

**Business, Innovation and  
Skills Select Committee**

**Developments since the  
Committee's Report on Pub  
Companies**



**CAMPAIGN  
FOR  
REAL ALE**

**A Response from CAMRA,  
The Campaign for Real Ale  
November 2009**

## **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 the 13<sup>th</sup> 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)<sup>1</sup>.
- 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<sup>2</sup>.

## **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<sup>3</sup>. 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.

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<sup>1</sup> The super-complaint is available to read in full online at:  
<http://www.camra.org.uk/media/attachments/305998/Super%20Complaint.pdf>

<sup>2</sup> The RICS Report is available online at:  
[http://www.rics.org/site/download\\_feed.aspx?fileID=4517&fileExtension=PDF](http://www.rics.org/site/download_feed.aspx?fileID=4517&fileExtension=PDF)

<sup>3</sup> CAMRA evidence to the BEC Inquiry into Pub Companies, Point 7

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.

### 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<sup>4</sup> 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"<sup>5</sup>. 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.

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<sup>4</sup> Independent Pub Confederation – see point 3.3 below

<sup>5</sup>BBPA, FLVA and BII agreements, Point 5. Available online at:

[http://www.fairpint.org.uk/downloads/BBPA\\_BII\\_FLVA\\_FINAL\\_AGREEMENT\\_2009\\_Signed.pdf](http://www.fairpint.org.uk/downloads/BBPA_BII_FLVA_FINAL_AGREEMENT_2009_Signed.pdf)

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.

3.3.2. The IPC as a whole will be submitting separate evidence to the Committee which CAMRA fully endorses.

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”<sup>6</sup>.

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”<sup>7</sup>.

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<sup>8</sup>) 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.

4.6. 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

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<sup>6</sup> The BEC Report, paragraph 176

<sup>7</sup> OFT Response to CAMRA’s super-complaint., point 6.4. Available online at:

[http://www.of.gov.uk/shared\\_of/super-complaints/of1137.pdf](http://www.of.gov.uk/shared_of/super-complaints/of1137.pdf)

<sup>8</sup> OFT point 6.7

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<sup>9</sup>. The complaint cited the following as evidence of clear harm to consumers:

- higher prices in tied pubs of between 7p and 23p a pint<sup>10</sup>
- reduced investment in pub staffing and maintenance
- restricted choice of beer in pubs, especially locally brewed beers, due to tie agreements
- 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<sup>nd</sup> October, rejecting the super-complaint in full and refusing to act on our recommendations as set out above<sup>11</sup>. In their response, the OFT claimed that they had “not found evidence of competition problems that are having a significant impact on consumers”<sup>12</sup>.

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<sup>13</sup>.

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.

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<sup>9</sup> Other suppliers would include providers of Technical Services, Technical Services Equipment, Wholesalers, Insurance Companies and AWP machine providers.

<sup>10</sup> CAMRA Prices survey 2009

<sup>11</sup> View the response online at: [http://www.offt.gov.uk/shared\\_offt/super-complaints/oft1137.pdf](http://www.offt.gov.uk/shared_offt/super-complaints/oft1137.pdf)

<sup>12</sup> OFT p6

<sup>13</sup> OFT 8.10

- 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<sup>14</sup>, 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 8 pence a pint more expensive<sup>15</sup>. However, their analysis excluded managed pubs, where prices are significantly lower, which in our view demonstrates the inadequacy of their reasoning.
- 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”<sup>16</sup>.
- 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<sup>17</sup>.
- 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
  - 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.

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<sup>14</sup> OFT 5.51

<sup>15</sup> OFT p10

<sup>16</sup> OFT p6

<sup>17</sup> Competition Commission Inquiry into the Groceries Market, 2006. Available online at: <http://www.competition-commission.org.uk/inquiries/ref2006/grocery/index.htm>

- 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<sup>18</sup> (under article 7 of the Regulation) from any company with more than a 5% share of the UK pub market.

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<sup>18</sup> 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.