

Response to Fair Pint’s letters of 18 November 2010 and 3 December 2010

- Campaigners make highly misleading claims about the accuracy and lawfulness of our flow monitoring equipment to MPs, pub companies and the press.
- Vianet have shown the claims to be false.
- The campaigners refuse to admit their errors.

Fair Pint’s comments	Vianet’s Response
<p><u>Introduction</u></p>	<p>Fair Pint is a campaign group. The exact number of members they represent and their funding is unclear. In November and December 2010 they wrote to Enterprise Inns Plc letters setting out in full their challenge to the use of our flow monitoring equipment. The press were informed of the contents of the letters. The majority of the points raised in their letters were answered by the National Measurement Office (‘NMO’) test results and our Guide published in January 2011. However, in anticipation that they may try to repeat the same inaccuracies to influence this consultation, we will respond to them line by line.</p> <p>The structure of Fair Pint’s letters makes them difficult to respond to, so we have quoted below the key sections and responded to them. The passages in bold below come from the text of their letters of 18 November and 3 December 2010.</p>
<p><u>Accuracy</u></p> <p>‘The equipment provided by Brulines PLC cannot, as that company concedes, determine what fluid it is measuring from time to time’.</p>	<p>It is correct that the Titan 300-010 flow meter used by Vianet’s standard DMS system cannot determine which fluid it is measuring. However the flow meter is only part of the DMS system and we have protocols in place to distinguish between beer/cider dispense and line cleaning (see Appendix 3 of our Guide). Most commonly, with keg products, the DMS system identifies line cleaning using the flow meter on the line cleaning water ring main.</p> <p>Our i-draught system can differentiate between liquid types, as explained at pages 25 onwards in our Guide. In the NMO tests the i-draught flow meter successfully identified what it was measuring 98.7% of the time (source page 10 of our Guide).</p>
<p>‘To our knowledge there is no measurement equipment on the market, for the purpose to which your equipment is put, that can properly measure mixtures of gas and fluid (two phase flow).’</p>	<p>In the NMO testing both DMS and i-draught accurately dealt with the introduction of surplus gas in the beer line and were also proven not to be adversely affected by so called ‘two phase flow’ in the beer line.</p>
<p>‘There are many other aspects of the equipment in its application in pubs that</p>	<p>The system has been in thousands of pubs, for many years. Any inherent problems, of the type they suggest, would have become apparent and would be properly evidenced. Fair Pint have not pointed to any such evidence.</p>

mean it cannot be accurate’.

‘As you may be aware we have previously commissioned work in this regard from world leading company, SGS, and they found the equipment tested to be substantially inaccurate.’

The SGS report, sent by Simon Clarke (a member of Fair Pint) to the Select Committee with his submission of 18 November 2009, explains how they tested a version of the Titan 824 flow meter. For the last five years we have only used the Titan 300-010 flow meter in our DMS system. In other words, SGS tested the wrong type of meter. The manufacturer, Titan Enterprises, has confirmed that the two flow meters’ specifications differ significantly.

For example, the Titan 300-010 meter was designed primarily for lower speed beer flow monitoring applications in pubs, whereas the Titan 824 flow meter is particularly suited to arduous conditions, sometimes running continuously for 24 hours per day at high flow rates, monitoring fluids such as aggressive chemicals.

The 300-010 and 824 flow meters look different, as is clear from the photographs below:



**Figure 1: Titan 300 – 010 Flow meter
Used by Vianet’s DMS system**



**Figure 2: Titan 824 – VOP- U Flow
meter tested by Fair Pint/SGS**

The SGS report describes how they bought the 824 flow meter directly from Titan. The report describes how SGS attended at the Eagle and put the 824 flow meter on the same beer line as the 300-010 flow meter installed by us. According to Titan this would have been difficult as the 824 flow meter does not have John Guest fittings and would need to be adapted to fit on the line. Despite this SGS either didn’t spot that the flow monitor they installed was different or failed to explain their mistake in their report.

	<p>The letter from Fair Pint of 18 November 2010 is carefully worded in that it does not say that SGS tested the flow meter used by DMS. Instead it states that “the equipment tested” was inaccurate.</p> <p>Fair Pint member, David Law (who is also Simon Clarke’s business partner at the Eagle), is aware of the error: He posted a comment on the Morning Advertiser website on 27 October 2010 (just 3 weeks before their letter), trying to explain away the mistake:-</p> <p><i>“However, the 300-10 or ‘beverage meter’ as it is commonly called, is still an 800 series meter, ie, 810. It is only slightly different in that it has John Guest fittings that restrict the flow in the pipe even further, thus affecting performance. Mr Thorn [of Titan Enterprises] appears to have misled Dr Mark [of SGS]. Could it be because his company rely heavily on keeping Brulines as their main customer?”</i></p> <p>Titan Enterprises say that the 300-010 and 824 series flow meters are different and Mr Law accepts that the differences affect performance. Mr Law’s conspiracy theory as to how SGS bought the wrong meter is denied by Titan and makes no sense: What would Titan gain by the wrong meter being tested? How would Titan have known that the expert from SGS would not spot the obvious physical differences between the 300-010 and 824 flow meters? The mistake as to the 824 flow meter was wholly the fault of SGS, and those who instructed them, and it is churlish to seek to blame anyone else.</p> <p>Fair Pint should have, at an early date, admitted the error to the Select Committee. Instead their members have repeatedly stated in correspondence and website postings that the SGS report shows the DMS system to be inaccurate.</p> <p>SGS’s testing was carried out in a laboratory using mains water. Titan (the flow meter’s manufacturer) has confirmed in the attached letter, that using mains water is likely to generate false results.</p> <p>One of the main reasons that SGS give for the equipment being inaccurate is that we overstate the amount used for line cleaning. We do this to be cautious and it is in the tenant’s favour: It makes it less likely that the amount of beer dispensed will exceed that delivered.</p>
<p>‘Similar tests carried out by Trading Standards Officers on equipment in different sites around the country have also highlighted failings in the equipment.’</p>	<p>Stockton Trading Standards carried out tests in May 2009 which showed that the DMS system had an accuracy of over 99%. The results are at Appendix 1a of our Guide and are consistent with the NMO findings.</p> <p>We are aware of a further case, involving a pub in Slough. This is a case that Karl Harrison (a Fair Pint member) referred to in Unique v Onifas, as an example of how flow monitoring data is used to calculate damages. The testing carried out did not show large variance on most of the lines. The other results were affected by a transcription error by Trading Standards and testing involving mains water. The tenant subsequently admitted that she had dispensed more tied products from third party sources, than the flow monitors indicated.</p>
<p>‘We are currently commissioning further work</p>	<p>On 14 January 2011, just hours before the NMO Report was published, Fair Pint were reported in the press to have asked the NMO to prepare a further report and to</p>

in this regard’.

have claimed that the NMO Report we were publishing would “*prove very little indeed*”, without having seen it (source - Morning Advertiser). Fair Pint’s prejudging of authoritative evidence, because it may contradict their firmly held prejudice, is not helpful to a rational debate.

No second NMO report has been published by Fair Pint. Either:

a) Fair Pint have not sought a second NMO report, in which case they should explain their change of mind. It may be that having read the NMO report they realised that a further NMO report would not support their opinions.

b) They have obtained a report, but have suppressed it.

Fair Pint should clarify whether they have sought an NMO report, and if not, why not?

On internet forums, Fair Pint members have frequently chosen to personally criticise those who disagree with them, rather than engaging in a proper rational debate about the evidence:-

“Get a grip James [Dickson CEO of Vianet] the CEO of a big company and you’re sounding like a silly schoolboy’ J Mark Dodds 19/5/09

“Simon - why are spreading such baseless fear? I don’t believe for one minute there is any risk to tenants of custodial sentences being imposed by courts for contractual offences. There is no risk of contempt at all such as you suggest and it is either dishonest or ill-informed of you to suggest that there is.’ Karl Harrison 4/3/10

“Robert- stop being so high-handed. Playing patsy with pubcos failed the sector for years. Its important to retain the moral high ground on the issues at large but at the same time its no good taking a knife to a gun fight.’ Karl Harrison 4/3/10

Responding to Mark Daniels article “Why I love my Brulines” - *“You know its hard to know where to start on this rubbish from Mark Daniels. Frankly its embarrassing, looks scripted and reads like a commercial for soap powder. At some stage Mark decided he’d become a mouthpiece for Greene King and lord knows whether there was a genuine incentive or whether Mr Anand just loosened the thumbscrews a little.” Karl Harrison 1/12/10*

“Mark/James Dickson - not sure which one of wrote this article? Have you any shares in brulines Mark or is it that your just contempt to condone this inaccurate system even though you’re fully aware of how this awful stick has been used to extract obscene amounts of money from tenants who, quite simply; don’t deserve it.” Steve Corbett 3/12/10

“J Mark Daniels Whoooooeee! You must be nervous to have done that.” J Mark Dodds 6/12/10

Responding to Mark Daniels article “Brulines: One year on and still satisfied” *“Mark is more than likely to be a tied tenant under pressure. In a form of Stockholm Syndrome it is plausible that people in such a position will blame everything other than the one issue or person that is causing them the most difficulty...It is not impossible that a few positive words written or spoken give a little relief or ‘concession’ to a pliable and pressured tenant.’ Karl Harrison 7/6/11*

<p><u>Current Testing</u></p> <p>‘We are aware that Brulines PLC has privately commissioned the National Measurement Office (‘NMO’) to carry out tests on their equipment. It may be considered by both your company and Brulines PLC that those tests will produce some results that may add credibility to claims in favour of the system.’</p>	<p>Fair Pint wanted the equipment to be tested by the NMO. Fair Pint’s co-founder, Karl Harrison, in his oral witness evidence to the BISC on 8 December 2009 enquiry stated <i>‘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’</i>.</p> <p>The Government in its response to the 2010 BISC report recommended that we submit the equipment to the NMO.</p> <p>We believe that it would have been reasonable for Fair Pint to have waited to see the NMO Report before making assumptions about it.</p> <p>In our view, the NMO Report does show that our equipment is fit for purpose.</p>
<p>‘Our view is that [the NMO] tests, carried out in laboratory conditions on one piece of equipment, are likely to fail to address the main issues.’</p>	<p>The NMO Report states that <i>‘The delivery tests were conducted at the Brulines R&D facility at their Stockton-on-Tees premises. This was due to the availability of equipment to perform the range of tests, with access provided to software and data. Brulines provided the test set up which emulated a typical set up that could be expected in a typical installation’</i>.</p> <p>The testing carried out by the NMO was in a variety of realistic scenarios, and several unrealistic ones, on 13 different flow meters. It was not a laboratory ‘bench test’ on one piece of equipment.</p> <p>Fair Pint’s criticism of laboratory testing is unexpected, considering that SGS carried out laboratory ‘bench tests’ on one (wrong) flow meter when preparing the report they submitted to the BISC. Despite that they have trumpeted the SGS report as being authoritative.</p> <p>Will Fair Pint admit that, not only did SGS test the wrong type of flow meter, but they also carried out the wrong sort of tests?</p> <p>His Honour Judge Behrens in the Onifas case doubted the usefulness of in situ testing at one pub, as an indicator of how the system operates at other pubs.</p>
<p><u>Data Auditing and Manipulation</u></p> <p>‘It is apparent from admissions from Brulines PLC as well as representatives of your company that the data produced by the systems installed in pubs and received by Brulines PLC is the subject of considerable manual adjustment.’</p>	<p>In their letter they refer to <i>manual adjustment, manipulation, falsification, manual data auditing, tampering, manual changing and manual construction</i>. We assume that all of these comments refer to the same thing: The removal of line cleaning data in relation to the DMS equipment (the i-draught system detects and removes water automatically). That is the only manual adjustment made by us, outside of very exceptional circumstances (see page 78 of our Guide). Our data auditing procedures are explained at page 57 of our Guide. In relation to keg products the process is almost entirely automated (which is accepted in SGS’s report). We assume, therefore, that their criticism is limited to the removal of data relating to the cleaning of cask ale lines. Our Guide at page 74 explains that our processes are <i>‘extremely prudent in favour of the licensee’</i>.</p> <p>Fair Pint’s expert examined the treatment of line cleaning of cask lines at Simon Clarke’s pub, the Eagle. SGS stated:-</p>

	<i>'It is apparent from the table above that significantly more water is being attributed by Brulines to line cleaning of cask beers than would be expected in practice'.</i>
It is our understanding that Sprecher Grier Halberstam, a firm of solicitors that previously acted for your company, published a general note of advice on remedies for breaches of contract in relation to 'buying out'. That note does not identify the use of flow monitoring equipment as being of evidential quality use in such remedies as they proposed.'	The article referred to does not mention flow monitoring equipment at all, because it was prepared at a time (February 2004) when flow monitoring equipment was not commonplace. Enterprise did not begin their programme of general installation until late 2005 / early 2006. The conclusions Fair Pint draw are therefore erroneous.
'There does appear to be some evidence of actions carried out by, or on behalf of, your company, that seek perhaps to exploit the vulnerability of small business people using allegations of contractual breach, backed by manually adjusted data, and in order that your company is able to secure monetary gain.'	That is a very serious allegation. Fair Pint have not produced any evidence or detail to support the same. Pub Companies operate under Codes of Practice approved by the British Institute of Innkeepers Benchmarking and Accreditation Service Committee (BIIBAS). Those codes include provisions as to how the company deal with flow monitoring data. We are not aware of any complaints regarding breaches of that part of the Code of Practice having been made to BIIBAS or PICAS.
'The testing being carried out by the NMO and by Trading Standards (under the Stockton protocol) also fails to address the issue of the manual data inputting in relation to delivery of goods by your nominees to your tenants.'	The process by which pub companies send us the data regarding the goods we have delivered to the premises is automated. The information on the delivery notes is automatically transferred on to the flow monitoring report. There is no manual data inputting.
<u>Legal Matters</u> '1 There appears to be a growing body of evidence and opinion that the equipment is in use 'in trade' .	The expression in the Act is 'in use for trade'. Fair Pint submitted an advice from Counsel on the point to the BISC enquiry. Simon Clarke (of Fair Pint) told BISC in his covering letter <i>'The legal opinion states that use of Brulines to ... tied tenants means that it is probable that the equipment is 'used for trade'.</i> That statement was repeated by Karl Harrison (co-founder of Fair Pint) in his oral evidence to the BISC on 8 December 2009 (Q196) .

	<p>Fair Pint’s submissions were misleading. What their Counsel actually said was <i>‘There is no clear answer as to whether or not the statutory definition ‘use for trade’ would include the position of a pubco using the Brulines device to impose fines on a lessee. I can conceive a respectable legal argument pointing in opposite directions. However, I am of the opinion that it is at least properly arguable that the Brulines device is in ‘use for trade’ and therefore liable to the strictures of the Weights and Measures Act 1985. ...The argument would be, although it would not be uncontroversial, that the Brulines device is being used for the purposes of a transaction (the monetary ‘fine’ imposed by the pubco) by reference to the quantity of beer alleged to have been bought out of tie by the lessee.’</i></p> <p>Fair Pint’s submissions therefore translate <i>‘properly arguable’</i> into <i>‘probable’</i>. Fair Pint have never admitted this error.</p> <p>In the cases of <i>Unique v Onifas</i> and <i>Unique v Broad Green Tavern</i>, the courts have ruled that the equipment is not in use for trade, and is not therefore covered by s.17 of the Weights and Measures Act 1985.</p>
<p>‘....and should, whilst in such use, always have been prescribed under the relevant legislation. ‘</p>	<p>Page 1 of the NMO Report states <i>‘Although the submitted equipment is not prescribed by regulation.....’</i>. Trading Standards have confirmed that the equipment is not prescribed under Section 11 of the Weights and Measures Act 1985 (page 52 of our Guide). Therefore the highest authorities have confirmed that equipment is not prescribed under the 1985 Act.</p>
<p>‘2. It is possible that the equipment could be considered to be false and unjust under the relevant legislation. Again, if this is the case then it may be appropriate for there to be a prosecution’.</p>	<p>See above.</p>
<p>‘3. If it were the case that manually adjusted or constructed data were to be presented to tenants, without explanation as to the origins of the data and its limitations, and in an attempt to secure an admission of breach and/or monetary gain, then a serious criminal allegation could be made against those seeking to use</p>	<p>In their letter of 3 December 2010 Fair Pint are more specific and point to potential offences under the Theft Act 1968 and Fraud Act 2006.</p> <p>The advice of Fair Pint’s Counsel, Gary Grant, dealt with this issue in August 2009. However the part that dealt with allegations of potential criminal behaviour by pub companies was edited out before the Advice was sent to the BISC. The editing was carried out carefully, with paragraphs and notes being renumbered, so that one cannot tell that the Advice has been edited from the document itself. Simon Clarke’s submission describes the Advice as ‘abridged’. We can only assume that the Advice was so carefully edited because it was not helpful to Fair Pint’s campaign (i.e. their Counsel did not agree with their view on the potential for criminal charges). A copy of the abridged advice was filed at the Parliamentary Library. We invite Fair Pint to disclose the full Advice to the Select Committee and to ourselves.</p> <p>The allegation of fraud (which we believe Fair Pint had been advised was not tenable) was nonetheless referred to in web postings and used in correspondence</p>

<p>potentially falsified evidence in this way.'</p>	<p>by campaigners to attempt to pressurise Pub Companies.</p> <p>In their letter of 3 December 2010 Fair Pint stated that they were considering seeking further advice from leading counsel on the issue. Nothing further has been heard and the point was not pursued in the Onifas case.</p>
<p>'4. If evidence from the equipment supplied by Brulines Plc is being used as in 3 above and further to secure injunctions or consent orders in the Court.....there may have been an act of contempt [of Court].'</p>	<p>The assertion is based on so many hypothetical and false premises, that the simplest way to answer it is: To the best of our knowledge there has never been an occasion when a Pub Company have been accused of being in contempt of Court in relation to flow monitoring equipment.</p>
<p>'5. In the case of flow monitoring equipment, or its use, that would fall foul of any of the above then subsequent adaptation to such equipment or a change to the circumstances of its use, are unlikely to form a defence against allegations that have occurred in the past or claims arising out of those matters.'</p>	<p>We do not know what is meant by "subsequent adaptations" or "a change in the circumstances of its use".</p>
<p>'We have seen a number of those Codes of Practice and there is mention in your code of variations in the data produced by flow monitoring equipment resulting in 'fines' to tenants'.</p>	<p>The Codes of Practice do not refer to '<i>variations</i>' or '<i>fines</i>'. They refer to 'damages' to compensate them for the volume variance. It is therefore inaccurate to put the word '<i>fines</i>' in quotation marks as if it were quoting from Codes of Practice.</p>
<p>'Whilst we do not accept that there is a contractual basis for such 'fines' - which may themselves be unlawful - then we also noticed that there is no mention of the manipulation of the data that is used to generate the monetary penalty.'</p>	<p>A breach of the purchasing obligations in the lease is a breach of contract. The pub company have the right to claim for loss of profits arising from that breach of contract. It is compensation, not a penalty.</p> <p>Pub Companies and ourselves, do take steps to explain to tenants how the system works. As for instance Enterprise Inns Code of Practice confirms; within three months of taking a pub, or having flow monitoring equipment installed, the tenant receives a visit from a qualified technician who will provide them with the necessary instruction on how the system operates and how to view and use the dispense data accessible on our website. That website has comprehensive information as to how the system operates (including the NMO Report and our</p>

	Guide).
‘We will provide the BII and the BBPA each with a copy of this letter. A copy will also be sent to the Chairman of the Business Innovation and Skills Select Committee Chairman, Adrian Bailey MP.’	<p>We invite Fair Pint to send to those parties:-</p> <ol style="list-style-type: none"> a. Confirmation that SGS tested the wrong meter. b. An unedited copy of Gary Grant’s advice on the legal issues and any further advice they have received. c. Confirmation that Gary Grant did not advise that the equipment was probably ‘in use for trade’. d. Confirmation that they accept the equipment is not prescribed by the Weights & Measures Act. e. Confirmation that they accept there are no offences being carried out under the Fraud Act or Theft Act. f. Confirmation that by manual adjustment, manipulation, falsification etc, they mean the removal of line cleaning water in relation to cask ales.
‘It has been put to us that Brulines PLC may consider some of their customers to be putting its flow monitoring equipment to uses for which it was not wholly intended.’	We refer to our Guide. The way Pub Companies use the equipment is entirely consistent with that Guide.
‘i. you accept the flow monitoring equipment installed in pubs in your company’s estate is not wholly accurate, that it cannot directly identify different fluids and it cannot properly or accurately measure two phase flow.’	Pub Companies have had our flow monitoring equipment in their estates for nearly 20 years. Over the years, and in thousands of pubs, they have found them to be accurate and reliable flow monitoring systems.
‘ii. you accept that limited testing of equipment in laboratory conditions relying on immediate and non-adjusted data is not an accurate reflection of the use of the flow monitoring equipment in pubs’.	The NMO testing was carried out in realistic cellar scenarios. In our extensive experience the flow monitoring equipment is accurate when installed in real pubs.
‘iii. you accept that the data produced for you and tenants of your company by Brulines PLC is the subject of manual adjustment and manual data input.	Full details of the auditing of line cleaning data for cask ale lines is set out at page 57 of our Guide.

<p>‘iv. you do not seek monetary compensation, injunctive relief or consent orders in reliance on the manually adjusted data produced by Brulines PLC.’</p>	<p>Flow monitoring evidence remains one of the types of evidence Pub Companies rely upon. Pub Companies use that evidence in accordance with their Codes of Practice. It is very rarely the only evidence the Pub Company will rely upon.</p>
<p>‘v. you will write to all tenants of Enterprise Inns to make it clear that the data produced by Brulines PLC for you and them is capable of manual adjustment and by necessity will almost certainly have been the subject of such adjustment and that you will amend your company’s code of practise (sic) accordingly.’</p>	<p>We believe that the steps we, and Pub Companies, take to inform our tenants as to how the systems operate are satisfactory. Those efforts are not helped by the misrepresentation of the evidence by Fair Pint members.</p>
<p>vi. you will write to all tenants of Enterprise Inns and the BII to confirm that you are not properly able to rely on the data produced by Brulines as primary evidence in legal proceedings relating to allegations of ‘buying out’ and accordingly that no employee of Enterprise Inns or any representative of Enterprise Inns, will hold out otherwise.’</p>	<p>See answer to question (iv) above.</p>
	<p><u>Conclusion</u></p> <p>We believe that Fair Pint in their submissions to the BISC enquiry in 2009:-</p> <ol style="list-style-type: none"> a. Presented an expert report which tested the wrong flow meter and have since failed to admit the error. b. Presented a Counsel’s advice which had been edited to remove parts which were unhelpful to their campaign c. Misled the BISC as to Counsel’s view on whether the equipment was ‘in use for trade’. d. Were wrong as to the prescription of the flow monitoring equipment under s.11 and s.17 of the Weights and Measures Act 1985. <p>Subsequently they have repeated those errors in their literature, wilfully ignored</p>

	<p>credible testing by the NMO and shouted down those who disagree with their views.</p> <p>Rather than maintaining these unsustainable positions, we would invite Fair Pint to act in a responsible manner and confirm that they were wrong. Particularly as one of their founders is quoted in the Morning Advertiser article “<i>Simon Clarke - Master of all he surveys</i>” dated 6 September 2010 as saying:-</p> <p><i>“Fair Pint has maintained the moral high ground in the main. It’s given MPs the honest facts and it’s proved them.”</i></p>
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