61. The document states that pub companies will have to provide an early breakdown of dilapidations to lessees who are seeking to assign or surrender their lease, and advise whether fixtures and fittings will be purchased.

62. This seems to be a pretty basic requirement and it should be expected that this would happen as a matter of course. There are no requirements on pub companies to ensure that calculations of the cost of dilapidations are fair and reasonable.

63. Current experience in the market shows that pubcos may be inappropriately seeking to use the assignment process, and the necessity for them to give consent, to secure works to the premises that would not be considered in law to be dilapidations. Where the original term of the lease is seven years or more and three years remain unexpired the tenant can seek relief against the effect of an interim schedule of dilapidations.

Surrender

64. The document states that companies will set out how it will deal with any request for surrender of leases, but sets out no requirements about how the companies should go about this.

Business Relationship/Development Managers

65. The framework states that company codes will have to set out provisions and commitments governing the competence and future progression for BRM/BDMs. However, it sets out no requirements about what these ought to be.

66. Companies will be obliged to have a procedure to deal with complaints and an mechanism to deal with disputes. In most cases companies claim to have these mechanisms already. There are no details about what these procedures ought to be and whether they will be independent.

67. In the same way, the document states that codes of practice will set out the role of BRM/BDMs and the support and professional guidance they will provide, but there are no further requirements about what kind of support this might be.

RESTRICTIVE COVENANTS

68. Companies will be obliged to make their "policy on restrictive covenants clear". This is meaningless as there are no requirements about what company's policies should be or for them to provide any explanation of their policy.

DISPUTES

69. There is a requirement that company codes of practice should explain procedures for complaints and dispute resolution and states that resolution of complaints should be at a higher managerial level than the initial decision. Most pub companies already have a mechanism for complaints to be taken to regional managers, so this requirement is simply describing what most companies claim to do anyway.

70. It is clear from the document that the there will be no effective sanctions and no independent dispute resolution mechanism for complaints from tenants.

71. The framework states that the adoption of codes by each company "provides an adequate procedure for the resolution of differences". This is clearly not the case as the mechanisms within existing codes of practice have been shown to be inadequate in dealing with disputes.

72. The framework does set out a mechanism for lessees to complain to the BII if they feel that they have not being treated fairly by the mechanisms within the company codes. It explains that the "BII or the FLVA will pass on this information to the company concerned and use its good offices to ensure, *as far as possible*, that there has been no *misunderstandings, or personality issues*, that are standing in the way of a more fruitful dialogue between the company and the lessee or his representative."

73. It is therefore clear that there will not be any effective mechanism for dealing with disputes between companies and their tenants. Given the instances of bullying and intimidation in the relationships between companies and their tenants highlighted in the Select Committee's report last year, it is highly unlikely that the a tenant would complain to the BII or the FLVA. This is because it would mean having their identity exposed to the company they are complaining about in the knowledge that neither the BII of the FLVA has any sanctions at its disposal if the company wishes to ignore the complaint.

Memorandum submitted by Mark Fearon

I would like to comment on the RICS forum report.

I consider the RICS is the only body that matters in this debate about how to get fair rents. Ultimately, the rents will be set by RICS members whether they are acting as independent experts or as arbitrators.

The forum report suggests more transparency in calculating rent on the basis of the profits method, which is a useful practice. However, it is wasted if, in practice, rents are set on the basis of comparables, ie what the market will bear. I have evidence in terms of correspondence from Robert May, when he chaired the RICS Committee for establishing best practice in pub rent reviews, that this is the key factor in rent determination. I note the forum report includes proposals for a Code of Practice, and this includes "Recommended best practice for both landlords and tenants in seeking the advice of a Chartered Surveyor to establish a tone of comparable rents"

To me, this implies that practice will not change. The profits method of valuation will continue to be used, but in practice the surveyors and landlords can and will bend it to arrive at the rent the market will bear. I have experience of this being done by an arbitrator, although it is in practice difficult to prove that this is how he reached his conclusion. I very much doubt that the Committee can alter this fundamental practice, and there arguments as to why it should not try to do so. However, the RICS practice , which will not change, involves establishing a separate market for pubs, as opposed to general retail premises, which in my opinion is indefensible. You only have to look at the success of Wetherspoons, based on buying retail or convertible premises freehold, and free of tie, to see that the market could be changed significantly if pubs really were in the open market.

I consider the Committee should focus on abolishing the tied lease, which is arguably a contract in restraint of trade, and is a fundamental in establishing the excessive power of the landlord in rent negotiations. I also consider the profits method of valuation should be another target. It is in practice a sham, and a waste of time and money. It could easily be replaced by a simple comparison with rent per square foot for retail premises in the locality, and an allowance for the value of domestic accommodation where provided. These two achievable targets would make a huge shift in the balance of power between landlord and tenant, and result in a better deal, ultimately, for the consumer.

5 November 2009

Supplementary memorandum submitted by Mark Fearon

I have looked at the evidence to the Committee on 8 December. I am particularly struck by the evidence from Mr Rusholme in response to Question 32 from Miss Kirkbride, where he states:

"There are perhaps two separate issues here. First, the question is whether it is information that can be captured in a benchmarking system. Clearly, it can be. I suspect that the second part to the IPC's argument is whether in rental calculations allowance should be made for a manager's cost or a salary cost. I think that is a little more difficult. If it is included the consequences may be a little more than we wish because it goes back to the basis of valuation which is to establish what someone would pay in the market. What variables you put into the hypothetical calculation are only a way of getting to that answer. I am unsure whether it will add a great deal to that process."

I have suggested in previous correspondence that the "profits" method of valuation is a sham. This is about as direct an admission as you could get from the RICS that I am correct in that conclusion. Mr Rusholme is admitting, (and I have the same in writing from Robert May when he chaired the RICS valuation Committee for licensed premises) that the market rent is what people will pay. The profits calculation, he rightly states, is "a way of getting to that answer". In other words it can and will be manipulated until it reaches that point. Fair enough in a free market—but the pub business is an oligopoly. The power of landlords to determine rent is not the power which would be available to them in a free market. I doubt whether RICS members wish to discontinue their existing practice of dividing the market into artificial sectors of which tied leased pubs are one, or of ditching the profits method of valuation. If existing practice continues, tenants of leased pubs will continue to pay rents which are significantly in excess of those paid by occupiers of retail premises in the same locality, with no evidence that there is a justification for the differential. They will also continue to have poor returns for their time and money, and many will become failed businesses.

I continue to maintain that the RICS should compare rents paid by tenants of retail premises in an open market with those paid by public house tenants on a square footage basis. At present most public house tenants pay far more, because of the use of the profits valuation, which has no foundation in fact or logic, but enables RICS members to pretend that it has.

28 January 2010

Memorandum submitted by The Federation of Small Businesses (FSB)

This update complements both the written and oral evidence the FSB submitted to the Committee's 2008–09 inquiry.

The FSB has been a key player in the formation of the Independent Pub Confederation (IPC), a new umbrella organisation bringing together all representative bodies and campaign groups representing publicans, consumers and the lobbying organisation of small brewers in the fight against the unfair practices of pubcos. The FSB fully endorses the IPC's submission to this inquiry and will play an active role as a member of the IPC.

In August 2009, the FSB published the results of a survey of publican members whose findings agreed with the committee's and highlighted that significant problems remained in the tied pub sector. The key findings of our survey are outlined in Box 1 below:

FSB publican survey: Key statistics

- 87% of tied publicans say that the tie is a problem for their business.
- 75% supports the opportunity to opt out of the tie at the signing of a new contract or at each subsequent rent review.
- 56% supports the initiation of an independent ombudsman to support tied publicans in conflict resolution cases.
- 77% of tied publicans say that the transparency in rent reviews is a problem for their business.
- 69% supports a new thorough investigation of the beer/pub market by the competition commission.
- 53% supports a statutory code for Pubcos.
- 69% supports a new thorough investigation of the beer/pub market by the Competition Commission.

The FSB does not believe that the tie should be abolished, but that it should be urgently reformed. All lessees should be offered a choice of being tied or free. Furthermore, there should be significantly greater transparency and fairness in all rental agreements and in the issuing of leases.

Over the summer the FSB was involved in an industry-wide mediation process in an attempt to generate agreed changes to current practices across the industry. The FSB was disappointed that the mediation process did not result in any agreement. We were also disappointed by the recent response from the OFT to the super-complaint issued by CAMRA which concluded that there was currently no cause for concern. The FSB does not accept this decision and believes it must be overturned.

The FSB believes that since the publication of the Committee's report there has been much activity by the pub companies but little meaningful change. The British Beer and Pub Association (BBPA) has agreed a new Framework Code of Practice on the Granting of Tenancies and Leases with the Federation of Licensed Victuallers (FLVA) and the British Institute of Innkeepers (BII). The FSB believes that this agreement is nothing more than window-dressing as it does not offer any reform that is not required by law and it is not legally-binding.

The BII have also recently announced their Independent Pub Rent Review Scheme (PIRRS) which establishes a panel of surveyors—approved by pubcos—to settle rental disputes. The FSB believes that this system will not be fair or transparent and will quickly fall into disrepute due to pubco vested interests. It is important to note that PIRRS specifically excludes the involvement of the Royal Institute of Chartered Surveyors' (RICS). The FSB believes that PIRRS will only have credibility if pub businesses are free to engage any qualified surveyor who is a RICS member.

The FSB welcomes RICS' Pub Industry Forum report and recommendations. The FSB especially welcomes RICS' endorsement that a tied tenant should be no worse off than a free of tied tenant.

The FSB has responded to a European Commission consultation on the review of the competition rules applicable to vertical agreements. The FSB's response focused solely on the tied pub sector where we believe there is a significant imbalance in the larger pub company (pubco) market share. The FSB is calling for the current block exemption guidelines in relation to the tied pub sector to be revised as a matter of urgency. Given the nature of this particular market the FSB believes that the 30% exemption threshold should be significantly reduced in order to recreate a level playing field for all.

The FSB also responded to the UK Government's consultation on the Land Agreements Exclusion and Revocation Order 2004. Again, the FSB's response focused on the tied pub sector and agreed with the Government that the Exclusion Order should be repealed altogether to create a fairer market. Anti-competitive practices by Punch Taverns and Enterprise Inns are having a significant impact on local pubs and are resulting in the closure of over seven pubs a day. The situation is worsened by the practice of implementing restrictive covenants by these two pubcos preventing potential new publicans from taking over a pub premises if their landlord is not the same as that of the previous tenant.

In conclusion the FSB is calling for:

— Urgent review of OFT decision on CAMRA's super-complaint.

— Immediate reform of the beer tie—all lessees should be offered a choice of being tied or free.

— Greater transparency and fairness in all rental agreements and in the issuing of leases. Government to give legal backing to the proposed RICS Code of Conduct.

— Repeal of the Land Agreements Exclusion and Revocation Order 2004.

— European block exemption guidelines in relation to the tied pub sector to be revised and significantly reduced.

18 November 2009

Supplementary memorandum submitted by FSB

PUB COMPANIES: FOLLOW-UP, 8 DECEMBER 2009

The Federation of Small Businesses (FSB) as part of the newly-formed Independent Pub Confederation was delighted to recently provide written evidence to the Committee ahead of its oral evidence session on 8 December.

During the oral evidence session, which the FSB attended, Mr Michael Clapham MP cited our written evidence which concerned the exclusion of RICS from the Pubs Independent Rent Review Scheme (PIRRS). It is on this matter that I would like to clarify our position.

The FSB understands that RICS runs a dispute resolution service body that appoints and regulates the arbitration process for the rent review process in 99 per cent of cases, appointing 11,000 arbitrators every year.

The FSB understands that when the PIRRS scheme was created, RICS were keen to be involved and offered their support in the scheme's development. However their offer of assistance was rejected. The FSB notes that there is no representative from RICS on the PIRRS Board of Directors, but acknowledges that

a significant number of the arbitration experts appointed by PIRRS are also RICS members. The FSB also notes that David Rusholme, who represented RICS at the evidence session was not asked about the PIRRS scheme by the Committee.

7 January 2010

Memorandum submitted by Fuller, Smith & Turner Plc

I write as the Chairman of Fuller, Smith & Turner Plc, a brewery in Chiswick with 365 pubs. The Company was founded in 1845, and is sadly the last long established brewery left in London.

I would remind you that I wrote to you on 30 January 2009 as we had heard that your inquiry into the outcome of the TISC inquiry had moved into the territory of questioning the Tie. I received a charming response assuring me that you were sympathetic to the position of Independent Family Brewers such as ours.

In the event the outcome of the BEC Report has, as you will be aware, affected the operation of the Tie for all members of the British Beer and Pub Association (BBPA) through the mediation process that was undertaken. Each member, regardless of whether they have historically had a good relationship with their Tenants or not, have had to engage in a process that makes changes that are solely to the benefit of Tenants.

I understand the issues that your Committee has faced, but would point out that any remedies to perceived imperfections to the way Ties have been operated in certain instances will inevitably be blunt instruments that affect all companies that operate Tied tenancies, regardless of how satisfied their Tenants may be.

There is no doubt that in the current economic climate, there are many businesses both large and small that are finding life extremely hard, and many pub landlords are in this category, but the idea that this is due to the Tie without reference to the 20% increase in Beer Duty since March 2008 or the smoking ban, or the economic meltdown of last year and consequent shortage of lending from the banks is unrealistic. But if one reads the comments from opponents of the Tie one would be lead to the conclusion that the Tie is the evil relationship that is sinking the pub, rather than the very successful relationship that allows entrepreneurs with limited funds to start their own business.

Opponents of the Tie have mounted a very high profile and concerted campaign both in the media and through local MPs, but as you are aware the issues are complicated. The BBPA has been trying to direct its efforts to finding constructive responses and solutions to the BEC Committee Report, and to let the OFT make its own decision on the Super Complaint, but please don't under estimate the cost to companies that all of this extra work by very senior members of management has caused. I am pleased to say that Fuller's has a team strong enough to deal with the distractions that this causes to running the business, but smaller companies can ill afford the complications caused at times like these.

The current financial turmoil has put enormous strain on the tenants of all leases, regardless of which industry they are in, and wherever possible individuals and companies are doing everything in their power to renegotiate their rents, and this is understandable, but it is important to realise what the actual causes of such tensions really are.

In other organisations I am involved with, tenants of property landlords are negotiating for reduced rents claiming that the economic outlook has changed dramatically. These tenants are not in our industry, and wouldn't even know what a Tie was.

We have a list of 22 Pub Companies that have gone into administration since January 2008 headed by Laurel Pub Company (460 pubs) and Orchid (287 pubs). These companies collectively have over 1,500 pubs, and the interesting thing is that none of those pubs were Tied to anyone. They have gone bust because the pressures of the current economic environment, the Duty rises that are being piled onto the industry, the increasing pressure from additional legislation, the smoking ban, and the rents they pay to their landlords have combined to make their businesses unviable.

Fuller's itself has a number of toxic leases which we entered into in better times with our eyes open, but now that times have changed these landlords (all of which are unconnected with our industry) are deaf to our pleas to reduce the rent. The result is that we have several sites in which we are losing money, and we would like to cease trading in, but we cannot. For the avoidance of doubt, none of these leases are tied.

The issues between landlord and Tenant are inevitable in any industry, but in our industry the problems are all being blamed on the Tie, and that is not appropriate. The parties to the recent industry mediation saw an opportunity to reduce their rents, and understandably they have pursued that line relentlessly, and are continuing to do so, as this may be their only opportunity to avoid bankruptcy, but I would contend that it is not appropriate to consider the landlord Tenant relationship in the pub industry in isolation from the landlord Tenant relationship in other property transactions.

In any group of rental agreements, you will always get some properties being over-rented, in the same way as you will always get some being under-rented. The market is not perfect, and you will get wrinkles in the system however carefully both sides approach a negotiation, but the recent mediation has come up with some sensible improvements to the BBPA code that both the FVLA and the BII have signed up to, and the RICS have also clarified their method of calculating rents. There is a low cost rent review system (PIRRS),

there is greater transparency in the rental calculations, and there are better procedures on assignment (where so many problems have occurred), and the BEC Committee recommendations have been addressed by the BBPA to the extent that we can without transgressing the fearsome Competition Commission rules. There are better operating procedures, and practices criticised by the BEC report have been removed. None of this is without cost and represents a considerable transfer of value from the Brewery/Pub Company to the Tenant, and some of the more established pub operators have only signed up to this under sufferance as their Tenants in the main are happy with their rents, but any further transfer of value would, I fear, cause the voluntary agreement to fall apart.

There have been suggestions that all pub companies should offer Tie free leases, and the Wellington pub company has been used as an example, but I am sure that you are aware that they have been quoted as not considering any rent reductions in the current climate, even though every Tied pub company that I am aware of has been happy to review rents with a view to reducing them if there are extenuating circumstances, and I am aware that most of them are already reducing rents at reviews if the RPI is negative.

Criterion Asset Management which runs the estate on behalf of the Wellington Pub Company have been quoted as "indicating that the amounts provisioned for bad debts have substantially increased, as have costs linked with recoveries of unpaid debt, repossessions and void properties". "Wellington continues to experience a shortage of experienced and financially-strong Tenants looking to enter substantive agreements for pubs, and as a result around 7% of the estate is not currently let on long leaseholds". This does not suggest that freeing pubs from the Tie is the solution.

As you noted in your report the Tie allows Tenants to pay less rent where their beer sales drop and it is thus a very appropriate model for the economic downturn, which is not how the critics portray it. However if lessees wish to have a Free of Tie pub, there has never been a better opportunity for them to purchase a pub for themselves, and to operate it Free of Tie. There are literally thousands of pubs for sale, and as we have seen, Punch have been happy to sell almost any of their pubs to their Tenants.

You have heard a great deal about the less successful Tenants who (like the less successful businessmen in other industries) are having an extremely difficult time and many are going out of business, but as has been pointed out this affects both Tied and Free of Tie licensees.

At Fuller's we also have some pubs that are losing money but even in these difficult times 46% of our Tenants are not only increasing their cash sales, but even their volume of beers sales are ahead too. There are two sides to every story, and the IPC are only talking about the unsuccessful licensees.

There will always be poor sites, and there will always be poor retailers, and whilst the outcome for such operators is bleak in such an economic environment, it is the same in any industry, and it is not the result of the Tie which is actually a much more flexible relationship than that which operates in other industries.

Some opponents of the Tie point out that Tenanted pub prices are higher than those in large managed house chains like Wetherspoon, and that this should have been taken into account when assessing the OFT submission, but that is like comparing a single shop to the prices available in ASDA. You may want them to be the same, but the reality of business is that the economies of scale mean they never will be.

Summary

In a market that changes as fast as ours there will always be imperfections in any system, but the market will eliminate them over time. The BEC Committee Report has speeded that process up significantly, but it is not possible to eliminate all imperfections by legislation, and I would appeal to you now to let the industry get on with implementing the very significant changes to the new code and with dealing with the major threats facing it rather than spending more time on the Tie which has been the backbone of our industry for several centuries, and has served companies, Tenants and the public so well over that time.

The British pub is the envy of the world, and it now needs everyone's support.

13 November 2009

Memorandum submitted by Mike Goff

Enterprise/Brulines have accused me of buying 102.75 bulk barrels off tie, this I have strongly denied. They have sent me a "damages" fine by way of an invoice, to be paid by 1 February 2010, of over £20,000 and have added this on to my rent account, which will make it look as if I am defaulting on my agreed rent in the event that this sum is not paid by this date. This would also indicate a 20+% increase in trade! (which is a physical impossibility considering the state of the licensing trade).

Drew Milne (Regional Manager) from Enterprise told me I was being fined this £20,000 plus for buying off tie and that Brulines could prove this and the "barristers" would take me to court if need be. I was offered the option of paying a reduced fine of maybe £4,000 or £5,000 if I admitted to a buying a smaller amount off tie. This made me feel very intimidated and panicky.

I refused to agree with information on the 22 December 2009 and on the 15 January 2010 the £20,000+ invoice was raised on the rent account, with a payment date of 1 February 2010. There was no other communication during these dates.

At my request Brulines have sent me flow charts dated from 21 October 2008 to 29 September 2009, Brulines had not contacted me with any queries to say we were in disagreement over their readings and my purchases, this has come as a bolt out of the blue. My tenancy started July 2007 and I have requested these flow charts as there must be a starting point from where Brulines meters started being at fault. During this alleged "buying out" period, Brulines have been into my premises and "repaired" numerous pieces of equipment.

I have since been in touch with Trading Standards and hopefully an appointment will be arranged very shortly to check the accuracy of their metering equipment.

27 January 2010

Memorandum from Dawn Groom

I am a publican based in Slough. I have two freehold houses and one leasehold with Enterprise. The Enterprise pub is completely tied for everything and the rent £1,064 per week and we are running at a huge loss.

I purchase one 11 of Fosters from a wholesaler for £74 and sell a pint at £3. This gives me £264 income from each barrel and £190 profit. At the Enterprise pub I pay £125.70 that's £51.70 more This reduces our profit to £138. Over say five barrels of Fosters only per week we lose £13,520 per annum just on this one product which is a disgrace when we are paying £1,064 rent PER WEEK. I accept we signed an agreement to be tied but in this climate surely the pubco could adjust things to suit. Enterprise know what we sell and they know the rent and rates so they know the pub is and has been running at a huge loss but they do nothing. So we need help!

On another issue we have also been subjected to the Brulines scam which so far has cost us £16,000 from the reports submitted to us by Enterprise that more beer had gone through our lines than we had brought from Enterprise. We did have some issues but no way did we have that much barrel beer brought out go through our lines. But we had to pay it as we were unaware that the system was under question. Since then Trading Standards have tested our system which showed clear differences, indicating that we again have had more beer go through the lines than has. The Trading Standards tests showed a difference of 16 pints across the pumps if that happened every day at the least Enterprise would demand £17,520 per year for buying out or breaching your tenancy. Why do they get away with it? There is no one to stop them not even Trading Standards can do anything. The equipment should not be allowed to be used, it's an abuse of power. Please listen to the publicans before it's too late

11 November 2009

Memorandum submitted by Martin and Alan Hand

Review of Beer Tie

As lessees of an Enterprise owned public house operating to a Whitbread lease since 1995, I wish to submit the following regarding the operation of tied leases which I believe are inappropriate in today's market environment.

Key Issues

1. The product cost per barrel charged by Enterprise versus other sources of supply such as Cash & Carry operators is excessive and results in managed pubs enjoying an unfair and significant selling price advantage over beer tied operators. The consumer ends up paying higher costs and the lessee has margins squeezed too tightly.

2. The process for establishing a fair rent currently favours Pubcos since where there is dispute the Lessee finds arbitration too high a cost to mount a challenge.

3. Pubcos state that the high product cost which they charge lessees provides for the cost of services which they make available such as training etc and also helps to offset/subsidise rent charges. This results in a total lack of clarity between true rental costs and the cost of services which they offer. In addition it results in lessees paying for the services on offer which very many of them they do not require or use.

4. Concerns have been expressed that if the beer tie is removed then brewers will assume the same powerful negotiating position regarding product pricing as is currently operated by Pubcos.

RECOMMENDATIONS

1. That the beer tie be removed which will bring clarity to the opaque situation which exists between true rental costs and cost of services provided by Pubcos.

2. A low cost effective method for arbitration to settle rental disputes should be established.

3. If Pubcos believe that the services they currently provide are important then they could continue to offer them and lessees are free to pay for the particular services they wish to use. Alternatively there are many independent companies providing training across a whole range of activities who would be willing to provide comparable training to those currently operated by Pubcos.

4. The concerns expressed that removing the beer tie would result in the brewers taking a similar position on product costing to that currently operated by Pubcos misses the point that Lessees currently have no option to purchase other than from one source and no right of appeal on the charges levied. The element of competition is reintroduced when Lessees are free to purchase from a range of suppliers who will need to compete or will see their product sales decline. Surely a better position than a having a Pubco as the single supplier, with freedom to charge whatever they wish without the purchaser, the lessee, having the right to appeal.

5. The possibility of lessees establishing a buying group should not be discounted nor should the opportunity for Pubcos to provide that service on behalf of lessees since they have the operating procedures and structures to meet that need and since the Pubcos could be free to supply any lessee which would provide competition between Pubcos to maximise their product sales and grow that part of their business.

6. The alternative to a total removal of the beer tie could be the introduction of an optional arrangement which allows the lessee to contract in or out of the beer tie. My belief is that if this option were implemented then in a very short time the beer tie would cease to exist through lack of demand.

7. If the Pubcos believe that their business model is such a good thing for the total industry and the consumer as they claim then they should not need to oppose the lessee having the option to contract out since if they are right then few lessees would choose to contract out!!! We believe that the above reflects a reasonably balanced view of the way forward to achieve what is necessary to enable a thriving pub trade, fairly rewarded and providing employment for thousands of people to survive and to achieve a fair cost per pint to the consumer.

10 November 2009

Memorandum submitted by Karl Harrison

I write further in receipt of the uncorrected transcript and letter in that regard from the Committee Office. I have written separately with one correction to my answer to Q177. I'm taking this opportunity to follow up with further information in relation to my answers to five questions. Taking each in turn:

Q 166. Please see enclosed a copy of notes in relation to the court case (*not printed here*) involving Punch Taverns from November of this year and to which I referred. I understand that Simon Clarke may also have provided information in this regard.

Q 167. You invited me to comment further about the enforceability or otherwise of the proposed BBPA code of practice.

As a preliminary point I would say that we have still not seen a draft of this proposed code. I understand that it is now again in the process of being further revised. I would comment simply as follows:

(1) Codes of Practice are commonly used by companies or sectors where the application of law is not the preferred route of those producing the codes. I think this is one of those cases. It does not seem to me that there is any serious intent here from the BBPA or its members to address the concerns raised by your Committee in its Report from May of this year.

(2) The BBPA cannot bind all those companies that operate tied leases as they are not all members. A member of the BBPA can, in any event, resign and no longer be bound by any terms of membership.

(3) All existing leases are deeds. A deed can only be varied by a deed and nothing else. As such, without a deed of variation then any terms of a code of practice will not be binding in the case of any existing lease. A code could only be binding on new tenants if the document is included within the body of the lease or as a schedule to it.

(4) To be binding and effective a code of practice would need to be drafted independently, be binding upon all companies operating vertically integrated, exclusive supply agreements in the pub sector, and enforced rigorously by an independent party or the Courts. As such a statutory code, mandatory for all those companies operating tied leases, would need to be in place. In effect, a license to operate, much as already happens in other sectors, and indeed in the pub sector in the case of regulated entertainment, liquor licensing etc.

Q 177. I commented that we were taking Counsel's advice in relation to various matters concerning rent and mentioned that we would revert to you in this regard. We are indeed seeking the advice of leading Counsel on the following issues:

- The implications of the Brooker Judgement
- The implications of the RICS report including the potential for retrospective claims, by tenants, against experts. (RICS noted that a correct reading of the its extant guidance would leave a tied tenant not worse off than if non-tied (sic). Also noted that the RICS had not at any time endorsed any particular split of the Divisible Balance
- The potential for clarification in the Court, of the application of current law to the valuation process in use in the pub sector.
- The use by the VOA of an entirely different valuation system for assessing rental values in connection with the provision of Rateable Values.

We are happy to update you in due course once we have received the advice.

Q 185. I contradicted Mrs Simmonds' (BBPA) version of events in relation to the withdrawal of the PIRRS website. Mrs Simmonds claimed it was a "technicality" whereas in fact it was due to the substantial non-disclosure of interests by chartered surveyors wishing to be part of the scheme and who failed to disclose their work for large pub-owning companies. I attach here my e-mail to Neil Robertson (CEO of the BII) of 3 November and his response of 4 November (*not printed here*). This will confirm to you the real reason for the withdrawal of the website, the proper behaviour of Mr Robertson and incorrect assertion of Mrs Simmonds.

Q 196. I contradicted Mrs Simmonds (BBPA) in relation to her assertion that she was not aware of the Direct Debit scheme being used in connection with the withdrawal of "fines" from tenants' bank accounts following allegations of "buying-out" supported by evidence from Brulines. I stand by my account that I made Mrs Simmons aware of this personally during the course of my meeting with her, at her offices, on Wednesday 16 September 2009. I enclose here a copy of my email dialogue with Mrs Simmonds in relation to the arrangements for that meeting (*not printed here*) such that you can be assured that it took place. I raised a number of issues with Mrs Simmonds at that time including the intimidation that occurred using Brulines and the removal of money from tenants' accounts using the Direct Debit scheme. As I said in my evidence to your Committee this month; not much seemed to sink in.

Q210. I referred in my answer to a document from Enterprise Inns plc in relation to AWP machines and a copy of that document is enclosed here (*not printed here*).

19 December 2009

Memorandum submitted by the Independent Family Brewers of Britain (IFBB)

In response to your invitation to submit our opinions on the Tie to your Select Committee I am writing on behalf of the Independent Family Brewers of Britain. At the outset of the (then) Business and Enterprise Select Committee we were informed that the brewer's tie was not under threat and that the issues were simply to do with long leases carrying full repairing and insuring obligations. As your hearings unfolded it became clear that some parties were arguing for the complete abolition of the Tie.

You pointed out in the announcement of the initial findings that "we would not wish to damage regional brewers" and we are grateful for that clarification, but nevertheless some parties are still arguing for limitations on the Tie and, for example, the right to have a guest beer on every bar from a small brewer. This move would be hugely damaging to those of us brewing cask ales for all the reasons we have stated before, and have summarised in the attached document.

Many commentators seem to continually confuse long leaseholds with tenancy agreements and we would like to highlight the latter as a fair and effective way of taking on a small business. The brewery tenancy operates very like a franchised system with strong support from the "brand owner", in this case the local brewer, with strong local beer brands which are well known, and with effective and relevant support from the centre in return for the purchasing obligation in the tie. These agreements are popular with business partners who have modest levels of capital available, or are risk averse to leasehold or freehold values, or simply wish to be able to enter and exit their own business at lower cost.

We have surveyed our tenanted business partners to understand their views on the fairness of their agreements and those results are contained in the attached document. It makes clear that brewery agreements offer strong support to licensees in many ways and in responding to the key question, "I believe my rent is fair for the business I do", 56% agreed and 26% disagreed. We believe that this is a positive finding in the current economic climate.

The members of the IFBB are all members of the BBPA as well, as it is the main association for brewing in the UK. We therefore support the new code agreement drawn up with the BII and FLVA. It is well thought through and workable.

SECTION 1

THE INDEPENDENT FAMILY BREWERS OF BRITAIN (IFBB)

1.1 *Introduction*

Brought together in 1993 to defend the tie, the IFBB in 2009 consists of 27 brewers who represent a distinct and unique sector of the UK brewing industry—the family owned and operated brewing company.

Our pubs are at the heart of the communities we serve. We produce distinctive, regionally brewed cask beers ("real ale") and support regional and local suppliers through the use of locally sourced raw materials and services.

While our breweries have been family owned and run for many generations, our businesses are dynamic and innovative, constantly developing new products and brands and spending millions each year on pub developments. We share a common goal to "maintain the traditions of cask brewing in Britain, and to continue to support and promote this healthy, profitable and vibrant sector of the industry".

The name of each family brewery is still prominently displayed on (and in) each IFBB member's pub indicating the main brand of cask beers sold in the pub. Each of those names embodies a long brewing tradition.

1.2 *Our Members*

Member companies are distributed throughout the regions of England and Wales:

Member name	*Location*
Adnams	Southwold
Arkells	Swindon
Batemans	Wainfleet
Charles Wells	Bedford
Daniel Batham	Dudley
Donnington Brewery	Stow-on-the Wold
Elgoods	Wisbech
Everards	Leicester
Felinfoel	Llanelli
Frederic Robinson	Stockport
Fullers	London
Hall & Woodhouse	Blandford St Mary
Harveys	Lewes
Holdens	Dudley
Hook Norton	Hook Norton
Hydes	Manchester
Joseph Holt	Manchester
JW Lees	Middleton
McMullens	Hertford
Palmers	Bridport
SA Brain	Cardiff
Shepherd Neame	Faversham
St Austell	St Austell
Thwaites	Blackburn
Timothy Taylor	Keighley
Wadworth	Devizes
Youngs	London

SECTION 2

MARKET DATA

2.1 *Beer*

The total volume of beer (lager, ale and stout) sold in the UK is 47,965,250[19] hectolitres, and IFBB members have a 5.9% share of that total.

2.2 *Pubs*

There are around 54,000 pubs in the UK. IFBB members own 4,227 of these giving the IFBB members a market share of the pub market of just under 8%.

There are 150,000[20] on-trade licences[21] in the UK as a whole. The IFBB share therefore of the total on-licence market is 2.8%.

[19] British Beer & Pub Association (BBPA) Statistics Handbook 2009
[20] BBPA Statistics Handbook 2009
[21] On-trade means licensed for consumption of alcohol on the premises—a definition of a "pub"

Around 75% of our members' pubs are operated as traditional tied brewery tenancies, with the balance as managed operations, ie directly owned and operated by the member brewer.

2.3 *Employment*

IFBB members directly employ around 19,000[22] people in brewing and pub estate management, and if we assume that each pub—tenanted or managed—employs an average of seven people, a further 29,500 are employed.

2.4 *Breweries*

Our members' breweries range in size from producing 5,000 hectolitres up to 800,000 hectolitres, and each operates one brewery.

Distribution of beers, ciders, wines, spirits and minerals to the pub estates is undertaken by most members using directly employed staff. All members sell not only to their own pubs but also to free-of-tie ("free trade") accounts and to non pub customers.

An extensive range of beers brewed elsewhere is also usually available. Nearly all members offer national and international brands of beers, especially lager beers which they tend not to brew. This range offers good opportunities for inter state trading in the EU and many members have forged partnerships with imported lager brands from other EU countries.

SECTION 3

THE BREWERY TIED PUB SYSTEM

3.1 *Basis of the tie*

The traditional pub usually has one of three forms of ownership, giving rise to different bases for the tie:

1. *Freehold*—where the owner licensee buys the pub outright and is therefore free to buy all products from any source. Often the owner licensee will take loan finance from a supplying brewer in return for a product tie (tie by loan).

2. *Long (assignable) lease*—where a premium is paid for the lease. These leases may operate on a tied or free-of-tie basis, dependent on the landlord/lease owner.

3. *Traditional brewery tied (non-assignable) tenancy*—a shorter term tenancy agreement tending to be for a three to six year term, with a full or partial drinks tie, as offered by our members.

The property tie originated when brewers started to buy their own pubs to guarantee an outlet for their own beers. This meant (in the days before mass distribution) that brewers could ensure the delivery of their cask beers to their own pubs and thus guarantee beer quality without there being concern around the short shelf life of the product. Cask conditioned beers have a secondary fermentation in the barrel so it is essential to use them within, ideally, three days from starting to serve from the barrel.

With the tie agreement, the licensee tenant rents premises from the brewer and is supplied by that brewer with a range of products. The brewer has a marketing outlet, and the tenant the opportunity to run his or her own business.

Traditionally, the vast majority of pubs in the UK have been operated on short-term tenancy agreements with rents calculated on the trading potential of the pub rather than on a commercial market rent. In the late 1980's national brewing companies (not IFBB members) began to offer longer-term leases, with a right to assign, and therefore build a goodwill premium.

The Beer Orders of 1990 stimulated the break-up of the national brewers into separate brewing companies (now all owned by overseas global brewing companies) and large pub owning companies. Institutional investors favoured the latter, as the long leases (with upward-only rent reviews) allowed steady profit growth from property income for these investors. With property values escalating in the last two decades, pub companies were bought and sold routinely and consolidation produced today's two large pub companies.

The recession has meant that values of freehold pubs and long leases have fallen, which has caused difficulties for individuals who have invested large amounts of capital in a pub business in recent years. By comparison, the tied brewery tenancy provides not only a low cost entry for a licensee starting a small business, but also offers a low cost/low risk exit as neither the freehold nor the lease need to be sold to another investor. A tied brewery tenancy is a less risky financial option (and requires less capital) than either buying a freehold or taking on a lease premium.

[22] IFBB annual members survey, August 2009

3.2 *How it works*

The Tie has the effect of creating a dry rent and a wet rent payable to the brewery by the tenant licensee.

— The dry rent is fixed (subject to rent reviews, which are covered within the tenancy agreement) and is the element for renting the building from the brewery. The rent is determined by the pub's past beer sales volume and on predicted Fair Maintainable Trade. The latter is the level of trade agreed to be achievable at the pub, if that pub is run by an average competent operator

— The wet rent is variable, since it is a percentage of the prices paid to the brewer for stock ie beer and other products. This wet rent then varies in line with the pub's beer sales and the tenant pays rent only on what he sells. This offers the tenant some protection during a downturn because, if sales reduce, so will this element of rent. If the tie were to be abolished, then this protection would disappear and the fixed cost to the tenant would increase significantly

SECTION 4

Benefits of the Tie System to the Brewery Tenant

4.1 *Entry into the trade*

In principle, the traditional brewery tied tenancy system operates as follows (although there may be some small variances between member brewers):

— the brewer owns and insures the pub, and pays for repairs, improvements and alterations, and

— the tenant will buy the inventory (tables, chairs etc) and stock at value, this being his only capital investment.

A traditional brewery tied tenancy (inventory and stock) can be acquired for as little as £5,000 and would rarely cost more than £50,000, depending on the size of the inventory and ingoing stock value of the pub in question. This offers an excellent opportunity for those with relatively limited capital to run their own business.

4.2 *BDM support*

The brewer provides a full support package to tenants, headed by access to a Business Development Manager (BDM) to advise on how to operate the pub and help deliver business growth.

Within IFBB members' tied estates, the BDM manages an average of just 34 pubs, which is considerably fewer than most other pub companies which can be as high as 55 pubs. Taking into account other "head office" staff who visit the outlet to bring help and advice, the ratio is even more favourable, at approximately one to 20 pubs.

As with any individual business, the brewery and the tenant will agree a business plan and invest, for example in capital expenditure, training or marketing. The brewery brings long experience of owning and operating the property, essentially providing retail knowledge and the intellectual property of decades' worth of successful pub operations. This invaluable insight helps ensure that the tenant makes progress in growing his own business. Free house operators do not have access to this type or level of business support.

4.3 *Special Commercial and Financial Advantages (SCOFA)*

For newcomers and for experienced licensees, the brewery provides extensive support in order to ensure the success of the pub operation. The mutual benefit to be gained from a successful pub is at the centre of this support and licensees will be able to look to their brewery for a range of benefits.

Each IFBB member provides a range of services and support free of charge, or at reduced cost, to its tenants. The value of this support is typically around £8,000 per pub in the first year depending on the family brewer in question. As these are not available to free house pub operators and any other on-trade outlet, they constitute a unique (and critical) aspect of taking a brewery tenancy. The majority of new licensees need this level of support in their first 12 to 18 months—without it many would cease to trade very quickly.

All this contrasts with the free-of-tie leaseholder, who normally pays a large capital sum to acquire the lease and is then obliged to keep the building in good repair and fully insured, both at his own cost. He will receive little or no support from a brewery

In addition to these specific support services, the brewery regularly alerts its tenants to issues such as new legislation which require their attention. This may lead to providing free follow-up advice given by experts on how to meet obligations cost-effectively. These benefits are substantial but not included in the quantified list.

4.4 *Rental benefit*

A traditional brewery tied tenancy offers lower fixed rents than commercial property transactions. Rent has traditionally been calculated on beer volume and Fair Maintainable Trade figures as opposed to a full commercial rent based on the value of the property, its location and total square footage of the building.

The variable "wet" rent paid to the brewer for stock, ie beer and other products varies according to trading conditions and offers the tenant some protection during a downturn because it reduces if sales reduce.

If the tie were to be abolished, the protection of the variable "wet" rent would disappear and the fixed cost to the tenant would increase significantly.

4.5 *Survey of tenants experiences of running a brewery tied pub*

Seven IFBB members have participated in a survey of their tied tenants, led by independent industry experts. A total of 719 surveys have been completed, representing just fewer than 24% of the total tied brewery tenancies across the IFBB members' estates.

The survey results were collated on a member-by-member basis, and have been amalgamated to form a benchmark for the IFBB members. The survey results have been shared with each participating member, on both an individual brewery and collective IFBB member basis, but individual surveys have not been shared with the members, allowing their licensees to remain anonymous.

SECTION 5

Conclusion

The Independent Family Brewers of Britain represent a relatively small but distinctive part of the UK beer market. Our members are companies owning regional breweries and pub estates and the majority are private, family run, businesses. We rely largely on the "beer tie" to operate as both brewers and pub retailers.

With the security of the tie, the brewers buy, insure and maintain the properties operated by their tenants. This provides a very low entry cost for tenants setting up in business, creating new employment opportunities for entrepreneurs. When sales increase or decrease, the system causes the financial impact to be shared between the pub and the brewery, thus lowering the tenant's risk.

As the businesses are co-dependent, IFBB members provide extensive support services to tenants which are not available to licensees operating in the free house market. This is particularly helpful in a difficult economic climate. Not surprisingly then, IFBB members have an extremely low turnover of tenants compared to the industry as a whole.

The tie also allows IFBB members to plan brewing plant capital expenditure over future years, secure in the knowledge that there are guaranteed outlets for their beers; the majority of which are Britain's best cask conditioned beers. Brewing is a highly capital intensive business and brewing, packaging and supplying beer on a large scale requires substantial capital. The tie system, therefore, plays a vital role by enabling smaller brewers to compete with the much larger enterprises.

Brought together originally in 1993 to defend the tie, IFBB members meet periodically to discuss industry issues. However, they compete with each other, as well as with more dominant enterprises, and all their business relationships are conducted independently. There is no commercial agreement or network of agreements between our members.

As we have shown, the tie works because of the mutual benefit between landlord and tenant. Their goals are aligned and commercial success is the shared vision. The mechanisms upon which that mutuality rest are the lower fixed rents and counterbalancing wet rents.

There is a differential in pricing between wholesale prices in tied and free-of-tie pubs, and this has become more pronounced in recent years. However discounts to tied pubs have also increased and there is no valid evidence of differential retail prices between tied and non tied pubs.

A comparison of the financial models for our tenancies and free-of-tie pubs shows that multiple valuable benefits accrue to our tied tenants by way of special commercial and financial advantages. The lower cost of entry and exit and the value of these advantages are also well illustrated by the evidence from tenants themselves. Moreover, the cost of property maintenance (borne by the landlord in the brewery tenancy) and the cost of business support are increasing.

Pub closures in the recession have attracted publicity. The greatest difficulties are faced by those who invested shortly before the recession in long leases with full commercial rents and a product tie. The IFBB members have very few pubs operated on this arrangement. In the recession, it is apparent that a minority of these leaseholders are in economic hardship, often having paid substantial sums to buy their leases.

Blame for such closures is sometimes attributed to the tie system. In fact, they face the same difficulties as other small businesses purchased for high prices before the recession. They should not be taken to be representative of the business model which the tie allows. On the contrary, the shared risk and reward approach contained in the traditional brewery tenancy is of greatest benefit to licensee tenants.

17 November 2009

Memorandum submitted by the Independent Pub Confederation

Introduction and Overview

1. The newly formed Independent Pub Confederation (IPC) welcomes the opportunity to submit written comments as part of the above ongoing inquiry. The component members of IPC submitted evidence to the original inquiry and this short memorandum seeks to build on, rather than repeat their views. It summarises the views of our members on the issues identified in the original Report and the Committee's call for further evidence.

2. The IPC is an umbrella body, bringing together all representative bodies and campaign groups representing publicans, consumers and small brewers. Members of the IPC are the Association of Licensed Multiple Retailers, Guild of Master Victuallers, the Fair Pint Campaign, the Federation of Small Businesses, Justice for Licensees, CAMRA, Unite the Union and the Society of Independent Brewers—supported and endorsed by BII and FLVA.

3. The original Business and Enterprise Committee Report published in May 2009 was the culmination of an exhaustive inquiry process examining all aspects of public house ownership. It outlined a series of substantive concerns about the relationship between pubcos and their lessees as well as a number of key recommendations for legislative and regulatory intervention in the market in order to address them. These can be grouped into five key areas—the beer and other product ties, the rental valuation model, the issuing and management of leases, dispute resolution and the competitive environment

4. The IPC supports and endorses the Committee's key findings and recommendations for action. As the voice of the publican we are uniquely placed to comment on the degree to which recent industry initiatives and developments—the RICS Report, the agreement between BBPA, BII and FLVA and the establishment of PIRRS—adequately address those concerns and recommendations.

5. In responding to this call for additional evidence we have therefore focused on whether the Committee's recommendations are still valid, the degrees to which they are addressed by the recent initiatives and we identify which issues remain outstanding. We have concluded by identifying the further steps we believe must be taken to address the Committee's legitimate concerns about the plight of lessees.

The Independent Pub Confederation

6. By way of background, the IPC was established in October 2009 following the publication of the Business and Enterprise Select Committee (BESC) Report, the OFT investigation of the CAMRA Super-complaint and ongoing scrutiny of the sector by the Government. The IPC provides a strong and unified voice for the grassroots of the industry and we represent independent publicans, both singleton and multiple operators.

7. Between them, the national trade bodies of the IPC represent around 25,000 publicans. Just under half of these businesses will be operated under lease issued by a pub company or other industry landlord. Of these, three quarters will operate with an exclusive purchasing agreement as part of the terms of the lease.[23]

8. The formation of the IPC is a direct consequence of the recent industry mediation process, the agenda for which was the BESC Report of May 2009 and its key recommendations. It rapidly became clear that the landlord representatives were unwilling or unable to address all of the matters arising from the Report. Moreover, the Committee's substantive recommendations were explicitly excluded from consideration.

9. Whilst all parties to that process were therefore unable to agree on a complete package of measures to address the BESC Report and recommendations, the discussions did demonstrate the very high degree of commonality and accord amongst lessee groups. The mediation process was therefore a catalyst for the establishment of a common position and a broad coalition of support behind it. That culminated in the launch of the IPC and its manifesto on 14 October, a copy of which is attached.

10. The IPC continues to endorse the conclusions and key recommendations of the original BESC Report. We believe action is required in all five areas—the beer tie, the rental valuation model, the setting and issuing of rents, the machine tie and the competitive environment. The measures taken recently by BBPA, BII and RICS are only a partial response to the report and we therefore do not believe that they are sufficient to justify a step away from the small number of specific regulatory interventions BESC recommended.

---

[23] *ALMR Benchmarking Survey 2009*

THE RENTAL VALUATION MODEL—THE RICS REPORT

11. In direct response to the criticisms of the Institution implicit in the BESC Report, the RICS commissioned an independent Forum, chaired by a senior property lawyer, to review the rental valuation model and make recommendations for its refinement. A number of members of the IPC were invited to give evidence to the Forum over the summer—most notably Fair Pint and the ALMR—and the report was published in October.

12. The IPC concurs with much of the analysis put forward by the Forum. The Report is highly critical of the current situation and seems to concur with the Committee that the "status quo is not an option". It states that the current relationship is under "stress", where a lack of transparency and an imbalance of bargaining power results in "difficult and adversarial negotiations" and where efforts to address this are hampered by a lack of "cross industry cooperation". It notes that if this was a situation involving consumers, then the case for government intervention would be overwhelming, and regrets that this is not the case. We support and applaud this observation.

13. The Forum sets out a series of recommendations—to be adopted by RICS and others—to address this unacceptable situation. These are summarised briefly below together with commentary by IPC:

(a) *Principles based approach:* the report rejects the suggestion that there should be an automatic 50/50 share of the divisible balance between landlord and lessee. It also states that a correct interpretation of the RICS Trade Valuation Guidance should see the tied tenant being financially no worse off than a free of tie tenant. Both of these points were raised by the lessee groups during the mediation process but they were rejected out of hand by landlord representatives. The failure to accept these principles has been a major stumbling block and remains a matter of concern

(b) *Self-Regulation:* There should be one code, not many, and it should be objective, with independent redress and review. We agree wholeheartedly with this. The lack of independent redress and sanctions for breaches is a major failing of the current system of voluntary self-regulation and the weakness of it can be seen in the fact that the 2008–09 inquiry was necessary despite the 2004 TISC Report. We have pledged to work with RICS to develop an independent code.

(c) *Transparency:* there should be an independent protocol outlining which items are rentalised and which are excluded, an explicit statement of how the rent will be calculated and the treatment of tenants' improvements. There should be minimum standards of information to be presented for rent reviews. These were all things asked for by IPC in the mediation process and which are not adequately delivered in the BBPA's outline agreement; we have, of course, yet to see the proposed revised BBPA Code.

(d) *Operating costs:* RICS concurs with BESC that more information can and should be provided to lessees on this vital element of the rental calculation. It notes that the "lack of cross industry cooperation" has hampered the development of the ALMR Benchmarking Survey—a point underlined during the mediation negotiations—and undertakes to work with the Association to expand and refine it.

(e) *Guidance:* RICS will review is valuation information paper and the composition of the Trade Related Valuation Group to redress the perception of bias. The IPC has pledged to work with RICS on this and will make available experienced and qualified lessees to sit on the panel and input into the drafting of guidance.

14. The Forum's report is a welcome recognition by an independent third party of the problems facing the trade and an endorsement of the solutions put forward by IPC to resolve them. Lessee input into the revised guidance and TRVG will be vital to addressing these matters and we would welcome a commitment from RICS to work on a collaborative basis with lessee representatives, not just with landlord representatives as they have in the past.

15. We are somewhat uncertain as to the actual status of the Report. These recommendations are made by an independent Forum and it is not at all clear whether the RICS has agreed to adopt and implement them. We hope that this may be clarified through the evidence session.

16. Equally, we are unclear about the BBPA response to RICS. The RICS Report was published the day after the BBPA's Agreement with the BII and FLVA but the Agreement makes no reference to any of the RICS conclusions and in particular the suggestion that industry codes should be abandoned in favour of an independent Code with external redress. We would be very willing to work with BBPA and others to present a joint submission to RICS on the establishment of an independent Code and redress mechanism.

17. The key question for the IPC in respect of the RICS Report is whether, when and how its recommendations will be adopted and implemented.

THE ISSUING AND MANAGEMENT OF LEASES

18. Following the failure of the pub industry mediation process to reach a satisfactory conclusion, the BBPA announced that it had reached an Agreement with BII and FLVA to review and revise its Framework Code of Practice on the issuing of pub leases. The Agreement sets out the principles which will under-pin a revised Code of Practice but restricts its scope to the rent setting process. A commentary on the Agreement prepared by Fair Pint is attached in the Appendices to this submission *(not printed here)*.

19. The revised Code can therefore only address one aspect of the concerns raised by BESC; even the BII and FLVA co-signatories admit that it is not a full and final solution to satisfy lessee concerns. Crucially, the agreement contains no detail on how any new Code will be implemented and enforced. We understand that the revised Code will not be made available until early next year and not be in place until summer 2010.

20. Even as a partial solution, the Agreement is inadequate to address the concerns raised by BESC about the rent setting process. It simply enshrines existing common commercial practice and relevant law. As such it represents minimum standards rather than best practice. More importantly, whilst the Agreement—if fully implemented—will go some way towards providing more information for new lessees, it will leave the position of existing ones fundamentally untouched, arguably creating two tiers of lease practice. There is little meaningful or new, and we submit that many of the points included—eg clarifying where machine income sits in the rental model—should have been done following the 2004 TISC inquiry.

21. For example, the new proposal to improve transparency through the publication of a shadow profit and loss account was originally proposed by lessees and is simply disclosure of a document which the landlord already has in his possession. We argued for a far higher level of disclosure to meet standard accounting principles and practice. We also suggested that there be some obligation on the landlord to justify the assumptions of turnover and costs used. The absence of these reassuring checks and balances remains a matter of concern and renders the "concession" meaningless.

22. A more detailed commentary on the proposed Agreement has been produced by the Fair Pint campaign and is attached at Appendix 2 *(not printed here)*.

23. The IPC's biggest area of concern about the BBPA Framework Agreement remains that any Code issuing as a result of it will remain entirely voluntary and unenforceable. We entirely concur with the RICS's analysis of the inadequacies of voluntary self-regulation in the sector and the need for a single Code of Practice, independently established, monitored and enforced with a separate mechanism for redress. We note that this model exists in the domestic property sector and that the RICS has established a Property Standards Board to afford consumers access to independent redress. This model applies to Home Information Pack Providers, Estate Agents, Property Search Agents etc and we believe the same protection and redress should be afforded to tenants and lessees in the pub sector.

24. The BBPA Code makes no provision for independent scrutiny and there are no effective sanctions defined. Detailed implementation of the Code's provisions is left to the member companies' discretion and the revision will leave that largely untouched. The adoption of the revised Code will still leave pub companies free to change their individual Code of Practice at a whim, without consultation, or to ignore it altogether. The decision by Greene King to resign its membership of the BBPA shows that the Code is now meaningless as there is no requirement on them to adopt or implement it.

25. The BBPA admitted in the Morning Advertiser of 5 November that there will be no sanctions for companies who choose to ignore or pay lip service to the revised Code. A breach of the Code can only be dealt with by expulsion from the BBPA or removal of BII accreditation. Neither of these sanctions will have sufficient commercial impact to act as a check on company behaviour. Moreover, the BII is far from an independent redress mechanism.

26. The Code will have no legal status and enforceability unless it becomes part and parcel of the relevant lease. Landlord representatives have refused outright to accept this principle, but if pub company behaviour is to be truly regulated by means of an industry Code of Practice, then the IPC believes it to be imperative that such a Code is enshrined in the lease.

27. For the IPC, the key outstanding question in relation to the BBPA Code is not whether the elements are sufficient but whether they will actually be delivered. Can voluntary self-regulation be trusted and can it work? We would have more confidence in this if the TISC Report had not recommended urgent, more effective regulation in 2004. Then, the Committee recommended that the Government should impose a statutory code on the industry "if it did not show signs of accepting and complying with an adequate voluntary code". The pubcos promised in 2004 that they would deliver but the continued weakness of the BBPA proposals in this regard suggest that this recommendation has yet to be recognised and adopted.

DISPUTE RESOLUTION—PIRRS

28. The 2004 TISC and 2009 BESC Reports both expressed concern about the lack of a low cost dispute resolution system. Since the inquiry, much work has been done to pilot a new scheme run by the BII. The Pubs Independent Rent Review Scheme (PIRRS) is in the process of being established and aims to provide a fixed-cost professional arbitration system, with access to independent experts.

29. It is too early to say yet whether this will deliver a satisfactory avenue for lessees to resolve rent disputes but it undoubtedly has the potential to do so. The PIRRS Board comprises a number of lessee representatives and national trade bodies to ensure that the scheme is truly impartial, independent and addresses lessee needs. The surveyors who have responded initially to provide services under the proposed scheme include a number of familiar firms. All were asked to disclose conflicts of interest by providing details of those pub owning companies they had worked for in the last three years. Several failed to make the necessary disclosures. This was highlighted to the BII by members of IPC and for the time being the scheme has been withdrawn.

30. What is clear, however, is that the PIRRS scheme will only provide dispute resolution in rent review cases; it will not provide a mechanism for resolving general complaints or grievances. The BESC report expressed concern that lessees have few avenues of complaint if they believe that their pubco is acting unfairly or, more pertinently, if the Code of Practice is being breached. Arguably it is this absence of a general dispute resolution mechanism which has fuelled letters to MPs from lessees who have nowhere else to express their concerns.

31. Despite the BBPA's evidence to the Committee that they would act as an "intermediary to resolve any misunderstandings" in the Code of Practice, this has not addressed lessee's fundamental concerns. The IPC has received many calls from lessees who feel they have nowhere to turn when their pubco has acted unfairly or where Codes of Practice are ignored or breached. The BBPA refer them to the company concerned and has said it is not a matter for it to address. The BII has begun to offer a service to consider complaints, but there still is no independent mechanism for redress. Lessees have little confidence in either organization and ultimately it appears that neither can effectively moderate the behaviour of the pub companies.

32. The establishment of a truly independent statutory code with access for lessees to independent redress along the lines recommended by the RICS, and indeed TISC in 2004, remains the only solution to this conundrum. Properly addressed and implemented the findings of the RICS in its recent report are capable of providing the valuation framework and guidance for RICS members such that the normal system of expert and arbitral determination of rent reviews in the pub sector should work properly and and in a way that would be expected in other commercial sectors.

Outstanding Issues of Concern

33. The above three initiatives can be seen as a partial response to elements of the BESC Report, but they leave the substantive recommendations of that Report largely untouched. In particular, they fail to even acknowledge the recommendation that the use of product ties should be severely restricted and that these agreements should be scrutinized by the competition authorities. The assumption by pubcos appears to have been that if sufficient progress is made on the other matters, then this will assuage competition concerns about the tie and political concerns about the treatment of tenants.

34. The view of the IPC is that these issues are so fundamental to the nature of the relationship that they cannot be simply offset in this way and must be separately considered. Moreover, we would argue that the above proposals are not in and of themselves sufficient to address even the individual recommendations in those areas.

35. The following issues raised by the BESC Report remain unaddressed by the above initiatives and remain issues of concern to the IPC:

(a) *Beer Tie:* the Committee felt that if the interests of pubcos and their lessees were aligned, then the pubco would sell beer to the lessee at a price which enabled them to remain competitive. The OFT conducted a partial analysis of price, comparing the some aspects of the free trade with tied lessees. This analysis failed to take account of the aggressive prices charged by town centre outlets such as Wetherspoons and others. Even so, it still found that consumers were at least 8p a pint worse off buying in a tied pub. We would be happy to provide additional figures to the Committee on the price differential between tied and non-tied pubs. This reinforces the Committee's conclusions and justifies its recommendation that the tying of beer and other products should be severely limited

The Committee also suggested that the only way to settle the argument about whether the Tie did confer benefits to the tied tenant or not was to offer all lessees a choice of being tied. This has been taken up by some smaller landlords, but has been rejected by pubco representatives. We therefore have to concur with the assessment that this will require Government intervention and that DBIS should consult on how best to achieve this

The Beer tie is not mentioned in the BBPA framework Agreement or RICS Report. Political intervention is therefore required to address this recommendation.

(b) *AWP Tie:* both the 2004 and 2008–09 inquiries agreed that the pubcos did not add sufficient value to justify their claims to 50% of machine takings and MPs were unconvinced that the benefits of the machine tie should outweigh the income foregone by the tenant. BESC recommended that the AWP tie be removed.

The BBPA Agreement simply requires companies to make clear where the AWP income sits in the rental model. The suggestion is that it be removed from the divisible balance but that the tie remains in place. The tie allows pubcos to receive royalty payments from preferred suppliers which results

in higher than market rents for tied tenants and an additional income stream for the landlord. We agree with BESC and TISC that the tie should be removed. Given that this has been a recommendation since 2004 but no voluntary action has been taken to address it, again, political intervention is required.

(c) *Insurance:* in response to BESC concerns about the nature and cost of the insurance provision, the BBPA has proposed that pubcos will price match insurance cover. This is something of a smokescreen as it still forces lessees to go through multiple hoops in order to save money on their insurance. More importantly, the second aspect of the Recommendation in this area is left unaddressed—namely that some insurance policies require the lessee to pay for a benefit to the pubco, in particular to cover them for loss of income from wet rent. We concur with BESC in saying that pubcos should themselves pay to take out insurance against the risks they face.

(d) *UORR Clauses and RPI:* the 2004 TISC Report called for an end to the use of UORR clauses. Although the pubcos have agreed that they will not enforce these clauses and will interpret all lease provisions as providing for downward as well as upward review, the fact remains that many thousands of leases still contain these clauses, which could be enforced in the courts if the landlord chose so to do. Should the property change hands, the lessee has no comfort from a side letter which is not binding on successors in title.

The same applies to RPI clauses. Coupled with regular rent reviews, the use of an RPI clause results in an automated rental accelerator where rent increases regardless of what is happening to earnings. In many cases, RPI clauses have been imposed upon lessees as a "price" for asking for a Code of Practice rent review or for the removal of an UORR clause.

The continued refusal to remove these clauses once and for all from lease agreements by means of a deed of variation is puzzling but ultimately unacceptable. The BBPA code offers the opportunity for lessees wanting their removal to change to a new agreement and to bear the cost of doing so. There is no guarantee that the new agreement will not be on worse terms. As has already been noted, pubcos have in the past imposed punitive lease terms as the "price" for a requested change.

IPC Recommendations for Action

36. In summary, the IPC believes that the steps taken by BBPA, RICS and BII are insufficient to address the Committee's specific concerns about the rental valuation model, the issuing of leases and dispute resolution. All of them require additional strengthening to be considered an adequate and robust response to the Committee's recommendations. In addition, the substantive issues raised by the Committee in respect of product ties and lease clauses remain outstanding.

37. What the TISC Report in 2004 teaches us is that once the spotlight of public scrutiny has been removed, then the threat of regulatory intervention weakens and there is no imperative to act. Warm words and good intentions do not translate into positive or lasting action; for example, we have recently learnt that Enterprise Inn has removed its financial support from distressed lessees, effective after the OFT inquiry reported.

38. The IPC therefore believes that the Committee's overall conclusion that "the time has now come for government to intervene to ensure a fair and legal framework" remains valid and should be pursued as a matter of urgency.

39. We would propose the following series of actions:

(a) The Government should, with immediate effect, withdraw the Land Agreements Exclusion Order to subject pub agreements to the full scrutiny of competition law. A consultation on this subject was held earlier this Autumn and the IPC's submission to it is attached

(b) The OFT inquiry failed to consider the competition implications on business to business agreements and the Government should either negotiate serious undertakings in lieu of a reference on the following matters with the pubcos, or refer the matter forthwith to the Competition Commission

(c) The Government should proceed as recommended by the BESC Report to consult on means to offer all tied lessees a choice of whether to be tied for beer or not. In addition, these lessees should be afforded the opportunity to buy one guest beer—supplied by small local brewers—outside of any tying arrangement. This could form an undertaking in lieu of a reference and should only apply to those companies with a market share of more than 1%—to avoid damaging the smaller regional brewers

(d) Where agreements contain a beer tie, all other forms of tying for wines, spirits and minerals or ancillary should be severely restricted and AWP ties should be abandoned forthwith. This could form an undertaking in lieu of a reference and should only apply to those companies with a market share of more than 1% to avoid damaging the smaller regional brewers

(e) The Government should consult to extend the terms of the Unfair Contract Terms Regulations to small businesses

(f) The use of UORR clauses should be outlawed. There was a 2003–04 Government consultation on this subject which set out such an approach but was abandoned following commitments given at the TISC. It should be revisited as a matter of urgency. Undertakings were previously given to your committee by at least one pub owning company that this matter would be addressed by way of the provision of deeds of variation to existing leases and removal of the offending clauses from the draft templates for new leases. This has not to our knowledge been carried out or offered to tenants.

(g) TISC said that the Government should impose a statutory code on the industry unless it took steps to "accept and comply with an adequate voluntary code". The BESC report noted that these recommendations had not solved the problems of inequality in bargaining power and were inadequate. The BBPA has failed to negotiate an adequate voluntary code and the system of self-regulation has been shown to fail. TISC stated that "the Government should not hesitate to impose a statutory code" in these circumstances. We would suggest that this matter is reviewed in the next Parliament and that a statutory code is imposed if the RICS recommendation for an independent code with access to independent redress is not implemented in full.

(h) The BESC Report highlighted the very low returns many lessees are making from their business. At present, the rental valuation model makes no provision for lessees time spent in the day-to-day running of the business in the operating costs. Whilst we accept that a full salary should not be included, we nevertheless believe that there is scope for financial recognition of the lessee's time within the model.

Notwithstanding all of the above actions to be taken, we would strongly urge the Committee to commit to review the situation in the next Parliament. There is clearly a range of measures promised by BBPA, BII and RICS which are to be taken forward on a voluntary basis rather than through government action; but the lessons of TISC suggest that we cannot take those undertakings at face value and it will be vital to maintain political oversight and the pressure for action. A commitment to review and revisit, in line with the TISC recommendation, would greatly assist in that respect, but should be considered in addition to, rather than as a substitute for legislative or regulatory intervention

19 November 2009

Supplementary memorandum submitted by the IPC

The BBPA/BII/FLVA Framework Document on the issuing of leases, published on the same day as the IPC's Executive met, and its contents and implications were amongst the subjects debated.

The Framework Document differs little from the Heads of Terms reached by BBPA, BII and FLVA in September 2009. We are at a loss to understand why it has therefore taken so long to publish and, more importantly why it was not available ahead of the Committee's evidence session in December. This appears to be simply a delaying tactic rather than an attempt to address the Committee's genuine concerns.

In commenting on the Framework Document, it must be noted that this is essentially an internal document between BBPA and its members, setting out the obligations the trade body expects them to meet. The audience is therefore landlord not lessee and the drafting reflects this. It is therefore unsurprising that the Framework does not address the specific needs and concerns of lessees.

As mentioned in our previous written and oral evidence, we are concerned that undue weight will be given to this document. The revised Framework is a codification and formalisation of existing good practice. Whilst this is a step in the right direction—making it more transparent and clear what the landlord expects of the prospective lessee, the obligations it is imposing and the money it is making from the business— it does not deliver anything particularly new or substantive. Crucially, it leaves the fundamental nature of the commercial relationship between landlord and lessee—which is at the heart of the Committee's deliberations—untouched.

The Document is, therefore, a small part of the overall picture. All matters of concern relating to the exclusive purchase obligations and their operation, comprehensive dispute resolution and the competition/legal framework and the associated Committee recommendations relating to them are outside of the scope of the Framework and remain extant. Indeed, over three-quarters of the Committee's original recommendations are left completely untouched as a result of this and the RICS activity.

The IPC does not wish to comment further at this time on the actual detailed content of the Framework Document. As previously noted, this is an internal document for BBPA members and the important documents from a lessee perspective are the company Codes of Practice which will flow from this and implement it. It is very much to be hoped that these documents will go further than the Framework and will start to address the substantive issues of concern to lessees, in particular the nature of the tie and the fair share of the economic benefit deriving from it.

In commenting on the Framework Document we wish only to draw the Committee's attention to its limitations in and of itself and to pick up on those issues which were of concern to the IPC at the time we gave oral evidence to the Committee and which we hoped would be addressed by the Framework. That hope has not been realised on any of the substantive issues:

— *Enforceability*: the Framework Document places an obligation only on the landlord members of the BBPA but it provides no details on how it is to be made enforceable on them. We understand that it will become a condition of membership of the BBPA for companies to have a Code in place which meets the minimum requirements of the Framework Document; it is not clear whether it is also a requirement to have a code in place which is accredited by BII. The document is silent, however, on what will happen if a company fails to meet those requirements in their entirety or in part. For example, what is the sanction if you do not have a Code in place and when and how will this be assessed? What will happen if a Code fails to reach accreditation standard? Does a company have an opportunity to rectify the situation or are they expelled from membership? What is the procedure for dealing with recalcitrant landlord representatives? We believe that the mechanism for enforcing this voluntary set of standards should be made clear to avoid any potential backsliding. Equally, as has already been noted, this Framework will not apply to non-BBPA members.

— *Timetable*: there is no clear timetable for implementation at an individual company level. The Framework sets an indicative timetable for companies to develop their own codes of practice and have them accredited but this is not set in stone and extensions are already being talked about for smaller companies including the regional brewers. Crucially, no timeline is set for the individual company Codes to be in place and in force, nor is it made clear how and when the Codes will be applied to existing leases.

— *Legally Binding*: the BBPA Framework Document states that the Company Code of Practice will become binding simply because it is signed by both parties. This is a deceptively simple assertion and we remain unconvinced that this is the case. At present, pub company representatives can and do argue in court that there is no legal obligation on them to abide by a code of practice. The Framework Document will not change that. The Codes could only be legally binding if there was a legal obligation to produce a Code and abide by its provisions ie a mandatory code or if the Framework Document was translated into the clauses of the lease itself.

  We assume that the Company Code will be provided to the prospective lessee as part of the due diligence process before a lease negotiation is concluded. Unless the lease makes explicit reference to the company's Code of Practice or the Framework Document, we are at a loss to understand how it can be truly legally binding. At best it is an agreement to agree.

  Our understanding of the provisions mean that the Code or Framework could only be relied upon in Court if a breach of the agreement or a failure to abide by the Code could be shown to result in detriment to the lease. This in itself is an inherent weakness of the self-regulatory regime: it relies upon an individual lessee taking direct action to enforce their rights. A company could be persistently in breach of the Code or continuing to act in an unfair manner, but unless or until an action is taken against them in court, there is no restraint on their behaviour.

  The situation is more complicated in respect of existing leases where the lease agreement pre-exists the Code. In such circumstances, unless the lease is varied by a deed, the lease would be considered to have primacy and its provisions would be upheld in a Court regardless of what was said in a Company Code.

  What is arguably more pertinent to a discussion on the binding nature of the Code or Framework is what would happen if a potential or, more likely, the existing lessee refused to sign it. The Framework requires Codes of Practice to impose significant additional obligations on lessees. Many of these are sensible and will do much to raise the barrier to entry and prevent problems arising in the first place. There is a risk, however, that signing a Code based on the Framework Document could undermine a tenant/lessee's existing legal rights and remedies. It is likely that many professional advisers would advise clients not to sign such an agreement. We are unclear about what rules would apply to such lessees; would they be afforded a lesser degree of transparency or disclosure as a result? Also, if the lessee refuses to sign the company's Code will the pubco still honour its part or will there be different behaviour by the landlord in this relationship?

— *Sanctions*: the Framework Document is silent as to what penalties or sanctions may be applied if the landlord obligations are not met and equally if there are breaches of the Code. The Framework does not establish a complaints or dispute resolution mechanism. There has been discussion of BII action being taken in response to complaints but this is not formalised in the Framework Document and again is reactive rather than proactive enforcement of Code provisions. Moreover, mention has been made of the need for 25 complaints per 2,000 pubs before action may be considered but there is no reference to a time period for this nor any penalties being applied for persistent breaches. For example, would code accreditation be removed or membership suspended? How many "strikes" before a company is "out"?

When the IPC gave evidence to the Committee in December we set out our requirements from an industry code of practice: that it be independent of the companies being regulated; capable of being rigorously enforced and upheld; and carrying significant and effective sanctions for any breach of its provisions. This

Framework Document fails those tests and we continue to believe that the only effective remedy will be a mandatory Code of Practice with access to independent redress. The estate agency and now the grocery market provide effective models for this type of government intervention.

We would conclude by noting that the Framework Document and proposed Codes will do nothing to invalidate the Committee's substantive recommendation that there is now an urgent need to ensure that the competition issues related to tied leases are properly investigated and that the wider legal framework surrounding the issuing of such documents is robust and adequate.

18 February 2010

Memorandum submitted by Brian Jacobs

COMMENTS OF DEVELOPMENTS FOLLOWING THE ISSUE OF THE BESC REPORT ON PUB COMPANIES

The prime principle, that the tied tenant should not be worse off financially than if they were free of tie, is fundamental to ensuring fair competition. The fact is that every effort by pubcos, valuers, members of RICS, the BBPA, and even the BII have been towards either denying the existence of the prime principle, or subverting by any means possible. It is a fact that the pubcos have borrowed billions of pounds buying pubs and they are having problems servicing that debt. The fact is that their rapacious appetite led them to pay excessive prices and now they expect the tenants and consumers to fund their foolhardiness. Consider the recent activity.

REVIEW OF RICS STATEMENT AND IMPACT ON ITS MEMBERS

1.1 The evidence is clear and absolute, the member valuers, both pubco and external, have been failing to observe the prime principle

1.2 The recent release from RICS states "*For example in the treatment of the valuation of the wet rent, where it is clear to us that most lease agreements require a valuation largely on the terms of the lease. This follows the principle of the tied tenant being no worse off than the non tied tenant; a position which is arrived at with a correct interpretation of RICS guidance".*

1.3 RICS have refused to either remove members from their panel of arbitrators that have refused to accept and apply the prime principle.

1.4 RICS have indicated that they will not reprimand employees of pubcos or , such as Christies and Fleurets, who have wantonly disregarded the prime principle.

1.5 The impact of the failure to observe the prime principle has been that pubcos have increased their profitability substantially to the detriment of both the tenant and consumer. Profitability for both Enterprise and Punch Taverns may have been overstated by £60 million a year each.

1.6 The RICS stance has confirmed that the should not be the sole arbiters of rent, it requires other disciplines such as Chartered Arbitrator or a member of the accounting profession, after all profit is the basis of rent and who is more qualified than an accountant?

THE BBPACODE OF PRACTICE, BII AND FLVA

2.1 The BBPA have rendered a fresh Code of Practice, supported by the BII and FLVA.

2.2 Their Code regurgitates, cleverly, most standards that should have been in force more than a decade ago, and which the T&ISC recognised in 2004 as not having been fulfilled. There is nothing in the COP that the pubcos can be forced to apply.

2.3 Their code, as revealed in the press, claims to put into effect the following: [comments in italics]

2.3.1 A revised BBPA Framework Code of Practice on the Granting of Tenancies and Leases is stated to be a mandatory requirement for membership of the BBPA and will be provided to all new and existing tenants or lessees. The revised Code will take effect from 1 January 2010 and member companies will have until 30 June 2010 to incorporate the revised BBPA Code into their individual Codes of Practice and to seek BII accreditation. *This does not prevent any member from withdrawing from the BBPA and ignoring in total. Nowhere within this document has the BBPA or its members accepted the prime principle, in fact some of the members have openly stated that, to which there is no punishment.*

2.3.2 In addition, in conjunction with other industry bodies, BBPA has set up an Independent Pub Rent Review Scheme (PIRRS), to be funded by BBPA, that will offer lessees a low-cost alternative to arbitration in rent review disputes. *None of the persons nominated to carry out PIRRS will undertake to transparently show that they will apply the prime principle. No tenant should consider their rent being judged by" poachers2*

2.3.3 The revised BBPA Code will include a range of obligations on pub companies who, amongst other things, will be required to:

— establish standards of competence for BDMs and set out a procedure to deal with complaints and resolve disputes *This should always have been the case and the T&ISC in 2004 reminded the pubcos of their responsibilities, since ignored;*

— describe the various rental and purchase obligations offered by the company. *Not new and has no real value;*

— demonstrate transparency with regard to prices charged for beer, eligibility for discounts and whether they will allow guest beers supplied outside the tie *Not new and should always have done so also see TISC2004;*

— make clear the pub company's policy in respect of rent setting and review including full transparency in regard to how the Fair Maintainable Trade (FMT) has been calculated with a breakdown of costs and detailed information on the assumptions made on turnover. The BBPA Code will also incorporate a checklist of information to be requested by the tenant or lessee from the pub company. *Not new and should always have done so, also see TISC2004 recommendations para's 144 and 145;*

— provide shadow P&Ls which must provide sufficient detail to enable tenants to take proper professional advice *Not new and should always have done so. also see TISC2004;*

— draw attention to the availability of ALMR and other benchmarking reports *Of no real value, there is no substitute for detail and benchmarks whilst advisory do not reflect accounting practice;*

— ensure Upward Only Rent Review clauses are not included in new leases and offer existing lessees the opportunity to convert to new leases subject to agreement *This was supposed to happen after TISC2004, BBPA failed to secure Deed of Variation for each lease;*

— remove AWP machine income from the divisible balance and make clear how machine income is considered *TISC 2004 recommended total removal but ignored;*

— supply lessees with full details about insurance cover and excess payable and price-match where lessees…. *should have always done so, there has been a failure to attach details to lease* are able to find a cheaper like-for-like policy *NEW!!!!;*

— set out a clear policy for the operation of flow monitoring equipment in accordance with minimum standards be set out in the BBPA Code *Dubious as to usage, and fails to satisfy Weights & Measures, not required if tie removed; and*

— make clear the company policy with regard to restrictive covenants *There is no need to have restrictive covenants.*

The agreement also requires lessees to undertake pre-entry training, produce a business plan and take qualified professional advice prior to taking on a lease *This has always been so but not always applied.*

On assignment the lessor must also give any assignee the same financial information disclosed by the pub company. *Always been so*

The BBPA is the UK's leading organisation representing the brewing and pub sector. Its members account for 98% of the beer brewed in the UK and own nearly two thirds of Britain's 56,000 pubs. *And wrongfully hold themselves out to represent some 30,000 tenants*

2.4 The BII has failed to support the prime principle and yet together with the BBPA are progressing PIRR's which also fails to ensure the implementation of the prime principle. None of the valuers listed on the BII webpage, as persons who could be involved in PIRR's, have accepted the need to observe the prime principle, in fact the majority at some time or another have blatantly refused to implement the prime principle. The position of the BII is tarnished by their refusal to ensure the application of the prime principle.

2.5 The FLVA are funded to a substantial degree by pubcos and therefore will naturally agree with whatever they say, their position is thus tarnished.

12 November 2009

Memorandum submitted by Joseph Holt Ltd

REVIEW OF THE COMPETITION RULES APPLICABLE TO VERTICAL AGREEMENTS:

We wanted to write to you as Chairman of the Business and Enterprise Select Committee to voice our support for the beer tie. We are a privately owned regional brewery operating in the Manchester area and own 130 pubs of which 30 are run as traditional tenancies. It is our intention, within the next year, to increase this number to 45 tenancies as we convert more pubs from management. We feel it is vital for the tie to operate within the block exemption because:

— This allows us to have a route to market for our specialist cask beers, our seven bottled ale products and our excellent lagers and smooth beers, all of which we produce here at the brewery. This gives

the consumer the opportunity to drink our beers through our 130 pubs and allows us to then sell our beers into the free trade and nationally within supermarkets. As a family brewer this allows us to compete against the national brewers and therefore gives the consumer greater choice.

— The traditional style tenancy we operate provides a low cost of entry for our tenants enabling them to operate as self-employed business people using their entrepreneurial skills. We provide considerable support to our tenants both through the help and advice of our company management structure and through the repairs we undertake to those pubs. In essence the traditional brewery tenancy allows our tenants to operate under a fair business arrangement and benefit from a vertically integrated structure. It is as much in our interest for them to succeed as it is in theirs.

— We, as a company, both at the brewery and in our pubs, employ 421 full time and 916 part time staff. In addition to this our tenants employ a number of staff in each of our 30 tenancies. This employment provides vital support for the area.

We, as a business, operated as a public company for 49 years until 2000 when we took the bold step of taking the business private. Part of our logic for this was secure in the knowledge we would operate our pubs under the tie. Whilst, therefore, the continuation of the tie under the block exemption is vital to the company, it also provides huge benefits for our tenants, the consumer and the community at large.

We therefore feel it is in all parties' interest to support the continuation of the tie under the block exemption.

18 November 2009

Memorandum submitted by Justice for Licensees

RICS

RICS have held their forum and produced a somewhat viable report and yet they have still failed to act. There is no justification for hesitancy. The TRVG have not been brought to task over the manipulation of the rental system and the pubcos continue to abuse said system. Companies such as Greene King and Enterprise Inns are telling their tenants that the RICS report means nothing that it is business as usual. Since the release of the BEC report there has been murmurings but no change whatsoever, tenants continue to face rent increases in a time when the market just will not sustain those increases and so tenants continue to lose everything and the pubcos continue their churn. UORR's still remain as part of the contract as do upward only RPI, until those issues are addressed as part of the contract they will remain open to interpretation and abuse. The pubcos made promised to your committee that upward only rent reviews would be removed by Deed of Variation and this has not happened. Non-binding side letters have been issued by Enterprise Inns. The formulation for the rent must be completely transparent and form part of the contract and if comparables are to be used then there is substantial need for a national register of rents, to ensure that the tenants have the information required and do not have to rely on the evidence of the pubcos.

BBPA

The BBPA have produced their agreement which does little to address the concerns of the BEC report, it is nothing more than a suggestion that BBPA members may take part in more normal business practice. It is difficult to understand why it has taken two parliamentary investigations to instil action! The BBPA agreement is not legal and binding. Pubcos can leave the BBPA whenever they so choose (Greene King prime example) and therefore the agreement is open to abuse. Part of the BBPA agreement addresses training for incoming tenants, JFL sits on the steering group for this training. To date JFL is far from impressed with the manifesto put forward, it fails on core issues and two hours training is far from enough to address the issues of naive new-comers to the trade. The steering group are fully aware of the concerns of JFL and we await the outcome. JFL is aware that the BBPA have lobbied MP's with their agreement and hailed it as the answer to the problems within the trade, the agreement is far from the answer they portray and will do little to protect tenants, it fails miserably in addressing the prime concerns of the BEC report. Who is going to monitor adherence by the members of the BBPA, not forgetting that the BBPA failed to acknowledge the problems that the tied sector have faced for many years? Should the pubcos choose to leave the BBPA then who is going to ensure that the current debacle does not continue? The BBPA and its members have made promises before and have not carried them through. This looks like a repeat of the same.

PIRRS

In essence the PIRRS scheme could be a good idea if progressed correctly. It would appear however, that the proposed scheme may already have been the subject of pubco manipulation. The PIRRS website went live a couple of weeks ago and then was removed. On the site there were some surveyors who were noted as declaring no interests eg Fleurets and yet they act for the pubcos, this is not a good sign. The integrity of the

PIRRS system has been called into question by these actions. In reality, if the RICS is to fully and properly implement the findings of its recent report then there is, in principle, no need for the PIRRS scheme to be in place.

IPC

The formation of the IPC will be good for tenants and for the trade. They represent the voice of the Publicans which is something that this trade has lacked in previous years.

PUBCOS

From a tenants perspective it would appear that it is business as usual for the pubcos, despite the numerous press releases stating the opposite. Tenants continue to feel abused, exploited and bullied by their alleged business partners, in fact the levels of discontent have risen considerably since the findings of the BEC report. The pubcos are continuing to fail to address the issues and concerns of the tenants, they continue to increase rents, they continue to use Brulines as a weapon despite it's obvious inadequacy, they continue to increase the cost and severity of the tie, they continue to fail to help struggling tenants, they continue with the churn, they continue to instil the view that they are benevolent business partners, they are failing to self-regulate and they are failing miserably in transparency and honesty. In fact the situation within the pubco model had deteriorated instead of improving.

OVERALL VIEW

The pubcos have failed in self regulation as they failed in 2004. The BEC report was one of the finest pieces of investigation that this trade has seen, despite the mumblings of the pubcos and yet every action of the pubcos that the report highlighted continues unabated by the pubcos. It is absolutely imperative that the government act now to protect current tenants and immediately commence a full and complete investigation of every aspect of the pubco model by a totally independent body. The pubcos must go before the Competition Commission with all due haste, if the pubcos have done no wrong then surely they will welcome this to protect their name? This will give all sides the chance to clear the issues once and for all and tenants, pubcos, consumers, trade bodies and the government should welcome the opportunity to lay to rest the issues that have dogged this trade for many years.

18 November 2009

Memorandum submitted by JW Lees and Co (Brewers) Ltd

JW Lees is a family brewery company with predominantly tenanted pubs in the North West of England. We brew award-winning ales and lagers but it is our tenanted pubs that are the backbone of our business. Without the beer tie we are advised that our brewery would be uneconomical. Indeed, we have never granted any fully-repairing leases to any of our tenants because we think that these sorts of leases are inequitable: at JW Lees it is fundamental that the brewer-tenant relationship is win-win whereby both parties succeed if a pub is successful.

We are members of the British Beer and Pub Association, the British Institute of Inn keeping and the Independent Family Brewery of Britain and fully support the proposed code of practice that has been drawn up with the Federation of Licensed Victuallers Associations. In fact, it would mean little change for JW Lees, apart from the need for us to provide a more detailed shadow set of accounts for the business of each pub which would be a good improvement on the current information that we provide to prospective tenants: it will add cost to our business but will also allow greater transparency.

You will appreciate the unintended consequences of the 1989 Beer Orders and we hope that the current review that you are chairing will not result in further unintended consequences for companies such as JW Lees.

11 November 2009

Memorandum submitted by Phil Liddell

As a lessee with one of the major Pub Companies, (and member of CAMRA, and on occasions, a beer "consumer") I wish to register my severe disappointment at the failure of the OFT to act upon the CAMRA super complaint. Although I acknowledge the technicalities behind the decision, the fact that not even a market study has been instigated shows the board's lack of understanding of the subject. The fact of the matter is that the customer does suffer in both choice and price. The Pub Cos own a large percentage of the pubs in this Country. Although they are not dominating in specific regions, as did the Big Brewers at the time of the 1988 Beer Orders, they do hold a form of cartel. By charging over the odds in rent, and hiking the costs of tied goods to their tenants, they force the price of products to an unsustainable level. This is demonstrated in towns where say a Wetherspoons is in direct competition. To attract customers, the local

tied pubs are forced to either reduce their tied product prices below a viable level and look at alternative means to reimburse the shortfall, or go out of business. Why do you think you see so many closed pubs in towns, or Lease For Sale, with tenants desperately trying to exit the industry. Pubs in villages such as mine, survive on the "edge" because there is no direct competition on price. There is one freehouse, but they set their prices just below the other tied houses, so that they are still better value for money, but their profit margins are much, much better. There is no need for them to "discount", when there is no competition—other than the Supermarkets, where the customer can buy alcohol at a fraction of the price. That is where my missing customers have gone incidentally. A Wetherspoons in our area would kill all the tied pubs off instantly—the few customers we currently attract would be tempted by freetrade prices.

In the report, Simon Williams, OFT Senior Director, said: "Any strategy by a pub-owning company which compromises the competitive position of its tied pubs would not be sustainable, as this would result in a loss of sales. Pub-owning companies are not therefore protected from competition by virtue of the supply ties agreed with their lessees."

I think it's pretty obvious that tied pubs are generally unsustainable in the present state, with so many closed and others for sale. However, it's not the Pub Companies that suffer the loss, it's the individual tenants. It has been stated that the Pub Companies do not share the risk of the business—absolutely correct. These individuals have suffered in silence, many thousands going out of business as the systematic abuse of this system is exploited by the Pub Cos.

For a very small cross section of unhappy tenants, please take a look at some of the tenant support groups, Buying a pub business, Pub Revolution Supporters group (facebook), Fair pint, you will gain a small appreciation of the desperation that some tenants have endured in their dealings with the major Pub Companies—many losing all their savings, their house, their families in the process. There is a massive silent majority, who's voices haven't been heard and who haven't had anywhere to turn. I personally know of a quite a few who have disappeared following the collapse of their life and business. It is about time someone put an end to this corporate bullying, this exploitation of peoples lives, by the liars from these organisations.

The pub closures are only the tip of the iceberg. The only reason the tenants with businesses for sale (such as myself) don't leave immediately is because the price of pub leased property has collapsed to a point where every tenant will take a massive loss on their business. This will put bankrupt them, cost them their house if they still possess one, or put them out on the streets. Mine will cost me approx £30K to exit, unless I sell the business, and I will still have "lost" £20K over six years. The "leased model" has been only recently (over 20 years) been instigated by the pub companies, and will not survive as the tenanted tied model that has survived 100 years. It is largely the Pub Companies fault that the for sale leased market has collapsed, because of the desperate "fire sale" of their properties as the Banks started to call in their "toxic loans". It has not been helped by the property market decline, but this shouldn't have rendered a complete collapse of values as has happened. The Pub Cos have further devalued the value of leased businesses by virtue of the business model being virtually unviable. they are worthless, yet many thousands have bought into them, believing the hype the BDM's have put across.

You only have to look at the SIBA DDS scheme to get an small appreciation of the exploitation delivered by the Pub Cos against the tenant, the Supplier (Brewer) and the customer. The only way I can supply my customers with a local product, is by the DDS scheme. The Brewer has to join this scheme at a cost upwards of £300, then has an annual registration fee. I order and purchase this Brewers beer direct from SIBA (non-profit making), who pass the order on to the Brewer. The Brewer delivers direct, hence minimalising their carbon footprint, and I sell it to the customer. However, the Pub Company dictates the price I pay, and the price paid to the Brewery. The Brewery's price is driven down by the Pub Company £5 to £10 below their normal retail price. The Pub Co in turn charges me around £30 above the price they pay the Brewer, hence making a fat 30 odd percent profit for doing absolutely nothing. Instead of buying a product for 90 pence a pint, I have to buy the product for £1.35, therefore to cover my rent (again going to he Pub Co), wages, rates energy bills, etc. etc., I have to make a gross profit of at least 50%, hence the customer pays around £2.70 a pint, when I could be charging £1.80. Now before the Government retorts that that will encourage binge drinking, I wouldn't set my price at £1.80—I would like to actually see a profit in my business—I would set a fair market price.

As I have only taken £200 out of my business in wages/drawings during the past 18 months, I think it only fair that I actually earn a liveable wage. My wife and I have been forced to work outside the pub during the past year and a half, to stem the debts and cash flow problems. I have recently trimmed the business to the bare minimum, removed our food offering, and now offer only drinks—we are a pub after all. My staff has been cut from four full time (including my wife and I) and six part time workers, to one full time (me) and four part time. I no longer work outside of the pub, and my last month's wage from the pub yielded the £200 mentioned above. My wife is continuing to finance the family. We will be lucky to see out the next three months. Am I classed as a competent operator, is my FMT true at it's present rate, or at the inflated level we operated at previously. There is a an enormous way to go to allow tenants a fair deal, but it is far too late to save many of us. An immediate abolition of the tie for long term leases should be the first step, with no retribution on rents. That will never happen now. There are many questions remaining unanswered such as Insurance charges which act as a "stealth" income for the Pub Cos. These will take years to sort, probably through the Courts, which ever way, be it rent arbitration etc, it will cost money that I don't have. That is

why many are looking to grasp the nettle and take matters into their own hands. There is a deep feeling of anger and injustice and the system failing us. Until the Corporate might of the greedy Pub Companies is diminished, there is no hope for me or for that matter, the traditional British pub.

22 October 2009

Supplementary memorandum submitted by Phil Liddell

I don't feel I am qualified to comment on the RICS recommendations, not having read the report, however, their apparent re-alignment of their guidelines for rent calculations based on divisible profits and their interpretation of FMT is a step in the right direction. I feel that David Wakefield is far better qualified than myself to assess these changes, and puts forward many valid points which I thoroughly agree with.

Your second point, the BBPA's agreement with the BII and FLVA is a total white elephant—there is no substance to it, there is no meat on the bones. A voluntary agreement is useless—the likes of Punch Taverns and Enterprise Inns have ridden roughshod over similar codes of practice instigated by the BII, and their breaking of such have only warranted a slap on the wrists. The major Pub Companies will not voluntarily adhere to any practice that might erode their profits and give a fairer share to their tenants. They have demonstrated this in their attitude of contempt at the findings of the TISC Report and the latest BEC Report. Unless codes of practice are clearly defined, are agreeable between all the major players—tenants included, are mandatory and legally binding, the Pub Cos will continue to treat tenants unfairly. Don't forget the BBPA membership primarily consists of Pub Co employees and interested parties, and is funded by the Pub Cos. They have their paymasters' interest solely at heart. It's noticeable that the bodies who represent the tenants such as the FSB, Unite and Fair Pint, have not signed up to the BBPA allegiance.

An Independent rent review scheme funded by the bodies involved rather than independent tenants would be the way forward, with a blueprint for formulating rents, with variables set according to location, economic climate, footfall, and trading area.

The formation of the IPC is the only good news to come out of the breakdown of the mediation process. It is a true alliance, and one with a spectrum of interested parties. To have so many diverse bodies agreeing in principal to a basic manifesto, highlights the pub companies self interested views.

There has certainly been no change of stance from my Pub Company Admiral, since the publication of the BEC Report. They still refuse to allow me to source my own Buildings Insurance, they refuse to supply me with a copy or a schedule of the policy (if it exists), and they certainly refuse to provide financial help to their "business partner" in such a grave economic climate. This is despite irrefutable evidence presented to them that their rent and tied product charges are too high. Copies of my correspondence are available on request.

Admiral's most recent proclamation on their website also makes a mockery of intentions to change—voluntary codes cut no ice with these ruthless operators:

> "We're pleased to announce the successful completion of a financial restructuring which provides a stable foundation for the future.
>
> This move marks an end to recent speculation about Admiral Taverns' future and places us on a firm footing. There will be no impact on the day-to-day operations of the Group; business will continue as usual and the current management team will remain in position.
>
> Our main concern throughout these negotiations has been to minimise disruption to our staff, partners and suppliers and we are happy to say that we have achieved this."

Landlords, tenants, suppliers and contractors should also be unaffected, and will continue to do business with is as they have previously.

This recent intervention of Lloyds Bank to bail out Admiral Taverns to the tune of £650 million, having previously written off debts of £450 million in June this year, makes a mockery of the OFT's non–intervention in the super complaint brought about by CAMRA on the basis that the "tied model" is robust—ie that no major Pub Companies are in financial difficulties. Intervention is required immediately, and policies instigated without delay, if the tenanted pub sector is to survive. It won't survive in the hand of the Pub Companies, though they will simply re-form, leaving thousands of individual tenants and lessees bankrupt, homeless with savings and pensions decimated.

19 November 2009

Supplementary memorandum submitted by Phil Liddell

Considering other parties are being allowed to present further evidence to the Committee, I feel compelled to register my thoughts and views, and evidence should it be required. As a struggling current lessee with Admiral Taverns, I urge the Committee to be very cautious in accepting the notion that the Pub Companies are clamouring to change their ways. The codes of practices being formulated by the likes of the BBPA are very gracious, but do nothing to repair the damage done by the Pub Companies over the past 20 years to the tenants they have maliciously "churned", those left homeless, or stripped of their pension fund. Nor do they attempt to redress the totally one sided business arrangement that is the working of the modern "tied" lease. Nor do they help the businesses that are struggling right now—which is the majority of tied leases and tenancies. Don't be fooled, the Pub Companies are wolves in sheep's clothing. They have had numerous raps on the knuckles by inquiries in the past—and have treated the findings and recommendations of these learned committees with utter contempt. Only now, as they see individual tenants beginning to work together, with the formation of the IPC and the GMB backed Pub Revolution group, with the threat of mounting a serious challenge to their bully boy tactics, do they pretend to show reconciliation. However, as has been proved before, it is a sham, a guise to get them off the hook again.

The same problems in the industry remain as they did in 2004 as documented in the TISC inquiry, and certainly haven't changed since the first sitting of your Committee in 2008. In fact, the situation has deteriorated further. Just look at the evidence of pub closures. Don't rely on the BBPA/Pub Co closure figures—check out your local town for all the boarded pubs and the "lease for sale" signs—people desperate to leave this doomed trade, but unable to sell their business because the business has become worthless due to the "fire sale" of their landlords. The Pub Companies have devalued their own leased businesses by flooding the market with "business opportunities" available at nil premium. These are pubs in which the previous tenants (and sometimes a number before) have failed to stay solvent, but are now offered with "deals" that make them viable – if only for the short term. Many pubs currently avoiding the closed status are operating under temporary management—just to mask closure and prevent decay. These do not reflect the true picture of the tenanted and leased sector which you are attempting to investigate. Don't let manipulated figures of freehouse closures mask the fact that freehouses are many times more likely to survive in the current economic climate – or any other for that matter. The pubs closed by the Pub Companies are sold as freehouses, hence distorting the figures of true freehouses for sale. Highly respected property agent Fleurets issued a press release in November 2009, stating that 70% of it's sales were freeholds for Pub Cos, and that "the leasehold market has been decimated over the last 12 months—fewer assignments sold at prices 50% less than those pertained over the past 15 years". Instead of accepting the tampered figures that the Pub Companies and their lapdogs, the BBPA, produce, take a look yourselves in your constituencies, listen to your colleagues—(my MP Ian Lucas instigated a tenant survey which I have attached *(not printed here)*, similar to your own which highlighted many of the same problems). Speak to tenants, listen to accounts of their living hell. For all of the tenants currently operating, there is probable three times that number who have had their fingers burnt by the vicious practices of the Pub Companies. Some will have only themselves to blame, but many will have been ruthlessly exploited. The current deals being offered to new tenants and lessees are infinitely more attractive than existing tenancy arrangements, but are only a temporary fix—short term agreements which will be ripped up after a set time. They are currently viable, but will be unsustainable when they revert to the Pub Cos preferred terms. It'll be a case of like it or lump it for the tenant—most will become another churn statistic.

To enforce my point—look at the issues addressed in your first report and the help offered to me since its publication.

— Has the balance of risk between the tenant and landlord altered in this time. No

— Have the rewards of such a risk been adjusted in the favour of the tenant. Absolutely not. The rewards have diminished further as a result of the economic climate, and the refusal of the landlord to offer worthwhile help or incentives to allow the tenant to compete in a very difficult market, and its blinkered policy of screwing its tenants in order to keep the cash flowing to service its toxic debts.

— Have lessees earnings increased—No chance.

They've probably been eroded further.

— Have the major Pub Cos addressed the machine "tie"? No

My pub company has been trying to grab the profits from my newly installed prize and gaming machines for themselves—despite my lease having no provision for such terms.

— Is the tied tenant worse off than one free of tie. Of course they are.

This is a fundamental problem with the present system, and is why CAMRA were persuaded into issuing an objection to the OFT's first enquiry. The fact that the tied tenant has to pay up to double the open market rate for his beers is evidence enough. The figures in my case are:

Local Brewer Plassey, Fusilier Bitter 9g, 4.5%—retails at £58 plus VAT Free of Tie.

Through SIBA DDS scheme—I pay £90.29, the brewer gets well below list price of £58 (price dependent on Pub Company). SIBA take an admin fee, but do all the invoicing, payments etc, and the brewer delivers directly to the pub. The brewer also has to pay SIBA a joining and an annual fee.

Equivalent 4.5% bitter—say Marstons Pedigree, 9g through Admiral £98.31.

Carlsberg 11g—Admiral—£122.61 with current £50 brewers barrel discount—£107.33 plus VAT.

Bookers for six weeks around Christmas, £65.

Wholesalers non—discounted price—£88.11.

Direct from Carlsberg, much better deals can be agreed.

— Buildings Insurance: I challenged my Pub Company as to their Buildings Insurance policy details following an abortive claim. The excess was said to be £1,000 on all claims, and because mine was under that figure, I was unable to claim. The policy had never been sighted by myself, and I suspended payment until the document was produced this month. I also requested that I was allowed to source an alternative policy. Admiral refused. I have now resumed payments, but feel I am paying over the odds for an inferior policy to one offered on open market.

— Rent concessions, transparency and help: non existant, or available with strings attached.

— Rent concessions were sought by myself considering the current economic climate—although I have been able to pay the rent and pay most of my suppliers, it has been at the expense of my own wage. Considering my current turnover of just over £100K annum, and a profit of virtually zero, the current rent of £14,443, is excessive. Even considering our previous years turnover of approx £215K, the rent is excessive if you remove my drawings from the net profit. Net profit has never exceeded £18K. My lease is on an upward only RPI linked rent. Admiral and its predecessor Pyramid Pub Company, had failed to instigate this RPI clause since the commencement of the lease. Having discovered this oversight in 2007 Admiral issued me with a demand for 12 years back rent and increased the rent by over £4,000 per annum. Despite my solicitor negotiating a more affordable settlement, I am still struggling to pay the arrears.

The RICS formulas for rent calculations are flawed, and in need a serious overhaul. Considering Local Authority Business Rateable Values are based on the RICS formula, it brings into question the setting of these figures. Mine has increased from £2,500 to £18,500, based on 2008 turnover. This, amongst the many other factors, will undoubtedly bankrupt me in the coming year, unless it is drastically changed. However, considering the far reaching consequences of such amendments to these calculations, I doubt if the RICS will ever own up to their mistakes, nor adjust the formulas.

For the past four months I have been earning approximately £200 a month. This is not sustainable in the long term. For approx 16 months previous to that I had earned a good wage away from the pub, as had my wife, having realised that the pub couldn't sustain a decent wage for the pair of us, and we couldn't afford a holiday. It also ensured that our cash flow would be maintained and we would remain solvent. I was working 40 odd hours outside of the pub and putting in 30 40 hours at the pub. During this time we took absolutely minimal wages/drawings, and registered a break-even/loss on the accounts. However, my work dried up in September 2009, furthermore, it was debateable how long I could sustain a 80 hour week without risking my health. My wife continues to work outside the pub, helping occasionally, and is subsidising my wage. I am unable to run a car through the business, and there are no other perks that I can think of. My wife became so disillusioned with the pub and business that she moved out last year into a private house, so the accommodation is hardly a perk, and sub-letting is prohibited in the lease. For the first five years tenure, I have earned on average £2.60 an hour, my wife similar in the time she has worked. Currently I am working for approx £1 hour. We are unlikely to recoup our investment of £30,000 in the business, as in the unlikely case of the business selling, most will be paid in fees and debts. The Pub Company will demand around £800 for dilapidations survey, around £1,000 solicitors fees (theirs), plus the costs of dilapidations repairs. My costs will be £1,000 solicitors fees, £700 EPC report: to creditors; £12,000 Barclays bank loan repayment, £5,000 back rent to Admiral, £6,000 fee if an agent secures a sale.

I currently have an uneasy relationship with my landlord. I have had a recent visit from my BDM, who was unable to offer any concessions or financial help. He did offer "free glasses and t-shirts as some sort of "olive branch" which I'm sure will constitute a 'financial help package' in the eyes of Admiral, and can be presented to you as the caring side of the Pub Co. It's only window dressing though, as I hope you realise. Maybe they want to counter my claim's, through various media (including BBC Radio Wales recently) that they are unwilling to help their "business partners", and are more concerned with their fat bonuses, on par and just as immoral as the failed bankers bonuses. The cellar Inspector appeared last week—suspicious that falling orders through Admiral constituted "buying out" in his eyes, rather than falling sales due to the January "slump". I object to paying his and his colleagues wages through my inflated charges and hefty rent. I also object to financing a BDM who cannot offer anything more constructive than "raise your prices to increase your profit levels" as business advice. As Wetherspoons have proven, value for money goods are attractive to the customer especially in time of recession. This is a company who are continuing to expand, continuing to post decent profits, despite the current economic climate. I also object to indirectly financing my landlord, as should members of the Committee. Admiral have recently been "bailed out" by Lloyds (who

took on HBOS toxic debt), to the tune of £850 million. However, the Company infrastructure remains, the same managers and operations personnel are running the business, the same failed business model is unaltered, the same gross incompetence repeated, yet as a taxpayer enlisted without choice, we are bank rolling Lloyds/Admirals financial failings. This is a National disgrace.

I am striving to instigate initiatives to maintain and improve business, the pub is as busy as it can be, and I have made many financial adjustments, tried many different concepts. In September I decided to finish with our highly popular pub meals. The overheads had become too onerous, energy bills, wages, repairs and raw materials had made it unviable. We have looked to economise in every way, bills are down drastically, staff numbers have been more than halved, and ironically, it's the IR and VAT bills which have reduced most. I no longer pay the Revenue and Customs up to £5,000 a quarter in VAT, Tax and NI contributions. The general economy suffers as a result of these forced actions, as does the local economy in reduced staffing and the suspension of purchases of local produce. However, despite all of my efforts, these measures do not hide the fact that we are fighting a loosing battle given my financial and operating constraints and it is only a matter of time before I "call time" for the last time.

There is an ongoing systematic abuse of the system, the exploitation of tenants and lessees under the tied model which has been going on for many, many years. It's about time that someone had the "balls" to do something about it, and to do it immediately, before more lives are tainted, before more of our National Heritage is destroyed forever, before we loose the hub of our communities. I hope this Committee has the foresight and courage to tackle the problem full on, rather than compromise and pussyfoot around. I somewhat doubt that anything will happen before a General Election, with most of you toeing the party line, and accommodating the do-gooders. But please consider the lives that are being ruined by this corporate exploitation, and the position you are in to change that. Please have the courage of your convictions.

1 February 2010

Memorandum submitted by Marston's Pub Company

1. Executive Summary

Marston's Pub Company (MPC) has taken very seriously the conclusions and recommendations of the BESC investigation into leased and tenanted pub companies. Not only has MPC launched a range of initiatives designed to address the significant business issues faced by our tenants and lessees, but also it has played a full and active part in the British Beer and Pub Association's efforts to develop accords with Lessee representative groups.

MPC is fully committed to the agreement between the BBPA, BII and FLVA. MPC will revise its own code of conduct in order to meet and exceed the new standards established by the BBPA/BII/FLVA agreement. Our revised code will underpin our relationship with our tenants and lessees and will be provided to them whether existing or prospective. This code will be binding on MPC and its customers where appropriate.

MPC, as a member of the BBPA, is also fully committed to the Pub Independent Rent Review Scheme (PIRRS) which has been launched recently.

MPC is passionate about the value of the tied pub model and remains convinced that it offers real value to tenants and lessees, the Company itself and consumers. MPC is committed to trading responsibly and to the mutual benefit of all parties involved in any agreement.

MPC believes that significant improvements have and will continue to be made to the operation of tied agreements. As a result it argues that further action or intervention in the industry will be unnecessary or indeed counter–productive.

2. Marston's and Marston's Pub Company

Marston's has been brewing beer and running pubs for 175 years. It owns about 2,200 pubs and operates five famous cask ale breweries. It also owns its distribution fleet and employs an extensive team of Beer Quality technicians which concentrates on raising the excellence of cask beer sold in pubs. Marston's is a significant employer in the Midlands.

Marston's Pub Company operates 1,700 tenanted and leased pubs in England and Wales. It has a very flat structure there being only two layers of management between lessee and Managing Director. Alistair Darby runs the division. In his first 14 months in the role he has visited 400 pubs and spoken extensively to tenants and lessees. He has also chaired the BBPA working party tasked with addressing the findings of the BESC report. MPC has also undertaken an in depth survey of lessees' and tenants' attitudes through CGA, which interviewed over 200 pubs.

3. Business Initiatives Launched to Assist Tenants and Lessees

i) *Pricing*

Around 75% of MPC's tenants and lessees are tied for wines, spirits and soft drinks. In the autumn of 2008 it reduced the prices of these significantly using Booker Wholesale as the competitor benchmark. This had the effect of moving £1 million of margin into tenants' and lessees' businesses — about £1,000 on average per pub. As a result volume sales have risen significantly.

In April 2009 MPC passed on lager price increases £5 per barrel below those recommended by the supplying brewers. In addition an extra £5 per barrel of lager bought between April and September would be refunded in October 2009, on condition that tenants and lessees agreed to clean their beer lines weekly, to confirm that they had professional stock takes and to stick to their contractual agreement. Over £40,000 was refunded in October to 159 tenants and lessees. It is sad to note that, despite considerable promotion of this scheme, less than 20% of eligible customers chose to participate when invited to do so.

MPC has continued to offer tactical price promotions to pubs under specific competitive pressure. These offers have had mixed results confirming that success is dependent on a committed tenant or lessee and adequate space in the pub to cope with increased volumes.

ii) *Support*

MPC has provided £3 million of rent and discount support to lessees and tenants over the last 12 months. It has also trained all of its BDMs to conduct in depth business reviews with tenants and lessees so that they can identify together opportunities for sales growth, margin improvement and cost reduction.

MPC also has a dedicated team which provides extensive business building advice through its regular Bar runner magazine, its Full House manual and by supporting industry events such as National Pub Week in cooperation with Justice for Licensees.

MPC uses the buying power of Marston's to offer services such as refuse collection or pub consumables to its tenants and lessees at better rates than can be achieved individually. It also provides advisory services, for example for utilities or business rates, to enable tenants and lessees to cut operating costs. MPC earns no commission from any of these services.

iii) *Licensee Skill Development*

MPC has always had a strong track record of offering high quality training both to existing tenants and lessees and new ones. During 2009 MPC has added new programmes designed to address the increased strain imposed by the consumer recession. Two courses, The Profit Improvement Programme and The Rescue Package, have proved very successful. They have been especially useful when allied to extended repayment plans as a result of tenants and lessees falling into arrears.

iv) *Agreement innovation*

MPC has recognised that more challenging market conditions require greater choice in agreements available to tenants and lessees. As a result MPC has launched four new agreements in 2009.

The Tracker agreement converts a fixed fortnightly rent payment into a variable charge levied on barrels of beer purchased. This agreement charges rent by adding £75 to each barrel purchased up to 200 barrels. At this point no further charges are levied and all incremental barrelage is rent free. The agreement therefore allows rent to flex with the ups and downs of trading and rewards endeavour. In addition all machine income after tax and rent is taken by the tenant to help increase revenues.

The Premium Tracker agreement builds on The Tracker agreement by adding additional support through a weekly reverse premium of up to £200 for the first six months and a free first delivery of stock. This agreement is used to give specific tenants a fast start in their pubs.

MPC now has about 100 Trackers in place.

MPC is trialling The Advance Agreement. This gives tenants and lessees high discounts on all purchases (£120–£130 per barrel on ales and £170 per barrel on lagers) in return for an additional payment. This payment is calculated off a reduced volume target resulting in a benefit of about £5,000 to the average MPC pub. The agreement also includes a more rewarding AWP income sharing mechanism. The Advance agreement sits alongside the existing lease and can be taken up subject to a few basic criteria being met. MPC believes that this agreement addresses the key issue which affects landlord—lessee relationships by supplying beer at competitive market prices.

The Retail Agreement is now being rolled out by MPC into 90 pubs. In these pubs the retailer earns 20% of the net take from which income is earned and staff paid. MPC takes responsibility for everything else from repairs and refurbishment to tills and utility bills. The agreement provides a very low risk entry into a pub business—the retailer only requires a refundable deposit of £5,000—and all the expertise of Marston's pub retailing skills. MPC expects this agreement to expand significantly over the next two to three years.

Finally, MPC no longer incorporates lessee/tenant AWP income into its FMT rent calculations.

4. Conclusion

MPC is fully committed to the BBPA/BII/FLVA agreement and PIRRS.

MPC has evolved rapidly to improve the sustainability of tenants' and lessees' businesses. MPC will continue to innovate in the face of a challenging consumer environment.

MPC is passionate about working cooperatively with its tenants and lessees to improve relationships and will continue to support the BBPA's efforts to build agreements with Lessee representative bodies.

MPC argues that significant progress has been made in the aftermath of the BESC report and that it is now time that the industry is allowed to implement the initiatives to which it has committed without further distraction.

18 November, 2009

Memorandum submitted by David Morgan (Cookseys DMP)

1.0 Introduction

1.1 In accordance with the email issued on 3 November in respect of the follow-up session of the Business, Innovation and Skills Committee to be held on 8 December 2009, I have the following report to place before the Committee covering the following four topics:

- RICS Pub Industry Forum Report and Recommendations;
- BPPA's Agreement with BII and FLVA to revise its framework Code of Practice on the granting of tenancies and leases;
- the Independent Pub Rent Review Scheme;
- the formation of the Independent Pub Confederation.

2.0 Rics Pub Industry Forum Report and Recommendations

2.1 The recently issued RICS Report is welcomed as a significant step in the direction of restoring confidence and credibility in the industry that it serves, from the perspective of the 23,000 supply tied lessees whose leases automatically contain rent review provisions or third party referral obligations, that are the subject of either the involvement of individual RICS members, or the President of the RICS acting through the RICS Dispute Resolution Service in the appointment of arbitrators.

2.2 *Trade Related Valuation Group (TVRG)*

2.2.1 The specialist division of the RICS dealing with licensed and leisure property, is known as the "Trade Related Valuation Group" (TVRG). Until the middle of 2008, the TRVG was chaired by Rob May, FRICS, the National Rent Controller of Enterprise Inns. That job title was never openly acknowledged and his four years or so chairmanship of the TVRG referred to his employment as "pub expert" rather than as a direct employee of Enterprise Inns who, with Punch Taverns, are one of the two largest owners of supply tied leasehold public houses.

2.2.2 The RICS Pub Industry Forum Report has correctly recommended that the composition of the TVRG should be the subject of significant change as a result of the perception of a bias within that all-important advisory group towards the interests of freeholders rather than leaseholders. Furthermore, the existing TVRG is chaired by Martin Willis, FRICS, a Senior Director of Fleurets Chartered Surveyors, who's Company also receives significant fee company from the major Pubcos. Currently, the membership of the TVRG has no representative element that is considered as substantially representing the interests of the 23,000 supply tied lessees. Unless that situation is addressed, it is quite possible that the perception of bias might unfortunately be allowed to continue.

2.3 *Conflicts of Interest*

2.3.1 The regulations governing conflicts of interest are currently under review by the RICS and comments and submissions have been invited to which I have contributed. The previous and relatively stringent conflict of interest regulations have now been removed from the RICS Codes of Conduct and as such there is no clarity over what actually constitutes a conflict of interest.

2.3.2 A recent example involved the appointment of an arbitrator in respect of a supply tied leasehold public house in Devon. The Arbitrator was appointed by the President of the RICS without the lessee being previously advised of the identity of the appointee, or of the detailed items that he raised of connection with the freeholder which he did not consider constituted any form of conflict of interest. That appointment was made, to which my lessee client strenuously objected. Those objections were ignored and the arbitration was to proceed against my Client's strongest wishes. However, a compromise settlement was effected, substantially under the freeholder's initial rental aspirations.

2.3.3 Another example concerns a central London public house occupied as lessee, by a Pubco. I act for the freeholders. The Dispute Resolution Service of the RICS were intending to appoint a central London Chartered Surveyor whose firm substantially acts for the same company that is the lessee in occupation. My freehold Clients raised strong objection and the intended arbitrator then stood down. A new arbitrator has only recently been appointed. Whilst the original arbitrator may have felt in himself that he could exercise impartiality, the perception was crystal clear that his stature as arbitrator was completely compromised as a result of his firm's detailed involvement with the Pubco lessee in occupation.

2.3.4 All property leases refer to the President of the RICS as being the source of appointment for either arbitrators or independent experts in respect of a request for third party dispute resolution. The automatic assumption is that a Chartered Surveyor should then be the appointee. In situations requiring substantial accountancy skills as with the profits method of assessing public house rents, there is no specific reason why a senior accountant, being a member of the Institute of Arbitrators should not equally be as capable of acting under the Arbitration Act 1996.

2.4 *Effect of the RICS Recommendations on Rent Review Negotiations*

2.4.1 The days of major brewery companies having significant influence over the leased pub sector has long gone. With the demise of those influential players when substantial estates departments were staffed by Chartered Surveyors, virtually all rent review negotiations are now undertaken by non RICS members in the form of either Business Development Managers (BDMs), or Business Relationship Managers (BRMs). The alteration or variation in RICS regulations, will have no effect or influence on non RICS members.

2.5 *That the Supply Tied Tenant should be no worse off than the Supply Free Tenant*

2.5.1 The RICS recommendations are that this prime principle should be followed in the course of rent review negotiations. In the seven days prior to the issuance of this document, I have had a number of negotiations with other Chartered Surveyors acting for Pub Companies. None had any conception of the prime principle and even if it was tacitly acknowledged, the method that they considered appropriate, was a simple adjustment of gross profit margins.

2.5.2 The Chartered Surveyors concerned, all considered that they had in a general sense, taken the prime principle into consideration. They had no comprehension of the balancing of the wholesale discounts foregone for the supply tied tenant, set against the wholesale discounts that would be available to the supply free tenant.

2.5.3 A similar situation has existed in recent arbitration awards wherein the arbitrators roundly dismissed any relevance of the prime principle in assessing rent calculations.

2.6 *Transparency*

2.6.1 The much welcomed RICS Forum Recommendations will not alter the basic issue of transparency in rent review negotiations. It is my considered view that comparable evidence will continue to be cherry-picked to suit the arguments advanced by the freeholders who in any event, have the availability of a comprehensive database of other public houses in the general area of the subject premises and which are never in totality revealed to the lessee or the lessee's representative. Applications for Discovery under the rules of arbitration or even in court procedures, are strongly resisted on the basis that they are but "fishing trips". Rent review negotiations never reveal the existence of other similar premises in the general area that have had rent reduction.

3.0 BPPA's Agreement to Revise its Framework Code of Practice

3.1 The current Codes of Practice that were formulated after the TISC 2004 recommendations, have in the main, been largely ignored at foot soldier level. It may well be that the Board members of the companies concerned, stoutly defend the existence of Codes of Practice and ensure that they are widely published. However, there are many examples of Code of Practice abuses that if discovered and aired publicly are dismissed as being perpetrated by "rogue elements" and the individuals concerned are either subsequently sacked or transferred.

3.2 A detailed critique has been made available by the Fair Pint Group, of which I am a founder member of the Steering Group, which has analysed as at the date of issuance of this Report, the objectives of the BPPA framework Code of Practice. Suffice it to say that I endorse the observations and comments made.

4.0 The Independent Pub Rent Review Scheme (Pirrs)

4.1 It has been acknowledged for some considerable time that the existing Dispute Resolution Service either by independent expert or arbitrator, under the aegis of the RICS, tends to be very expensive. Indeed, so prohibitively expensive, that a prime avenue for forcing settlement by the Pubcos, has been the threat to lessees of associated expenditure which almost always dissuades lessees with grievances that would either be resolved by third party resolution, from pursuing that objective.

4.2 PIRRS is a very welcome attempt to resolve the expense of third party dispute resolution. At the core of the system is the appointment of a panel of independent expert Chartered Surveyors who are deemed as having sufficient knowledge and expertise and can act on a fixed fee scale, given agreed referral by both parties.

4.3 It is understood that the initial attempt to establish the register of appropriately qualified Chartered Surveyors, has not been successful as a result of a number of selected individuals declaring on the BII website for PIRRS (now partially suspended) that they had no conflict of interest. The individuals concerned are either directors or partners of major firms of Chartered Surveyors who are in receipt of large volume instructions from the various Pubcos. The observations as above, in respect of RICS conflicts of interest apply. Although the individuals concerned may have it in their own minds that they cannot perceive conflicts of interest, it is more than likely that the supply tied lessees will perceive a strong potential area of bias by association. This is neither acceptable nor satisfactory.

4.4 *Lease Deed of Variation*

4.4.1 All existing leases have an automatic third party dispute resolution system that is ultimately controlled by the President of the RICS. The election of a PIRRS referral is a voluntary action between lessor and lessee. It can only occur with those companies that are signed up to the BII PIRRS initiative. It is an aspiration of the BII that leases will be changed by Deed of Variation to incorporate the PIRRS dispute resolution system.

4.4.2 I do not share the belief that that aspiration will be achieved. The underlying reason is that the banks and bondholders of the Pubcos would in my view, not easily accept a far simpler and cheaper method of challenging existing rents, thereby endangering the rent structure that underpins the asset values upon which share values are based. Without a specific industry-wide deed of variation, the general availability of PIRRS in a practical sense, will not be achieved.

4.5 *Costs and Representation*

4.5.1 Unless the supply tied lessee is capable of self-representation, the individual will still have to engage a professional to represent and stand against the aspirations of the freeholder. It is almost a certainty that the freeholder will either utilise their own in-house Chartered Surveyors, or engage an independent firm to act for them. This creates a severe imbalance against the individual licensee, should he or she care to not engage representation.

4.5.2 The PIRRS has been sold on the basis of providing a cost-effective alternative to arbitration. In reality, the only area that a saving is made, which in itself is thoroughly welcomed, is in respect of the independent expert's fees.

4.6 *Overview*

4.6.1 At the heart of the PIRRS is the panel of independent Chartered Surveyors. It is accepted that a large number have firms that achieve significant fee income from Pubcos. Therein lies the major of problem of the perception of bias and the declaration of genuine conflicts of interest. Unless this core factor can be resolved, the PIRRS will have great difficulty in achieving industry-wide support and recognition.

5.0 Formation of the Independent Pub Confederation

5.1 Fair Pint, of which I am a founder member of the Steering Group, is a member of the IPC. This umbrella organisation which includes a large number of other tenant based groups, is effectively spearheaded by the ALMR and Fair Pint. It would appear that there is no other organisation, even in a general sense, that actively represents lessees' interests and its continued activity and strength of purpose must be encouraged to give an alternate voice to that of the Pubco/Brewer's representative body in the form of the BPPA.

6.0 General Conclusion

6.1 To further expand on the observations and views as outlined above, I would be quite prepared to appear before the Committee and give evidence and further explanations as required.

16 November 2009

Memorandum submitted by Eddie Murphy

I have been in the licence trade for 30 years and so much of the difficulty we are experiencing has been bought about by diluted legislation from Parliament. When Lord Young looked into our business his initial reaction was the same as the BESC inquiry in that he was appalled and vowed to break the hold on free trade. I can only assume then that the lobbyists got to work on him and we ended up with a watered down version that was immediately taken by the beerage and we were back to square one. The very same has

happened again this time. I assume this as, once again, we are hearing of the thousands of happy people running pubs for Punch and Enterprise. How are their low cost entry and support packages are maintaining the ability to compete with free trade outlets?

I now work as a consultant mainly for groups in administration, the only pub I am involved in is free of tie and very successful! It is not in my interest to see the tie abolished but to once again see what I genuinely believe to be sincere politicians being fed misinformation by the beerage is very sad!

I strongly suspect that if anyone ever reads this it will be dismissed as the usual whinging from embittered individuals which is very sad, if you are in a position to give us a voice please help those thousands of people who desperately need it!

4 November 2009

Memorandum submitted by Punch Taverns Plc

Punch Taverns plc ("Punch") welcome the opportunity to make a submission as part of the consideration by the Business, Innovation and Skills Committee ("the Committee") of developments following the publication of its Report on Pub Companies in May of this year ("the report"). This memorandum is further to the detailed oral and written evidence submitted by Punch to the original inquiry.

1. Introductory Comments

1.1 Punch are one of the UK's leading pub companies, owning some 7,670 pubs—out of a total of approximately 57,000 pubs in the UK. Some 6,840 of our pubs are leased and tenanted while the rest are managed premises.

1.2 Punch readily acknowledges that the Committee raised in their report important and genuine concerns about the relationship between pub companies and their lessees. We recognise that these need to be addressed in a constructive manner.

1.3 Even before the publication of the report, Punch had begun a process of improving the relationship with our lessees. In our Interim Results announcement on 29 April 2009—prior to the publication of the Committee's report—we identified the need to evolve further our business model and provide greater clarity to our business partners—our lessees. We continue to be fully committed to building sustainable and open relationships with our lessees, as fundamentally we only succeed as a business if they succeed.

1.4 Punch agrees with the Committee that it is timely to look now at the significant developments in the industry which have taken place since the publication of their report on 13 May 2009—namely the industry-wide mediation process which ended with the production of a revised Framework Code of Practice on the Granting of Tenancies and Leases ("the Framework Code"); and both the submittal of a super-complaint by CAMRA and response by the OFT.

1.5 The period since the publication of the report has also witnessed continued challenging economic conditions for the pub industry. Punch has responded quickly to provide assistance to our lessees at more than more than £1.6 million per month through further product discounts and/or rent reductions. We have to date assisted more than 2,400 lessees with such extra support. This is more than double the level provided in the previous year. Financial assistance of this type is not subject to subsequent repayment.

1.6 Punch appreciates the opportunity to explain the implications of developments since the original report of the Committee. This memorandum will first offer comment on the four areas highlighted by the Committee in their call for evidence, along with a consideration of the super-complaint submitted by CAMRA to the OFT, and finally some concluding comments.

2. RICS' Pub Industry Forum Report and Recommendations

2.1 Punch supports the RICS' Pub Industry Forum Report and Recommendations and has worked to ensure that the key recommendations are included in the Framework Code.

2.2 Beyond this, Punch not only guarantees to abide by the terms of the Recommendations but will incorporate them into the Punch Charter, which sets out commitments to our licensees in the key aspects of our relationship.

3. BBPA's Agreement with BII and FLVA to Revise its Framework Code of Practice on the Granting of Tenancies and Leases

3.1 Following the publication of the Committee's report, Punch took the lead in working with others in the industry—lessees and landlords' representatives, small and large brewers, other pub companies and consumer groups – with a view to making clear and sustainable changes to our business model and in doing so addressing concerns highlighted in the report.

3.2 This took the form of a mediation process which involved stakeholders from across the industry and was presided over by Michel Kallipetis QC, taking place from June to October 2009. Mediation was entered into by Punch in good faith in order to seek an amicable and negotiated settlement of issues raised by the Committee's report. It is regrettable given the importance of the issues under consideration that not all parties who entered into mediation were able to agree to the Framework Code which resulted from the process.

3.3 The key elements of the Framework Code are detailed below and constitute obligations on pub companies which amount to a step-change in their relationship with lessees. Pub companies will be obligated to:

- Establish standards of competence for BDMs and set out a procedure to deal with complaints and resolve disputes.
- Describe the various rental and purchase obligations offered by the company.
- Demonstrate transparency with regard to prices charged, eligibility for discount and whether they will allow guests beers supplied outside the tie.
- Make clear the pub company's policy in respect of rent setting and review including full transparency in regard to how the Fair Maintainable Trade (FMT) has been calculated with a breakdown of costs and detailed information on the assumptions made on turnover.
- Provide shadow P&Ls which must provide sufficient detail to enable tenants to take proper professional advice.
- Draw attention to the availability of ALMR and other benchmarking reports.
- Ensure Upward Only Rent Review clauses are not included in new leases and offer existing lessees the opportunity to convert to new leases subject to agreement.
- Remove AWP income from the divisible balance and make clear how machine income is considered.
- Supply lessees with full details about insurance cover and excess payable and price-match where lessees are able to find a cheaper like-for-like policy.
- Set out a clear policy for the operation of flow monitoring equipment in accordance with minimum standards to be set out in the BBPA code.
- Make clear the company policy with regard to restrictive covenants.

3.4 Punch believes that the Framework Code offers a real and substantive step- change in the relationship between pub companies and lessees. We would like to bring to the attention of the Committee three aspects of the Framework Code in particular which substantially benefit lessees—namely; the breadth, speed and binding nature of the final agreement.

3.5 *Breadth*—The British Beer and Pub Association (BBPA) represents companies owning around 94% of leased and tenanted pubs subject to purchasing obligations. The Framework Code will therefore have a wide-reaching impact on lessees across the industry. It is worth noting that of the current Punch leased estate of 6,840 pubs, around 1,500 lessees are represented by the BII or FLVA, organisations who signed up to the Framework Code. The agreement reached at the end of mediation therefore benefitted from the engagement and agreement of formal, representative bodies who spoke for substantial numbers of Punch lessees.

3.6 *Speed*—The revised Framework Code will take effect on 1 January 2010, offering near immediate improvements to the position of new and existing tenants or lessees across the country.

3.7 *Binding nature*—The Framework Code will be a mandatory requirement for membership of the BBPA, meaning that this is now the industry standard.

3.8 Punch believes that the Framework Code establishes a robust and challenging industry standard which guarantees new levels of transparency and equity for tenants and lessees. However, Punch intends to go further and exceed the Framework Code in order to offer, in the Punch Charter, the most attractive terms in competing for quality lessees.

3.9 In advance of the Framework Code coming into effect on 1 January 2010, Punch have taken significant steps to improve their relationship with lessees, with the effect that the following provisions are now already in place:

- Removal of the lessee machine share from the rent calculation.
- Removal of upward only rent reviews.
- Passing on of negative RPI rent reviews.
- Removal of restrictive covenants on the sale of pubs.
- Introduction of a price match commitment on our insurance premiums.
- Publishing expected income for prospective lessees on our refreshed and updated website.

3.10 More broadly, to further evolve our leased business model and build open and transparent relationships with our lessees, Punch has embarked on a major change programme "Pathway to Partnership", which will see a cultural shift to ensuring joint profitability for Punch and our lessees. As a further step on this path we will in December 2009 relaunch our "Partner Forums" to enable face to face feedback from our lessees.

4. The Independent Pub Rent Review Scheme (PIRRS)

4.1 We have been fully supportive of plans by the BII—as endorsed by the Committee—to introduce a low cost arbitration plan for determining rent in the pub sector. As members of the BBPA, we are happy to support and finance the PIRRS.

5. The Formation of the Independent Pub Confederation

5.1 We note the establishment of the Independent Pub Confederation (IPC), which is an amalgamation of existing stakeholder groups. We also note that the IPC represents only a handful of licensees and includes a number of campaign groups that are not formally constituted membership organisations. Whilst respecting their right to participate in the important debate regarding the relationship between pub companies and their lessees, Punch would again highlight that of our leased estate of 6,840 pubs, substantial numbers—some 1,500—are represented by the BII and FLVA, who are signatories to the Framework Code.

5.2 In addition, Punch operates a robust complaints procedure and would urge any of its lessees who have concerns about their business to speak to their Business Relationship Manager or their Regional Operations Director.

6. OFT Consideration of CAMRA Super-Complaint

6.1 The pub industry has been a perennial subject for investigation by the competition authorities, with several inquiries over the years by the OFT in the UK and the European Commission in Brussels. The supply tie has repeatedly been found by competition authorities to be compatible with EU (and therefore UK) competition law.

6.2 The Committee will be aware that the since the publication of their report, the OFT has investigated the super–complaint submitted in July 2009 by CAMRA in relation to the supply of beer in pubs. Specifically, CAMRA raised concern about the operation of exclusive purchasing obligations by pub–owning companies, which require lessees to purchase beer solely through their pub–owning landlord (the 'tie'). CAMRA also raised other issues including the methods used by pub–owning companies for calculating rents.

6.3 Whilst Punch did not believe that it was necessary for the sector to be the subject of another competition investigation given multiple examinations over recent years, we cooperated fully with the OFT in their review of the super-complaint.

6.4 It is important to note that in submitting their super-complaint CAMRA made clear that they did not wish to see an end to the tie. We note comments made at the time by CAMRA Chief Executive Mike Benner: "*"Total abolition of the 'beer tie' would be a grave error and would be likely to turn the current storm of pub closures into a hurricane and lead to increased domination of the beer market by global brewers. Abolishing the 'tie' would be the classic example of 'chucking the baby out with the bath water."*[24]

6.5 The completion of the OFT analysis of the CAMRA super-complaint on 22 October 2009 concluded that the issues raised did not warrant further assessment and that no further action was to be taken. This conclusion was welcomed by Punch. We believe that both this decision and previous investigations by competition authorities in the UK and EU represent a robust record of detailed analysis of the sector. Further investigation would in our view be hugely time consuming and represent a major distraction from the challenges facing pubs across the country during the current difficult economic environment.

7. Concluding Comments

7.1 The developments which have taken place since the publication of the Committee's report do in Punch's view represent substantial progress towards the establishment of a new relationship between pub owning companies and their lessees, characterised by enhanced levels of openness and transparency.

7.2 Punch believes that the Framework Code is in terms of breadth of coverage, speed of implementation and binding nature, the most direct mechanism to deliver real and substantive improvements to the position of lessees. Punch has already begun the process of incorporating the content of the Framework Code into the Punch Charter and we look forward to our lessees both current and future benefitting from the provisions contained within.

[24] *"Super-Complaint" prompts OFT probe into Pub Market CAMRA Demands a "Fair Share" for Consumers*, 24 July 2009: www.camra.org.uk/page.aspx?o = 305998

7.3 It is further the view of Punch that whilst the reforms offered by the Framework Code provide a substantial rebalancing of the relationship between landlord and lessee, they should be seen as a floor rather than a ceiling. Punch intend to exceed the provisions of the Framework Code in our quest to be the most trusted and best value pub company in the UK.

7.4 The OFT analysis of the CAMRA super-complaint failed to identify grounds for further investigation. Given the continued challenging economic environment facing the sector and the far reaching attempts embodied in the Framework Code to improve further the pub company and lessee relationship, we are very firmly of the opinion that a further time consuming and costly examination of the sector by the competition authorities would represent a huge and damaging distraction.

7.5 Whilst Punch welcomes the further consideration of the sector which the Committee is currently undertaking, it is our strong belief that the priority for the industry should be the implementation of the reforms agreed under the Framework Code, rather than devoting time and resources to further consideration of structural issues surrounding the sector.

18 November 2009

Memorandum from the Royal Institution of Chartered Surveyors (RICS)

CLARIFICATION OF SPECIFIC TERMS USED BY RICS DURING THE ORAL EVIDENCE SESSION GIVEN TO THE COMMITTEE ON 8 DECEMBER 2009

Following your Committee's inquiry to clarify a few terms which I have used during the oral evidence session on 8 December, please find below the definitions of these terms:

On the difference between the terms ""reasonably competent operator" and "reasonably efficient", the correct term is *reasonably efficient operator*, which supplanted the alternative term several years ago. This follows the terminology used by the International Valuation Standards Board, which RICS follows. A full definition is contained within the RICS Valuation Information Paper (VIP Number 2) in section 2.4. A copy of this document has been sent to the Committee. This VIP is now the subject of review following the publication of the PUBCO Forum Report.

Regarding the calculation of goodwill, it is a complex area in all property sectors, not just for public houses. In relation to public houses, it is covered in a specific chapter of VIP Number 2 (chapter 3). The contents of this document include more comprehensive detail.

15 December 2009

Supplementary memorandum from the Royal Institution of Chartered Surveyors (RICS)

ANSWER TO THE QUESTION 19, ASKED BY THE COMMITTEE TO DAVID RUSHOLME DURING THE ORAL EVIDENCE SESSION OF 8 DECEMBER 2009

When the Committee asked whether a RICS member, when he values a pub, just gives an overall figure or is required to give a complete breakdown to explain how the figure is calculated, I said that if a chartered surveyor is engaged by the lesser or owner of the pub to negotiate a rent review, it is good practice to pass on as much information as possible to the person one is trying to persuade to accept that rent.

On the question on whether this is good practice or a requirement, there is no written code which states a chartered surveyor must give a full rental breakdown of the rent proposal at review when that surveyor is engaged by the landlord.

It is, though, a matter of generally accepted practice in all commercial rent reviews. Indeed, it is such an obvious and basic requirement that I suspect it has not been codified for this reason.

There are also issues of timing. A rent review notice to start a review may be served, often under the contractual provisions of the lease stating the amount of rent proposed. At this stage there may not be a full breakdown of the rent.

It is common practice for surveyors to open negotiations with the tenant or the tenant's representative if a rent notice is challenged (this happens in the overwhelming majority of rent reviews). When these negotiations are opened the first step is always to give a rental proposal breakdown. We identified that this was not happening as often as it should in the Pub sector during our Forum investigation. We anticipate our new code will require a breakdown to be given as soon as negotiations are started at each review.

15 December 2009

Supplementary memorandum from the Royal Institution of Chartered Surveyors (RICS)

It is obvious to us that the Select Committee, and industry, expect the RICS to take the lead as an independent body in helping to resolve some of the conflicts that exist in the pub industry. This includes creating a clear and transparent environment to reduce conflict and enable fair and equitable rents to be set within the industry.

Revised Guidance for Chartered Surveyors

One of the main recommendations of the independent RICS PUBCO Forum which reported in October last year was the need for a thorough review of guidance on the rental valuation of pubs (Valuation Information Paper No2).

RICS set up a working group to produce revised guidance and the first meeting was held last week, with the second scheduled to take place on the 11 February.

This group has two parts to it. Firstly, RICS asked TRVG members Martin Willis of Fleurets, Gareth Jones of Colliers CRE and David Butters of Gerald Eve to take the specific recommendations from the Forum and to start work in producing a working draft.

Secondly, RICS has populated the working group with surveyors representing other industry stakeholders, including Fair Pint and the BBPA.

RICS is also seeking to engage with other interested industry parties and seek further input on the final drafting before the revisions go through the wider consultation process and presentation to the Valuation Standards Board.

Code of Practice at Rent Review/Benchmarking Data

A wider group have been invited to input into a free standing code of practice for surveyors acting at rent review and lease renewal, and for proposals to recommend a set of some key financial variables for benchmarking data in the sector.

Scheduled meetings with several parties who believe that they may have an answer to the benchmarking topic are due within the next few weeks.

View of Industry Action

RICS welcomes the general industry efforts to change the environment in which it currently operates, such as the ALMR scheme, the BBPA Code and other initiatives from pub operating companies.

We understand also that a few cases have now been referred to the ALMR arbitration scheme and if this produces some good results for both parties it may grow into a similar service that is not unlike the RICS Dispute Resolution Scheme.

29 January 2010

Memorandum submitted by George Scott

I am a pub landlord, having now leased the Eastcote Arms for nearly 10 years from Punch Taverns.

Reasonably soon after embarking on this venture I realised that the contract I had signed in good faith was not what it was portrayed to be (ranging from failing to provide full FMT figures [thereby concealing misrepresentation] to severe service-level failures on a tied supply contract thus hugely negatively impacting the business).

On 17 November my case (a defence and counter-claim) was struck out of Court on application by Punch at Northampton County Court. This was followed by a recently added application for summary judgement for possession, which was awarded.

There are many serious issues, which Punch at all levels has consistently failed to address over a long period of time. (I would have got rid of the business long ago were it not for the fact that is was worthless, therefore "un-assignable"). I have therefore solidly stuck to the restitutionary tactic of restoring me to a position where I would have been were it not for Punch's activities—firstly within the company; ultimately using legal process which is where we are today.

Over the years Punch have used spurious and diversionary tactics to avoid confronting the main issues. I am particularly concerned and outraged at the events in Court last week:

- When it was alleged in Court to Punch that my reliance on the code of practice (Retailers' Charter), and Punch's repeated assertions that they would adhere to (or even undertake) the process; the response briefed by Punch via their instructing solicitors was that there was no need or legal obligation for them to adhere to such a document/process;
- And that an illegal (under duress) rent review was irrelevant to my case financially, as there would only ever be an upwards only rent review anyway.

Prior to this in July this year, when senior Punch representatives became aware of their repeated refusal to adhere to their code of practice (Retailers' Charter), again rather than confront and try to resolve the matters, they attempted to evict me from the site alleging that I was a trespasser.

— This came after nine years!

— They used the technicality that the wrong name (not person!) was on the lease.

— They were previously aware of this and accepted the reasons.

The fact of the matter is that when matters started to look uncomfortable for them they used any tactic possible to silence me. Fortunately I managed to overturn the July decision.

Again, before this in turn, in January this year, I wrote to Giles Thorley informing him that there was a long-standing rent (amongst other matters) dispute and that I was going to make one more attempt at resolving the situation. However, the business could not run in its current format, so I would trade on as if Punch were not landlords if nothing were to be resolved. As a result:

— A failed rent review partially took place ("we can't help you, you'll just have to go to the wall").

— A senior representative from Punch met with me and again refused to confront the issues but offered to sell me the site.

— I formed a syndicate and paid for a valuation.

— Punch pretended to have obtained a recent valuation and stated that a valuer had visited the site. I know this not to be the case.

— Negotiations suddenly and inexplicably foundered—a parting shot was: "we have possession".

— Upon further enquiry to a director of the company I was informed that they thought the site had closed, as on one Friday afternoon there was no reply from the pub or my mobile phone and an Area/Ops Manager had seen the site was closed at that time. This was completely untrue as there were two staff, a handful of customers and myself present at all times during the alleged time span.

This is further evidence of lies and "bully-boy" tactics and how the Courts cannot continue to hold that lessees and pubcos are equal business partners.

My point to you, Mr Luff, is that the pubcos have undertaken at the 2004 TISC and the 2009 BEC hearings to adhere to a code of practice and not implement upwards only rent reviews as part of a general undertaking to act transparently and fairly. This has also been very recently stated, and more assurances given, at various trade meetings and mediation processes; and therefore widely reported in the press and trade press.

It is surely appalling that Punch would so recently state in open Court (and therefore as a matter of public record) that there is no need for them to adhere to such principles and undertakings given to so many different organisations. I have requested a transcript of the hearing.

I firmly believe that this is another example of the inaccuracy of the recent OFT findings and that surely these matters should be referred to the Competition Commission. I am therefore asking you to consider this matter in the context of your Committee's most recent requests for evidence. Obviously any previous deadline cannot be applicable here due to the recent nature of this development. I have tried to be brief in outlining the whole matter. There is much more which I can say which completely belies this company's spin to the public.

26 November 2009

Memorandum submitted by Shepherd Neame Ltd

Shepherd Neame is a family controlled, independent brewer based in Faversham, Kent. We own and operate 368 pubs of which 321 are tenanted and 47 managed. The Company was established in 1698 and employs 325 people in Faversham. We operate the traditional integrated brewing and pub model.

Shepherd Neame registered its interest in the initial BEC Enquiry but was not asked to give evidence as the remit focused very much on the Pubco lease model. Since that time there has been a wide ranging Industry debate that has raised issues beyond the original BEC remit. We therefore feel it is important for us to register our interest in this debate.

Shepherd Neame, like other traditional family brewers, offers tenancy agreements with characteristics fundamentally different from many of the lease agreements offered by other operators. Our model, our business practices and our tenancy agreements are similar but not identical to other IFBB members, but are materially different in a number of key respects from Pubco leases.

— Our tenants can run a Shepherd Neame pub for as long as they like and are protected under the Landlord and Tenant Act.

— They are subject to one, three or five year rent reviews according to individual circumstances and agreement between the parties when they take the pub.

— The brewery is responsible for project management and payment of all external decoration, signage, lighting, major and minor structural repairs within the building.

— We pay for building insurance, and do not charge this back to tenants.

— We pay for and project manage all structural developments. As part of this process, we frequently will pay for and install new inventory, ie tables, chairs, pictures, etc for the benefit of the tenant.

— We hold the Premise Licence for all house and pay annual fees and make all necessary applications for variations. We provide full support in the event of reviews.

— The brewery owns and maintains most "hard fixtures", ie electrical wiring, central heating, gas and water piping, bar back fitting, etc

— The tenant only pays for the stock in trade and inventory on ingoing. The typical cost of entering one of our pubs is c£15–30,000. There is no goodwill payable at the beginning or end of the agreement; and the interest in non-transferable.

— We provide free of charge a full rating service.

— We pay for, maintain and are responsible for all health and safety and quality issues related to the supply of beer including dispense equipment, refrigeration, provision of glassware, gas and flow and electric equipment.

— We take out death in service benefit for our tenants.

— We work in partnership with our tenants through our Business Development Managers to identify how to maximise the offer for the pub in food, liquor and accommodation. We provide considerable marketing support, promotions, on line support and general advice.

We regularly survey our licensees on their attitude towards the Company. I include a copy of a recent survey benchmarking our performance in a variety of areas compared with other family brewers. In the main family brewers score very highly compared to other operators within the sector. Within this strong peer group we score very well in certain categories such as the relationship with our Business Development Managers but there is of course room for some improvement elsewhere. Importantly, 67% of our tenants are neutral or agree with the phrase "my rent is fair".

Only 15 of our pubs have been granted a lease with transferable rights (at the behest of the licensees themselves). All other agreements allow the tenant to issue six months notice to quit ie similar to a shorthold residential letting. If the tenant issues notice to quit then the onus and responsibility lies entirely with the brewery to find a replacement licensee. If we fail to do so within the notice period, we are obliged to buy back the inventory and stock in trade from the tenant.

In short we believe that this is a flexible low cost and mutually beneficial arrangement that compels landlord and tenant to work together in a constructive manner to achieve the common goal of growing the business. Of course it is true—particularly, at a time when the on trade is under so much pressure and there is a recession—that the relationship does not always work perfectly. Nonetheless there appears to be a high satisfaction rating for our support and services from our tenants. It is as much in our interests as it is in theirs to ensure that our current business model is not undermined in any way.

Almost all protagonists within this heated debate would agree that the family Brewer Tenancy Model is not the problem. I have taken the liberty of including an extract from an interview on the "You and Yours" programme with Mike Bell of Fair Pint and myself. In this Mike gives a strong endorsement of our model.

Shepherd Neame is a long established business that is determined to remain an independent family brewer and pub operator for many years to come. The model that we operate has evolved over generations and will continue to evolve to ensure that we attract the right quality licensees to our pubs and thereby maintain a sustainable level of trade.

We are aware of and support the submissions that have been made by the IFBB and the BBPA to this process and to the EU Block Exemption Review process.

We recognise that BISC will wish to look at all aspects of this debate. From our perspective the loss of the tie or any enforced variation to our business model could be devastating. Furthermore, any reference to the Competition Commission could create a high level of uncertainty in our business at a time when we are all focussed on trying to help licensees work their way out of the recession.

16 November 2009

Memorandum submitted by St. Austell Brewery

THE BREWERY TENANTED "TIE"

I write on behalf of St. Austell Brewery which was founded by my great great grandfather Walter Hicks in 1851. In addition to owning 175 pubs and operating a wholesale division we are a significant private sector employer based in Cornwall with around 1,000 people on our books at any one time. We trade across the South West in Cornwall, Devon, Somerset and West Dorset.

When considering the brewery "tie" I would ask that the BISC do not confuse long-term (assigned) leases, more commonly used by pub companies, and traditional three-year (renewable) tenancy agreements that are available through most traditional regional family brewers such as ourselves.

We are strongly of the opinion that our agreements are intrinsically fair and have stood the test of time. The brewery tie is of strength both to the tenant and the brewery.

It is not in our interest to have pubs that are closed because our business cannot afford that so we are constantly seeking ways to work with our tenants to ensure they survive in these difficult times. We are entirely flexible in our approach and any support is tailor-made to the individual pub.

As brewers and retailers we rely completely on the beer "tie" and the outlawing of it would certainly lead to more not less pub closures. The impact on the local economy and employment market is obvious to predict.

As a long-established family-run company we are very concerned by the potential damage to our business and to the interests of our tenants that any significant changes to the traditional tie would threaten.

We rely upon our traditional relationship with our tenants that for generations has proved to be a well-tried and tested and mutually beneficial business model. It is also important to note that the tie benefits the consumer in terms of wider product choice and competition.

Entering into one of our tenancy agreements offers good value and a comparatively easy way of starting up your own business. It is as easy to exit the agreement, by just giving a notice period, as it is entering it so that if by choice a tenant wants to move the business on he/she is not tied to a long lease that may or may not carry a premium for it.

St. Austell Brewery, as a member of the BBPA, has been happy to sign up to the new Code of Practice on the Granting of Tenancies and Leases and the industry now needs to focus on making that work in practice and not be wasting more time on another possible referral to the Competition Commission. Trading conditions are challenging enough at present without more uncertainty and red tape than we already have and that would result from any further intervention.

Please would you take the above evidence into account when the Business, Innovation and Skills Committee consider the future of the "tie". Thank you.

16 November 2009

Memorandum submitted by Stephen Shuttleworth

I am writing to share my experiences of Enterprise Inns plc and the general business practices of these organisations. I would like to offer my experiences of the said Pubcos. I will attempt to keep my emotions and personal feelings to a minimum, I feel it may be a little difficult so I apologise in advance.

I purchased a pub lease owned by Enterprise Inns in December 2007, and I am certainly not going to berate the fact that I did so, I was fully aware of the conditions of the lease. That said, I now know with undoubted certainty that the business model operated by this pubco is incredibly unfair, at the least extremely inconsistent and the manner in which they endeavor to enforce these practices amounts to nothing more than intimidation, bullying and harassment. Even while we were in the early stages of turning an ailing pub into a viable business Enterprise offered no assistance or advice. The regional manager was quick to praise us for raising beer quotas but never offered to help with the cost of entertainment which was a main cause of the uptrend in trade, this obviously then left us with huge stock bills from Enterprise, again in the early days of our business there was a learning curve, we certainly were not prepared for the manner in which Enterprise's credit control department collected money, insisting we put huge amounts of money on our personal credit cards or we would not be supplied with stock. Being honest we abided to the rules of the "Tie". Tell me; is this a fair and equitable arrangement, a partnership seeking success for all?

When I initially purchased the lease, Enterprise Inns, whilst divulging the basic facts about their terms failed to go into the details of their business. Being tied for beer, cider and alcopops I asked at the time "are your prices competitive?" the answer was yes. Perhaps you would consider it a little naive but I took this on face value believing it to be true. Please tell me how 22 gallons of Carling at £232 from Enterprise against £155 for the same from a local supplier is fair. This is one example; the rest of the price list is *pro rata*. I estimate in the first year I paid between £20K and £30K above what I could have purchased my stock for. When I queried the exorbitant and uncompetitive price, I was told this was one of Enterprise Inns "Profit Strings" and it along with the rent and 60% of any gaming machines in the pub, allowed people like me the chance to own public houses for a relatively cheap outlay. To conclude the issue of price setting, I presume

that a business the size of Enterprise Inns with the amount of beer/stock it buys, commands handsome discounts, which they will never disclose, from the breweries, not only do they not pass on any of this discount to landlords they then see fit to raise the price they sell the beer/stock by what must be approaching 100%, because they can. I/we have to pay that price. How is this fair, 1) to the landlord who pays these vastly inflated prices and 2) to the consumer who then has to pay an inflated price for his drink.

He could in theory go elsewhere to somewhere selling cheaper, this then brings into play the argument of fairness to the landlord, who must then reduce his margins in order to keep his trade at some sort of level. Is competition good? Of course it is but only when the playing field is level. I would suggest that this is one of the contributing factors to publicans going out of business, reducing margins, having to pay the pubcos or beer deliveries are withheld and thus leaves no money in order to satisfy all the other creditors. If I thought for one minute that this was just a badly run business on my part then I would hold my hands up, however, with hundreds possibly thousands of licensees in the same situation surely commonsense must prevail.

My next subject which whilst not directly attributable to the tie, is part of the pubco model which again is totally unfair, is the setting of rent. In the space of 20 months I have seen my rent rise from £38,000 to £44,320 added to which I have to pay Enterprise's buildings insurance of £41.50 a week, £2,150 a year for buildings insurance. The rent increase in the worst recession for 60 years amounts to approximately 24.5% when trade has dropped by approximately the same, again how can this be fair? There is no recourse.

The terms and conditions of the lease are another bone of contention, again I understood them when my solicitor went through the lease with me and I must say that there were some alarm bells sounding, but a combination of wanting to give my family a chance at better things and the belief that if we showed a little fortitude and a lot of effort we could make it work. I honestly thought that Enterprise would support us while we established ourselves, how sadly mistaken I was. When the lease said "Fully self repairing" boy did they mean it. Even when we had a major problem with unclean water, which we had unwittingly been serving to our customers, the amount of effort it took to get Enterprise to solve the problem was amazing. A fairly serious health and safety situation that resorted to us buying and using bottled water for a period of eight weeks while Enterprise Inns considered whether my lease meant that I should pay for the situation to be rectified, they eventually conceded. Again, I think it is the rigidity which Enterprise enforce the terms and conditions, another example, I asked for assistance in redecorating the pub, us being short of money, obviously this would have had a beneficial effect on trade, Enterprise would not entertain it, again quoting the terms of the lease. I was totally aware of the terms; it is this question of help, of working together.

Another aspect of our pub closing is the loss to all the people who work and are associated in one way or another with us, our employees, the entertainers and of course my family all of whom have said they will stand and fight with us but if it closes will leave with us. It saddens me to think of the personal cost to them.

Enterprise Inns have been unscrupulous and unrelenting in their pursuit of collecting money with absolutely no regard for landlords or the extreme trading conditions at all, indeed they have just sent into my pub bailiffs, no prior warning, just sent them in, despite the fact that we are still making an attempt to keep our rent to a manageable amount by making some payments. When the bailiffs were asked why they were there, we were told because of rent arrears, we are two weeks in arrears (£1,200), Why? Because I have taken the decision that it is only fair that my other creditors get some money and not only Enterprise. In order to get the bailiff to leave I was told by the head of Enterprise Inn's credit control department, that I would have to let the bailiff take all the money in our safe and till, when I pointed out I had very little, the reply was "you have been trading all weekend you must have money". When I pointed out that other creditors had been paid, I was again told that the bailiff would not leave. It was not until after the event that I discovered this is illegal, again another example of the bullying tactics employed by Enterprise Inns. The bailiff also made a walking possession order, listing all our fixtures and fittings, again unbeknown to us at the time, these cannot be removed, they have absolute privilege and only a court can issue an order to remove them. Next the bailiff said he was required to go into the residential part of the pub, my daughter's home, when she refused him entrance she was told the police would be called, again intimidation, bailiffs have no rights to touch personal belongings and no right to enter the residential part at all.

The following day I met with my regional manager to discuss the situation, when I pointed out that if Enterprise had wanted us out they could have entered and changed all the locks which they are quite allowed to do, that would have saved all the unpleasantness of the bailiffs, the response… "well you haven't bought any beer off us for weeks so we knew you had no money so we tried to get what we could before it was too late". I will admit to having broken my "Tie" but to make more profit, as Enterprise told me, well all I can say is that I have gone from a perfect credit rating to personally owing £78K in two years, admittedly not all Enterprise's doing, but a huge percentage of it definitely is. We broke our tie because of the restrictive manner it was applied, the cost of Enterprise's stock and to survive.

The point I am trying to make is the unscrupulous manner in which a so-called business partner conducts themselves. I am on the verge of losing my business; I'm certainly going to be bankrupt, a possibility of losing my home and possibly my marriage all due in no small part to Enterprise Inns business model. If I was the only publican in this situation then I would look at myself and question whether I did things wrong, but these unscrupulous people are doing this to hundereds of publicans countrywide and I know of at least one more city centre pub owned by Enterprise Inns that is on the verge of closing. I know there is nothing that can save me now, but surely you can do little to affect the setting of rents, but I would implore you to look at in great detail the "Tie", had I been able to pay competitive prices for my stock then I would have, to a

large extent, have been able to satisfy my other debtors, offer competitive prices to my customers and would not be in anywhere near the situation I am now and another viable public house would not be on the verge of closing.

I have proposed what I considered a mutually beneficial arrangement to Enterprise in order that we can continue to trade and hopefully begin to repay our debts, not only to them but our other creditors and obviously try to make a success of our business, Enterprise have chosen to take us to court, the judge making the comment that the Pubcos should be helping publicans, not taking them to court for £1,200 not even two weeks rent.

The most recent event that has happened to me, I made the offer to Enterprise that I would surrender my lease, hand back the keys and vacate the property, if Enterprise would drop all financial claims and the on-going court case, the answer was no but if I would admit all liabilities and vacate immediately Enterprise would deal with the matter by Consent! They have also now stated that we owe £20,000 dilapidation which they have ascertained without completing a report!

What happened to the virtues of integrity, endeavor, fortitude, hard work and honesty? I'm only one voice but how many has this diabolical occurrence already happened to? Why have no questions been asked? I would ask again please look into this intolerable practice and stop it before more people suffer.

I believe the facts in this statement are true.

22 January 2010

Memorandum submitted by Rod Suffell

I am unfortunately an Enterprise lessee.

I do feel that these investigations seem to be just revolving around in circles, I was very impressed with the BEC report and their findings and how accurate they were, however very disappointed with the OFT report outcome on the beer tie stating "No one would be better off being free of the tie" which contradicts the BEC report.

And with reference to Fair Pint and CAMRA and the super complaint against the Pub Co model this was an actual waste of time for me. I am an experienced operator who has worked in this industry from 1975, and do strongly feel that the Monopolies and Mergers Commission started the downturn in the public house, power and phone companies.

The days when you would take a brewery tenancy which was in black and white you pay X rent you are tied for all draught beer which is simple, free to buy spirits soft drinks one guest ale, cider no machine tie which meant the income from the machines nearly paid your staff wage bill, but today brewers are only allowed to operate limited pubs these days were days when operators made money and paid taxes.

In brief being an Enterprise Lessee:

I was offered a house which was closed on a low rent (TAW) £50 a week until a planned refurbishment, after four months of trading and being successful the rent was increased with an excuse that I was making too much money for myself.

When the refurbishment finally started (twelve months late) Enterprise stalled on negotiations for the lease, I supplied them with detailed profit & loss accounts and projected turnover with no response from the company. I was told that the rent expected would be between £22k & £24.5k with options of "Tied, Free of Tie or Volume on Discount" I again submitted revised accounts for the options and informed them that £22.5k would be the maximum for this house with written and accounted proof.

During this time the builders have nearly refurbished the house and being told by the area manager that my accounts are not a million miles away you think in your head to go ahead and by furniture and fixings for your new public house and venture with Enterprise. Close to opening after spending £55k I was told the rent is £28k tied only no other option available take it or leave it. I have to pay extra for cellar cooling insurance and building insurance although I can get the same cover for one third of the price.

At this point I questioned the offer and the previous proposals and was told if you do not sign the lease we have someone waiting to come in, when questioned about my investment into the premises I was told to take that as a loss. I feel misled, deceived and bullied into signing a lease.

Enterprise Inns have not come up with any historical trading figures or barrelage sales, they shunned my projections and wrote down on a piece of paper £5.5k a week would be my income so the rent equals £28k, year one after the refurbishment I took £4.1k per week and now at the end of year two we are at £3.2k per week which is £600.00 per year short of my projected accounts which is the one thing I am pleased about because I know I was not talking through my hat, and I could not foresee the bad times we are in now. However I feel we have still maintained a level of trade and held it.

Finally I must say I am not against the beer tie but I think the amount of percentage profit added by Enterprise is too high and it should be set at an acceptable level, The machine tie is very unfair I pay the electricity to have these machines on and I get less than 50% of the income. The monitoring of the beerlines via Brulines is unethical, inaccurate I have been charged £1,000 for buying in with evidence on a spread sheet that I questioned being inaccurate but they still took my money, "bullied again"

I have read in the reports that the pubcos are offering support to tenants, in 22 months I have seen my BDM three times, once to say hello the second to tell me I am buying beer out of the tie and the third after mailing him to tell him I have heard from my accountant and I have made a loss of £3,000 with a response I will come back to discuss this which was seven months ago.

I could possibly write a book as large as the holy bible with reference to Enterprise Inns and the unethical codes of practice, I do feel that all the pubcos are strangling the pub operators out of any profit which in turn reduces or totally diminishes all tax revenue for the Government.

I would feel happy paying a fair rent like 12% of total turnover buying my supplies 15% more than what my supplier purchases them for making £60k a year profit and 40% of my profit to the Inland Revenue knowing that money will go to improve our country instead of a property companies, directors and shareholders like Punch Enterprise S&N and Admiral.

18 November 2009

Memorandum submitted by Alan Turner

My wife has a lease with Punch Taverns, she works 60 hours a week and has not been paid for nearly a year. Each month is a struggle just to make the bills and she is only battling on because each month the money she will still owe, yes, owe when she moves out goes down with each loan payment.

She is paying in combined wet and dry rent more than 60% of her entire net turnover to Punch Taverns. On a turnover of £148k she is paying over £30,000 in dry rent alone by way of combined costs invoiced by Punch. Last week her takings were £3,150 but her payments to Punch totalled over £2,100, with that £1,150 she is expected to pay staff, and all operating costs as well as put money aside for VAT, it just is not possible. She has been made promises for over four years regarding repairs and upkeep, I used to own a buy-to-let property and I would be ashamed to take money from people living in such accommodation as we do.

These Pub Cos will not change, they can't change because the debts they carry will not allow them to change, only intervention from government can stop them exploiting people the way they do.

With the OFT completely failing in its inquiry it is imperative that you do as suggested earlier this year and forget the OFT and go to the Competition Commission.

I fear all of this will come too late to save my wife's business but it is something that needs to be done to stop her fate becoming that of others in the future.

22 October 2009

Supplementary memorandum submitted by Alan Turner

I hope that the inability/unwillingness for these Pub Cos to change as proved on two previous occasions will not be forgotten. All they are interested in is paying lip service to anyone they think can force them to change.

Last year this site pre-rent made a profit of over £60,000. After the beer tie was taken away and the rent was applied our business made less than £8,000 and that is without taking a wage. 50/50 split is something we only dream of.

Please do not allow them to continue in this way.

28 January 2009

Memorandum submitted by Nigel Wakefield

I act as a Consultant for the BII inspecting pubs, recruiting members and in addition I run a website www.buyingapub.com which is an information site with links to the BII on books that I have written and other useful information from all aspects of the industry.

In my opinion there has been very little change in the approach by the major Pub Co's and some of the others following the results of your last inquiry.

A certain amount of window dressing has taken place, where reductions in rent have taken place and discounts given, but only for specific limited periods in exchange for a Full Tie to all products, where no time limit has been declared the Pub Co has refused to grant a Deed of Variation, which means that in the event of a sale the normal lease conditions will be enforced, so effectively nothing has changed apart from the Full Tie.

In addition the lessee is often bound to a confidentiality agreement any comments and the agreement is breached and the existing lease conditions enforced again.

I was invited to the first discussion with the RICS on their investigation into the abuses and misuse of their Valuation System, I took Neil Robertson, CEO of the BII, with me and between us we raised the following points.

Firstly the term Competent Operator which relates to all rental valuations. We quoted the same classification of three years profitable trading with BII Advanced qualifications or five years profitable trading with minimal qualifications, that I quoted in my submission to your Committee, which has been defined as equating to full membership of the BII.

The training by the majority of Pub Cos consists of the basic one day course or at the maximum of ten days in exceptional circumstances, in no way does it meet the Criteria of Competent Operator. The BII are now committed to ensuring that far more information is made available to newcomers before commencing work in the industry and getting Pub Cos to provide extended training whilst the lessees are running their pubs. The Pub Cos are not happy about the additional cost, but it should be part of any business development in a reputable company.

Secondly business is not infinite, but finite any rental assessment made assumes that there is an immediate growth, this is pure fantasy and opportunism to raise a rent, any growth is at the expense of a neighboring business or businesses and they should actually have a corresponding rent reduction.

The use of Cherry Picking Comparables without consideration of the existing turnover, which is the pubs exact market share at the time, results in ratcheting rents higher and higher with no consideration of viability.

The failure to include any share of the Pub Co discount received from the suppliers into the divisible profit distorts the rental level.

The discount achieved varies roughly between 61p-87p per pint at this moment of time depending on the suppliers. The non brewers purely operate a paper exercise, the suppliers deal with all the individual deliveries.

The Pub Co gives the lessee fourteen days credit or insist on cash with order, yet receives in excess of three months credit in some cases, this is purely a ploy to generate cash flow and credit and could be disastrous if a major company fails, bringing down a vast number of other companies.

With the preliminary findings of the RICS being published there has been a lot of activity with Pub Cos trying to force through a vast number of rent increases, it would appear, to pre-empt any changes in the valuation system in the short term, any decision by the RICS may well come into effect at the next rent review.

I have had several phone calls and a number of emails. The levels of rent increase are around 20%, yet business has been static or falling over the last two years.

One lady last week, the company refused to budge on 18.5%, yet they had a dozens of closed, boarded up pubs, going for next to nothing.

This lady's business had fallen with the effect of the Smoking Legislation and was now static, being a community pub.

There have been some very inventive attempts by one of your companies that appeared at the inquiry to claim that the divisible profit split should be on the investment level between the company and the lessee, which is outrageous.

Another issue has come to light the valuers refuse to allow a basic wage for the lessee and his wife in the so called 50/50 divisible split, which effectively means that the Pub Co is entitled to half of a lessees and his wife's very basic earnings, yet they fail to factor in the discounts that they get for a paper transaction.

The 50/50 divisible split has been thrown into confusion following the *Brooker* Case and certain information regarding the original divisible split being described as 30–35% to the landlord when these guidelines first came into being, prior to the Pub Cos emergence.

If the Pub Cos had really made any progress in taking note of the BEC and RICS comments, then we would not be putting this information together.

The abuses of the individual companies Codes of Practice accredited to the BII continue and the people seeking my advice or ringing the BII Advice Line does not stop.

The BII will pursue all of these abuses and will in future be publishing summary outcomes.

Nothing will be done in the long term without effective legislation, these companies view themselves to be to big to have to be bound by voluntary codes, because they are not legally enforceable, the RICS Valuation Guidelines could be considered by certain companies to be not legally enforceable, unless stated clearly in the leases.

My views are not, of course, the BII's formal position but a significant number of members concur with my comments.

I trust that these comments will be of assistance in your Committee's deliberations.

Many thanks to the Committee for their hard work, it is appreciated.

4 November 2009

Memorandum submitted by Penelope Waller

Without wishing to labour a point, the price we as tenants are charged for our supplies is scandalous.

My lease reads "The tenant will buy beers and ciders from us at discounted prices".

So—one example: Budweiser bottles, Punch price after discount £26 plus VAT, £29.90 or £1.25 per bottle. Tesco price £7 for 10 or £0.70 per bottle.

Draft beers—the price for Hooky bitter is £85.26—locally it is advertised for £56!

Why is it that a company that owns 10 times more premises than J D Weatherspoons, (or used to) is unable to get the same or better discounts to pass on to their tenants? The economy is something that all businesses have to deal with and is not the fault of the pubcos.

What they need to justify is the fact that they state in their lease to supply goods at a discount when in fact it is actually a premium. Even though I am sure they have got it legally correct—it states from their price list (we can all make up a list and call things discounted) what they are doing is misleading in the first place, immoral in the second place and overall downright greedy!

There is no other explanation and it is now time that they accept they were wrong to charge such inflated prices—not start bleating about putting the rent up for free of tie, as rent is supposed to be fair market anyway—and allow their tenants the benefit of their massive buying power so that we can compete with the likes of JD Weatherspoon and Joe Bloggs in his freehold down the road! Basic economics tell us that most things can be bought for a discount relative to quantity. That means Pubcos buy cheaper than an individual pub owner, it means that larger pubcos such as Punch and Enterprise buy cheaper than a company owning 800 premises, it means that you are cheating your customers-us-and as a result we are suffering.

Yes, you are making some attempts to help—we recently received a rent reduction, which is great but I fear not enough.

Wake up and smell the coffee Pubcos—time for change!

4 November 2009

Memorandum submitted by Young & Co.'s Brewery Plc

INTRODUCTION

We understand that the Business and Enterprise Select Committee has decided to take further evidence on this matter and we are therefore pleased to have been given an opportunity to explain to you the benefits of the tie to our tenants and us.

BENEFITS OF THE TIE TO A REGIONAL/FAMILY BREWER

We believe that Wells & Young's Brewing Company Limited, a company in which we have a 40% stake, will be writing to you separately explaining the benefits of the tie to regional/family brewers. As such, we have not described those benefits in this letter.

BENEFITS OF THE TIE TO THE CONSUMER

We are aware of the recent submission made by the Independent Family Brewers of Britain (IFBB) to the European Commission Directorate-General for Competition.[25] Amongst other things, this explained a number of benefits to consumers of retaining the tie. We agree with the points made in that document but are not repeating them in this letter.

---

[25] This was on the review of competition rules applicable to vertical agreements (Block Exemption Regulation)

YOUNG'S

We are a long-established business that has operated in Wandsworth, South West London for nearly 180 years. We have a pub estate, mainly located in London and the South East that comprises 217 pubs. Of these, 121 are managed operations owned and operated by us directly for our own account. The remaining 96 pubs are tenanted operations that are operated by third parties (a mix of individuals and companies) who rent them from us and buy drink from us but otherwise run the pubs for their own account.

Until recently, we owned and operated the Ram Brewery in Wandsworth. However in 2006–07, we disposed of it and merged our brewing, beer brands and wholesale operations with those of Charles Wells Limited to form a new brewing business, Wells & Young's Brewing Company Limited. We own a 40% stake in that company and have an exclusive agreement with it for the supply of beers and wines to our pub estate.

We are a publicly quoted company with shares listed on AIM, the Alternative Investment Market.

OUR TENANTED OPERATIONS

The vast majority of the pubs in our tenanted estate are run on a traditional basis, that is to say a tied non-assignable tenancy up to five years in length. The tie is a partial drinks tie. Under this model, our tenants rent pubs from us and we supply drinks to them.

The rent that we charge for the pub itself is based on past beer sales volume and on the level of trade agreed to be achievable at the pub if it were run by an average competent operator; we do not charge a commercial market rate based on the property's value and its location and size. The latter would generally be higher. The rent is regularly reviewed and, as a result, can go up as well as down.

We are responsible for insuring and maintaining the fabric of the pub. We also, on a case by case basis, pay for or contribute towards the cost of improvements and alterations. All in all, this has seen us invest more than £5 million in our tenanted estate over the last three years.

Our tenants purchase the pub's inventory and stock in trade from us or from any outgoing tenant.

All of the above tends to provide a low, or relatively low, entry cost for someone starting a business.

In addition, to the rent charged for the pub itself, tenants also pay us for the drink supplied to them. The cost per unit is fixed but otherwise the amount paid varies in line with the volume ordered. This helps protect the tenant if there is a reduction in his sales volume. In this way, we share with the tenant the financial consequences of sales increasing or decreasing. For a number of years we have also enhanced the value of drink supplied around Christmas time by offering special discounts for orders placed in or around November and December. For our year ended 28 March 2009, revenue from our tenanted estate amounted to £14.3 million, roughly 12% of our total revenue for the year.

TENANT SUPPORT

A model that shares, to a degree, any financial upside or downside encourages the parties to work together. To that end, we have provided, and will continue to provide, whether to new or experienced tenants, an extensive support infrastructure and range of benefits.

We know that, across its membership, the IFBB valued this support at typically around £8,000 in the first year. We won't attempt to quantify the value of the support we offer to our tenants but believe that, across our tenanted estate, it is not an inconsiderable amount and certainly no less than the figure quoted.

We have two business development managers responsible for looking after tenants and helping them to grow their business in a sustainable way. With access to our long history and experience of owning and operating pubs, our business managers are able to help tenants put together viable business plans; they also then carry out regular business reviews. Marketing support comes from our in-house marketing team.

We co-ordinate or host tenant forums; these provide an opportunity for our tenants to share ideas, communicate more and ensure they get the best from each other.

Departments in our head office (such as finance, marketing and the learning and development team) also give assistance. This is sometimes free or subsidised.

With the ever increasing amount of red tape, particular focus has been on training and we run a number of useful, relevant, well conducted in-house courses designed to help tenants here. Licensing and health and safety are just two examples of courses run in the last year. We also provide regular regulatory updates so that tenants remain aware of issues.

Other in-house training courses run or promoted by us include financial management, catering management, wine knowledge, costing and margins, cellar management and marketing.

On the back of our relationship with an energy consultant, our tenants have been able to work with an independent third party that is able to help them find out the existing contractual terms for their utility services and re-negotiate those terms when their contracts come up for renewal.

A mystery customer programme, designed to give feedback to tenants on their pubs and help them gauge how they measure up against the demands and individual needs of increasingly demanding and discerning customers, is on-going. Through this, mystery customers visit the tenanted pubs four times throughout the year and report back on their experience. The introduction of this programme has seen standards improve across the estate.

Tenants can also have their pubs included on our website. This provides a platform for each and every tenanted pub to host its own mini-website within our main site. Each pub has a dedicated page which contains pub information, photos, facilities and opening times which can be updated online at any time and as often as the tenant likes. In addition, tenants can upload menus and use the "What's On" calendar to make sure their customers can get all the information on their pub. We also arrange registration of domain names for pubs upon request and at no cost to the tenant; this allows them to effectively have their very own website with which to market their business.

Bi-monthly newsletters containing information, promotions and business suggestions are also produced.

Conclusion

We remain convinced of the benefits of the tie and the tenanted model and hope that we have highlighted the considerable advantage to tenants from the relationship.

None of the benefits outlined above would be available from us (or would be available but on less beneficial terms) if the relationship with our tenants was simply as a result of a property transaction (ie one of landlord and tenant). Certainly, our level of recent investment would be lower.

None of our tenants are forced to enter into tied agreements with us. We have been and remain an attractive business partner to many and we continue to receive many applications from prospective tenants, reflecting the high quality and well-established tenant community we have.

13 November 2009

Supplementary memorandum submitted by Simon Clarke

ADDITIONAL RESPONSE TO MISS KIRKBRIDE'S QUESTIONS 207–209

Thank you once again for inviting me to submit evidence for your consideration and allowing me the opportunity to speak as a witness in the recent Committee hearing.

1. My previous submissions contained a "Personal Introduction" and I am assuming you would rather I avoid any repetition in this regard.

2. Miss Kirkbride raised questions (Q207 & 208) which I consider require embellishment in order to satisfy her own mind and perhaps the minds of other Committee members.

3. Where I refer to "pubcos" I refer to any pub owning company, including brewers operating a tied business model.

4. The pubcos themselves claim that the disadvantages of being tied are outweighed by the purported "countervailing benefits" they offer, it follows that if this were true the tenant would be no better off being free of tie than they would being tied and therefore no tenant would implement the choice of being free of tie.

5. If a tenant were to take up the choice offered, then the deed of variation to a lease should be accompanied by a rent review to the open market rental value reflecting the revised lease terms. The pubcos claim that this rent review would result in higher rents and therefore, if they are to be believed, one could conclude they have no financial benefit in maintaining the tie at all.

6. Miss Kirkbride indicates "…we do not go after other people's private business practices." (Q207). In practice, we do go after other people's private business practices in many ways, both by ensuring they operate legally, within parameters set out in documentation eg leases and contracts, and fairly, through legislation (eg Unfair Contract Terms Act).

7. The historic tied business model, whilst flawed in other ways, was operated to ensure brewers could distribute their product, it was never initiated as an unregulated, mandatory purchasing agreement allowing the supplier of tied products to dictate price increases at will, to any level and at any time.

8. The pubcos have purported the existing model is fair. We do not require a change to a fair model. We do dispute the pubcos interpretation of a fair model and wish to ensure the model is fair on both parties, landlord and tenant, and does not continue to be the root cause of so many pub closures.

9. Hand in hand with the tied model comes a responsibility to ensure fairness to the tenants on whom the restriction is imposed.

10. By offering tenants a choice of tie the landlords would have a genuine incentive to ensure that the benefits they offer, on a discretionary basis, are sufficient to outweigh the burden of the ties they wish to enforce.

11. If the pubcos, properly offered the above then they would have nothing to fear from offering a release, or relaxation, of the tie to their tenants, as none would take up the offer.

12. If a tenant is faced with the unpleasant discovery that their pubco are taking advantage of their position of power then legal action is invariably the only option, an option that all too often is outside the tenants reach as they have, at the time of realisation, already been bled dry of financial resources to fund such an action.

13. The option for tenants to go free of tie is the very incentive the pubcos need to ensure they offer attractive benefits, rather than the window dressing and false promises currently tabled. It is an efficient and solid backstop to discourage the abuses currently all too apparent by some of the bigger companies.

14. Miss Kirkbride is partially correct in her final statement (Q209) if the pubcos did deal with the first bit they would not have to deal with the second, as no tenant would implement their choice to go free of tie. The very existence of the second bit ensures effective and relatively swift policing and enforcement of the first without the necessity for legal redress.

15. The reason I say "partially correct" is that the "first bit", to which Miss Kirkbride refers, is the current proposal from the BBPA, outlined in their heads of terms for a revised code of practice. Their proposed code barely scratches the surface of the previous BESC report recommendations. The "first bit" should encompass all the BESC recommendations, not just a few easier options, and that is far from being offered.

16. In total there were 25 BESC recommendations. If we consider the entire industry response to the Report, 18 recommendations (by my count) remain untouched in any shape or form. In reality the pubcos and BBPA have fully addressed none of the issues raised in the BESC Report. Instead, once again, the pubcos have merely given the impression that the industry is capable of self regulation by "promising" to partially address the less substantial recommendations. There has been no demonstrable change for tenants since the BESC Report was published and those minor changes currently proposed will do nothing to alter the current status quo. Just like post TISC 2004, and as we have seen in the banking community of late, self regulation generally means no regulation at all.

17. The existence of a free of tie option would encourage continued efforts by pubcos to ensure they are offering a fair and reasonable exchange with their tenants to effectively reimburse for the detrimental effects of the tie.

18. The Committee may recall that the pubcos have long argued that the tie is liked by the majority of their tenants and is only disliked by a noisy minority. To offer a free of tie choice to tenants was a BESC 08/09 recommendation and was born from the differing opinions in this regard. The absence of any proposal to implement this recommendation does rather suggest that the pubcos may have misled the committee in this matter and that the "noisy minority" were correct all along.

21 December 2009

Supplementary memorandum submitted by Brulines

CORRESPONDENCE BETWEEN THE FAIR PINT CAMPAIGN, LACORS, SIMON CLARKE AND BRULINES

Email from Paul Chilver, Senior Trading Standards Officer, Stockton on Tees Borough Council, Trading Standards Section to Jeff Anspach at Brulines

I apologise for the delay in sending you the formal letter as discussed. In order for you to formulate your reply I can state the following:

1) Here is the test included in the email from Wendy Martin, Director of Policy at LACORS…

> Dear Simon,
>
> Many thanks for your email regarding your concerns relating to the Bru-lines metering system. I am sorry that it has taken me a few days to respond.
>
> We can fully understand your concerns. LACORS have not produced "a report" as respects the Bru-lines metering system as suggested in your email. However I hope the information contained below will help your deliberations.
>
> We are aware of the complaints relating to this product and this has led to lengthy discussion at the LACORS metrology panel (our expert advisory group on weights and measures matters) on how to best tackle the concerns relating to the product and any that may arise about similar systems.

It is our view that this type of equipment may be in use for trade, depending upon the exact nature of the contractual relationship between the brewery and the landlord. This could only be determined on a case by case basis as the legislation is dependent on the individual circumstances in each case.

If it could be determined that the equipment was in use for trade, it would be caught by S17 of the Act, and as such if a Trading Standards Department could prove beyond all reasonable doubt, that the equipment was false and unjust, they could take enforcement action.

It must be stressed however that any enforcement actions are the responsibility of individual local authorities who have to take into account a whole range of factors in determining the appropriate course of action.

Under current laws, this type of equipment is not prescribed for the purpose of S11 of the Weights and Measures Act, and as such does not need a pattern approval under S12 of the Act or need to be verified before it can be used for trade.

The equipment would only be caught by these obligations if the law were changed resulting in the equipment being prescribed under S11. It would be more appropriate to approach the NMO (formerly the NWML) to make such representation regarding a possible change in legislation. This is a course of action you may wish to consider.

A method of testing the Bru-lines metering system has been formulated in conjunction with Stockton-on-Tees Trading Standards and Bru-lines. LACORS have advised that all Trading Standards Officers should use this method when testing the Bru-lines equipment.

LACORS is also trying to get BRULINES (via their home authority Stockton) to submit their equipment for independent testing by the NMO laboratories. This would incur a cost to them and can only be a request not a requirement under the current legislation. However we feel this would be an important step forward.

We are aware that the present suggested testing regime does not consider the effect of other external influences and the accuracy of the measuring system. An assessment of this can only really be achieved by proper testing at NMO and of course is one of the key reasons behind the type approval process for certain types of equipment.

If for any reason Brulines choose not to take this course of action then we would certainly consider pressing NMO for a change in legislation to require type approval of this type of equipment.

The other issue arising is that analysts seem to have made certain assumptions about the quantity of cleaning fluid that landlords need to pass through the system. This seems another area of disagreement. This is not a regulatory issue however and the only way to address this would be for the industry to come to some agreement over the assumptions used.

I hope these comments are of some use.

2) As I mentioned this went out without me seeing it. I did contact LACORS afterwards to advise them that I had not approached you regarding the NMO testing yet and that the protocol was not a method of test but a method of contacting yourselves. I also suggested that "trying to get" was potentially misleading as it may suggest that any request has been rejected.

3) As that response says LACORS have stated that the equipment may be in use for trade but each situation needs to be looked at on its own merits. It is up to the TSO to make that decision based on facts to hand.

4) As expected it has been confirmed that the equipment is not currently prescribed and therefore does not require to be passed as fit for use for trade and therefore does not have to be "stamped" (which are verification stickers these days).

5) If an officer decides that a piece of equipment is in use for trade then although it is not prescribed it still must comply with section 17 of the Weights and Measures Act 1985 ie must not be false or unjust (it must be accurate).

6) I can confirm Brulines have been cooperating with Trading Standards

7) We did carry out a test on Brulines equipment in May 2009. The results of this test have been supplied to Brulines. It must be noted that this is not definitive proof that it is accurate because it was tested under controlled conditions and others factors were not considered eg time in use, different liquids, different flow rates, temperature variations, potential gas build up etc

8) Slough have tested Brulines equipment and believe that it is inaccurate. Brulines dispute some of the methodology behind some of these results due to the possible use of water instead of the liquid the equipment was set up to measure.

9) I have not yet submitted a formal written request for Brulines to have their equipment tested by the NMO. Brulines quite rightly would require further written information before making that decision. Any such submission would be voluntary.

10) I am currently looking at EMC (Electromagnetic Compatibility) compliance of the equipment, and will put this in writing to Brulines at a later stage. Briefly the question is whether the whole system is EMC compliant, not just the data transfer device and the power supply. There is a question of whether the system is a "fixed installation" as the requirements differ if this is the case. I am trying to clarify this.

I hope this helps you. As I said I am intending to send you a letter summarising the current situation as soon as I can.

18 December 2009

Supplementary memorandum submitted by the Department for Business, Innovation and Skills

Due to time pressures at the BIS Committee meeting on 19 January, I understand that there were some questions that you were unable to ask Peter Mandleson during the session. These questions related to public houses and supermarkets.

I have taken the questions in the order that they were asked in the email of 26 January and the responses are contained within the attached Annex A.

Annex A

How similar do you see the relations in the grocery sector between farmers and supermarkets to that in the pub sector between pubcos and lessees?

1. *Your Department has recently announced the need for an Ombudsman in the grocery sector to enforce codes of practice-is this something you would be prepared to do in the pub industry, should that industry fail to implement robust reforms?*

The markets and relationships are very different as are the circumstances surrounding the outcome of the competition authorities' investigations.

Government has been responding to a two year market investigation by the Competition Commission (CC) on the market for the supply of groceries in the UK following a referral from the Office of Fair Trading (OFT) in 2006. The CC identified a number of issues which it concluded had an adverse effect on competition (AEC). Where the CC has identified an AEC it is obliged to decide whether action should be taken by it or others to remedy the AEC or any detrimental effect on consumers. Whilst the CC was able to implement a number of its own remedies it made three recommendations over concerns it had in respect of certain supply chain practices and planning. The CC has drawn up a new statutory code for the largest supermarkets and believes that it will not be effective without monitoring. Government has accepted that independent monitoring is necessary and is taking steps to progress the recommendation.

There are no such recommendations from the competition authorities in respect of the pub market. The competition authorities have looked at the beer market over a number of years. Most recently in response to the Campaign for Real Ale (CAMRA) super-complaint the OFT has said that there is not a competition issue to be remedied. However, CAMRA has disputed and appealed this decision with the Competition Appeal Tribunal (CAT). A case handling conference is scheduled for 8 February.

The business models of the organisations involved in the two sectors are very different. For example:

— The markets are very different in size.

— The pubcos own little more than the property and have debts to service.

— Grocery retail in supermarkets is growing, pub beer sales have been in decline.

— Grocery stores are firmly in the retail sector competing on price, whilst pubs are part of the service sector which will include other factors such as location, ambience etc.

— The product range covered by the tie is narrow compared to product ranges offered by supermarkets.

— Clear contracts exist between pubco and licensee whilst often there has been no formal contract between suppliers and large grocery retailers. Longer term agreements can last up to 25 years in the pub trade.

— In groceries the small business supplies the supermarket with produce and but in the pub market it's the pubco that supplies the product. In groceries this relationship impacts on the ability of the small supplier to complain to the supermarket for fear of being delisted. The same situation does not arise in the pub market.

I wrote to you on 8 December to express my current view that it was too early to take a decision on whether Government needs to intervene. Officials recently met with the British Institute of Innkeeping (BII) and the Royal Institution of Chartered Surveyors (RICS). We remain vigilant in monitoring progress on the activity being taken forward by the sector.

2. *What effect will the recent decision of your Department to revoke the Land Agreement Exclusion Order have for the beer tie?*

On 13 January we announced our decision to revoke the order that currently excludes land agreements from the prohibition in Chapter I of the Competition Act 1998. This arose out of a recommendation from the Competition Commission recommendation in relation to the impact of the order in the groceries market.

We are satisfied it is no longer appropriate or necessary to exclude land agreements from the effect of that prohibition. Getting rid of the exclusion means competition law will apply consistently to land agreements in the same it does to all other types of agreement, removing any scope for doubt about this. Parties to land agreements must assess their agreements and ensure they are properly compatible with the law. This will help promote vigorous competition between enterprises in a way that is wholly beneficial to consumers.

In addition we are delaying the effect of the order's revocation by one year. This will ensure business has time to undertake necessary self-assessment of relevant agreements. The OFT will provide updated guidance to help businesses carry out this work.

On the more specific point of the impact on the beer tie, the Competition Commission concluded that restrictive covenants are not land agreements for the purposes of the exclusion order. Accordingly, the use of such covenants by pub companies is not a practice that is currently protected by the exclusion order. We believe revocation of the exclusion therefore has no impact at all on this matter.

I know that the issue of restrictive covenants was considered and addressed separately by the OFT in its response to the super-complaint brought by the Campaign for Real Ale in 2009. The OFT concluded that the use of restrictive covenants by pub companies would be unlikely to give rise to a significant adverse effect on competition in markets. However, it indicated that further action on this issue remained possible if such practices became more persistent and widespread.

3. *Equally what would be the consequences of the removal of the EU block exemption?*

The current EU block exemption on distribution agreements (the Vertical Agreements and Concerted Practices Block Exemption No. 2790/1999) is under review and will be replaced by a revised Block Exemption and guidelines, which is due to come into force on 1 June 2010. As part of the review, I understand that the European Commission has received and is considering submissions in respect of beer ties. The European Commission will be reporting on the review at a meeting with Member States and national competition authorities on 2 February. I am sure you will understand that, as a final version of the Block Exemption and guidelines is expected in the next few weeks, it is too early at this stage to conclude on the implications for the beer ties. My officials are, however, following this review closely and will be reporting to me on progress.

4. *Do you recognise that there is an unfair balance of relations between big business and small business for example: supermarkets and farmers/pub companies and publicans? Is there a need for unfair contract legislation to be extended to business contracts?*

Government recognises that that both parties to a business contract do not always have equal bargaining power, especially small businesses.

As the law currently stands, there are two major pieces of UK legislation governing unfair contract terms. The Unfair Contract Terms Act 1977 (UCTA) deals with exclusion clauses and covers both consumer and business contracts, and the Unfair Terms in Consumer Contracts Regulations 1999 (UTCCR) implements Council Directive 93/13/EEC on Unfair Terms in Consumer Contracts and deals with all unfair terms but only in relation to consumer contracts. In January 2001 the Government invited the Law Commission to consider the feasibility and desirability of re-writing the law of unfair contract terms as a single regime, in a clearer and more accessible style. At the same time they were asked to consider whether to extend legislation to protect smaller businesses, in particular small enterprises.

The Law Commission published their report in February 2005 setting out their detailed recommendations and a draft Bill. The Report recommended rewriting the existing law on unfair contract terms into a single, unified piece of legislation, which preserves the existing level of consumer protection. It also recommended the creation of a new regime extending the protection against unfair contract terms to the smallest businesses (those employing nine or fewer employees) which would extend to such businesses the protection against unfair terms given to consumers by the UTCCR.

In 2006 the Government accepted, in principle, the recommendations of the Law Commission subject to an evaluation of the impact of the reforms, and subject to securing Parliamentary time. However, in 2008 the European Commission published the EU Consumer Rights Directive which will repeal four existing consumer Directives including unfair contract terms, and will set out more consistent rules for both business and consumers through use of a maximum harmonisation clause, whereby Member States could not

maintain or adopt provisions providing greater protection than those laid down in the Directive. As this new EU Consumer Directive is based on maximum harmonisation it would obviously be risky to propose changes to UK legislation until the EU Consumer Directive takes shape.

As announced in its recent Consumer White Paper *"A Better deal for Consumers",* (published 2 July) the Government will simplify and modernise existing UK legislation at the same time as it implements the new Consumer Rights Directive. This will cover Unfair Contract Terms legislation—the Consumer Rights Directive will be used as a basis for simpler, clearer and unified regime on unfair business-to-consumer contracts. At the same time the Government will consider the issues around extending protections to the smallest businesses in business-to-business contracts.

8 February 2010

Supplementary evidence from the All Party Parliamentary Save the Pub Group

The All Party Parliamentary Save the Pub Group made a full submission to the Committee last year as part of the evidence collected for last year's report on Pub Companies published in May last year.

We commend the Committee for the leadership it has shown on this issue and I am pleased that this important subject is being looked at once again. *Further to that, we wish to make clear that we still stand by that submission and also that we do not feel that the issue and the problems highlighted have changed since it was written.*

After the publication of your Committee's report the industry started a process of mediation in order to come up with a cross industry agreement in response to your Committee's concerns. Mediation failed because it was apparent the BBPA members were unwilling to offer any meaningful concessions to address the imbalance of risk and reward between tied tenants and pub owning companies which was the core of your Committee's concern about the how the industry operates.

Now the BBPA (the British Beer and Pub Association) have published their "UK Pub Industry Framework Code of Practice" on the behaviour of Pub Companies and are asking for the committee not to recommend further action or referral to "give the industry" more time to resolve these issues ourselves.

Members of the All Party Save the Pub believe that it would be a mistake to give the industry more time. We believe that the big owning companies (and hence the BBPA) have a clear strategy of playing for time in the hope that the risk of regulatory intervention into the market will pass.

The BBPA code is not a "UK Pub Industry Code" as it has been presented and it is quite dishonest presenting it as such. The majority of pub trade organisations, including pub tenant and pub consumer organisations are not only not signed up to it, but believe it is merely an attempt to avoid much needed reform. The code applies only to BBPA's own members and the decision of Greene King, one of the big pub owning companies, to leave the BBPA, shows starkly that all even this is very limited. The code is not mandatory, even for those who do decide to stay within the BBPA, and it has no real sanction for companies that breach it.

The Select Committee's investigation was in response to the failure of voluntary measures, including the strengthening of codes of practice in response to the Trade and Industry Select Committee's investigation in 2004. *Crucially, the BBPA code simply does not deal with the Select Committee's core recommendations.* Of the 25 recommendations made by the Committee last year, the BBPA code only addresses seven. Nothing in the code of practice will make a difference to the way in which the tie is currently operated and the huge gap in prices for beer and other products charged to tied tenants compared to the prices that the same products are available on the open market which makes it impossible for many tenants to make a living, despite in many cases having a healthy turnover.

It is vital that everyone is clear who the BBPA represent. They are not the voice of the industry, yet try to give the impression that they are. They represent, perfectly legitimately, the big pub companies and big pub owning breweries who fund them and dictate their views. It is notable that the new Independent Pub Confederation, that includes nearly all the other pub trade association, including tenants and consumer organisations, do not believe the BBPA code will deal with the problems the Select Committee so powerfully highlighted and that real reform is desperately needed to rebalance the industry, give pub goers a better deal and to stem the tide of deliberate pub company closures that are taking away something of huge importance to communities and to our culture and heritage as a nation.

So the Save the Pub Group urge the Committee to stand firm to your original conclusions that regulatory intervention is needed to ensure free competition in the pub sector and that the Minister should use his power under the Enterprise Act to refer the sector to the Competition Commission.

18 February 2010

Printed in the United Kingdom by The Stationery Office Limited
3/2010 443071/1716 19585