FW: FOI - FW: Past mistakes ?

05 August 2015
09:47

Subject	**FW: FOI - FW: Past mistakes ?**
Attachments	[ATTACHMENT WITHHELD - EXTRACT FROM 'BREW BRITANNIA' - ALREADY PUBLISHED]

From: Simon Clarke
Sent: 22 December 2014 10:52
To: Swinson MPST; [redacted]; McLynchy Julie (CCP); [redacted]
Subject: Past mistakes ?

Dear Ms Swinson

I am conscious of the proposed meeting next year and, given where we are now with the Small Business Bill and MRO clause, I thought during the Xmas break you might like to consider where things were back in the days of the Beer Orders at the same stage of the progression of the Bill.

Please find attached an excerpt from Brew Britannia, a book by Jessica Boak and Ray Bailey and have a look at this link :

http://archive.spectator.co.uk/article/24th-june-1989/9/the-peer-and-the-beerage

I think this shows where things went somewhat wrong and the best intentions were undermined. Something I was working on with [redacted], was trying to avoid 'gaming' of the legislation, but I am concerned that since he moved on to pastures new this may have got lost in communications and the abundance of documentation. As things stand the legislative threshold (500 tied pubs) is directed purely at 'tied agreements' where Government clearly identified the 'problem' was the relationship between large pub companies and their tenants and lessees not the agreements themselves - hence the parliamentary desire to allow some tied agreements to continue where they operate fairly. It is the large companies that need regulating not any one particular agreement type and it is the tenants and lessees of those large companies that need the protection of the Bill and code, regardless of their agreement type.

I may have done this already, if so I apologise for repeating myself but a practical example is the ebst way to demonstrate the point.

If I, Simon Clarke of the , take the MRO option and [redacted] subsequently seek to penalise me for doing so in some way (e.g. unreasonably increasing insurance premium contributions to gain on the swings what the lost on the roundabouts) I do not appear to have any recourse and am no better off for the legislation. I do not appear to be in a position to appeal back to the SoS under Part 4 para 44 (1)(a), "Inconsistency with the code", as I am no longer a tied tenant.

For these reasons, I consider the underlying threshold in the Bill needs to seek to protect all tenants and lessees of the large pub owning companies, regardless of their agreement type.

All the best and Merry Xmas.

Simon

FW: Invite from Jo Swinson MP.

30 July 2015
14:53

Subject	**FW: Invite from Jo Swinson MP.**
Attachments	[ATTACHMENT WITHHELD - ALREADY RELEASED IN EMAIL TITLED 'FW: FOI - FW: Invitations to pub roundtables']

From: Simon Clarke
Sent: 22 December 2014 10:37
To: [redacted]
Subject: Fwd: Invite from Jo Swinson MP.

Dear [redacted]

I refer to the recent invitation to meet with BIS in the New Year (8th January 2015, 11.30am).

Of course I would be pleased to attend.

I notice there are two proposed meetings, tenant representatives and pubco/brewer representatives. Would it not be more appropriate, and promote more open dialogue to alter this to pro reform and anti reform meetings ?[redacted]

Could I also ask what the Governments proposed amendments are likely to be ? Again it might be more productive if the participants have an idea what the issues of implementation are and what is proposed as discussion areas. One thing springs to mind is the Government proposal to alter the threshold to 350, is that still a proposal and if so where did the 350 number come from ?

Finally, I recall at the last meeting there were some invitation hick ups and as a result some last minute invitations went out and indeed one group claimed never to have received an invitation at all (despite being clearly on the distribution list). For ease I list all the 'pro reform' groups (n.b. CAMRA are a consumer group but their participation I believe is essential).

Fair Deal For Your Local (umbrella organisation)
Fair Pint
FSB
CAMRA
PAS
Unite
GMB
LSL
Justice for Licensees
GMV
Forum of Private Business

If you need any contact details please let me know and I will do my best to assist.

Merry Xmas.

Regards.

Simon Clarke

-----Original Message-----

From: Swinson MPST Correspondence [redacted]

To: siclarke [redacted]

Sent: Thu, 18 Dec 2014 14:05
Subject: Invite from Jo Swinson MP.

Dear Mr Clarke, please see attached letter from Jo Swinson MP.

Kind regards,

[redacted]

Communications via the GSi may be automatically logged, monitored and/or recorded for legal purposes
---

This email was received from the INTERNET.

Communications via the GSi may be automatically logged, monitored and/or recorded for legal purposes.

FW: FOI - FW: Invite from Jo Swinson MP.

05 August 2015
10:52

From: siclarke [redacted]
Sent: 02 January 2015 12:58
To: [redacted]
Subject: RE: Invite from Jo Swinson MP.

Thanks for your email. I was just checking there had not been any inadvertent omissions.
Look forward to the meeting.
Regards.
Simon

Sent from Samsung Mobile

-------- Original message --------
From: [redacted]
Date:02/01/2015 12:15 (GMT+00:00)
To: Simon Clarke; [redacted]
Subject: RE: Invite from Jo Swinson MP.

Simon

Thank you for your emails of 22 and 31 December suggesting who we should invite and how the two roundtables would best be split. Further to [redacted] email of 23 December, we deliberately did not invite all those who came to the June 2013 roundtable in order to allow more time for discussion. At the previous roundtable, once we had gone round the table and attendees gave their views, there was very little time left for a discussion. We have invited those who have engaged with us on the legislation and I can confirm that Tim Page has been invited - I will check with the Minister's office that an invite did issue on 18 Dec (some were emailed and some were posted).

We look forward to seeing you next week. I will send out a list of attendees once all have confirmed.

Regards

[redacted]

From: Simon Clarke
Sent: 31 December 2014 16:14
To: [redacted]
Cc: [redacted]
Subject: Invite from Jo Swinson MP.

Dear [redacted]

In the event [redacted] is still away I am writing to you and copying her in.

I am conscious that BIS are keen to have a meeting for the 8th January regarding the pubs element of the Small Business Bill with tenant groups.

Over Xmas I have been in touch with a few organisations and have become aware that many have not received an invitation at all, is this deliberate or a mistake in communications ?

For the sake of clarity I outline the following individuals, their organisations and appropriate email addresses in order that you can contact them ASAP if you would like them to attend :

Bill Sharp - Guild of Master Victuallers -[redacted]
Chris Wright - Pubs Advisory Service -[redacted],
Tim Page - Campaign for Real Ale [redacted]

Should you have any difficulties getting in touch with any of the above or other individuals/organisations please do not hesitate to contact me.

Simon Clarke
Fair Pint Campaign
[redacted]

-----Original Message-----

From: [redacted]

To: siclarke [redacted]

Sent: Mon, 22 Dec 2014 10:38

Subject: Automatic reply: Invite from Jo Swinson MP.

I'm out of the office now until after Christmas. If it can't wait, please contact [redacted].

Thanks

[redacted]

Communications via the GSi may be automatically logged, monitored and/or recorded for legal purposes
---

FW: FOI - FW: Letter from Jo Swinson MP

05 August 2015
11:34

Subject	**FW: FOI - FW: Letter from Jo Swinson MP**
Attachments	[ATTACHMENT WITHHELD - ALREADY RELEASED IN EMAIL TITLED 'FW: FOI - FW: Invitations to pub roundtables']

[redacted]

From: Chris Walker [redacted]
Sent: 05 January 2015 17:10
To: [redacted]
Subject: FW: Letter from Jo Swinson MP

Hi [redacted],

I think he has been in touch with you directly, but just to make sure you are aware, Clive Davenport will be attending this for us.

Thanks,

Chris

From: Swinson MPST Correspondence [redacted]
Sent: 18 December 2014 14:07
To: Chris Walker
Subject: Letter from Jo Swinson MP

Dear Mr Walker, please see attached letter from Jo Swinson MP.

Kind regards,

[redacted]

FW: Commercial Leases

04 August 2015
16:43

From: Kate Nicholls [redacted]
Sent: 15 January 2015 15:21
To: [redacted]
Cc: [redacted]
Subject: RE: Commercial Leases

[redacted]

I have now spoken to Martin to discuss his figures on the number of contracted out tenancies and leases. I have also undertaken some snapshot research into the larger landlord companies.

I understand that Martin's assessment is based on around 200 lets which have taken place during the past year in one company and is a % of those lets which were on a contracted out basis – his figures show around 80% of those relets were contracted out. My reference to a relatively small number was based on information from the pub companies about the proportion of the agreements which are contracted out. This explains the apparent discrepancy – Martin's figure is the increasing prevalence of use and mine is total proportion.

When it comes to long leases (10 yr+), the average across the estate of the major pub company landlords is for between 10-15% of agreements to be contracted out. The figure rises for shorter leases and tenancies (typically 1 yr, 3 yr and 5yr) with a larger proportion of 1 yr agreements being contracted out, but with these being a smaller proportion of the overall market. The general rule of thumb appears to be that the shorter the agreement term the more likely it is to be contracted out, but this will vary from company. Put in the context of the total number of agreements, amongst the companies I have just assessed the figure is about 20-25% of all agreements are contracted out.

I hope that this is helpful.

Kate
Kate Nicholls
Chief Executive

[redacted]

From: Kate Nicholls [redacted]
Sent: 15 January 2015 09:57
To: [redacted]
Cc: [redacted]
Subject: RE: Commercial Leases

I think that that may partly be due to the different nature of our memberships and the proportions and type of the estate that we cover. Martin's membership is very small and will primarily be tenancies whereas ours is larger in terms of tied lessees and they are multiple companies with longer term leases.

I am not sure what concrete data is available in the market place on numbers, so we are both talking

about our sense of the market and therefore terminology may differ. I will do my best to find out details.

Kate Nicholls
Chief Executive

[redacted]

From: [redacted]
Sent: 15 January 2015 09:50
To: Kate Nicholls
Cc: [redacted]
Subject: RE: Commercial Leases

That would be helpful if you could. I have a call with Tim later.

One thing I notice is that you and Martin have given quite different indications as to the prevalence of contracted out tenancies amongst companies covered by the Code. That is apart from any consideration of whether they may increase after our measures. A clear shared view on what the data is there would be great.

Thanks

[redacted]

From: Kate Nicholls
Sent: 15/01/2015 09:43

To: [redacted]

Cc: [redacted]

Subject: RE: Commercial Leases

I know you have also been talking to Martin Caffrey and I am trying to get a coordinated position from ALMR, BII and FLVA on contracted out tenancies – I thought it may help you to have clarity on where we are all aligned

Kate Nicholls
Chief Executive

[redacted]

From: [redacted]
Sent: 15 January 2015 09:24
To: Kate Nicholls

Cc: [redacted]**Subject:** RE: Commercial Leases

That's very helpful Kate. I will pass this on to [redacted] and will get back to you later with any thoughts as necessary.

We are very grateful for your input.

Thanks

[redacted]

From: Kate Nicholls

Sent: 15/01/2015 09:10

To: [redacted]

Cc: [redacted]
Subject: Commercial Leases

[redacted]

Further to our meeting earlier this week, I have gone back to try to find some standard commercial leases and to look at the terms they provide re contracting ou :, insurance etc.

As I suspected, while there are common parts to a commercial lease – and indeed to an industry lease – they are all drafted slightly differently and some differences of approach. The following are common:

- Contracting out: I have looked at 5 commercial leases all of which have a statutory notice about the impact on contracting out written in at the front and making clear that if you commit yourself to the lease you will be giving up your legal rights. They all tend to say

> *"Business tenants normally have security of tenure – the right to stay in their business premises when the lease ends. If you commit yourself to this lease you will be giving up these important rights. You will have no right to stay in the premises when the lease ends. Unless the landlord chooses to offer you another lease, you will need to leave the premises. You will be unable to claim compensation for the loss of business premises. If you are offered another lease, you will have no right to ask the court to fix the rent".*
>
> Contracting out is more common in the commercial sector but still only represents a small proportion of traditional pub agreements. The statutory warning – derived from the Act - makes clear that the negotiation, should you choose to remain is a new lease not a renewal. I continue to believe that the wording of "renewal" in the Bill as currently drafted and, should the Government wish to include the issuing of new contracted out agreements in the MRO trigger the wording would need to be revised. Doing so would create a substantive point of difference between some contracted out tenants and others within the sector and cut across existing property law application. As you know, I believe that this could have unforeseen consequences for lessees as the landlord would be more likely to refuse to offer another lease and we envisage many tenants being required to yield up in order to protect the tie and/or the landlord taking properties back into managed to minimise the risk. We believe that the problem is better addressed through means of the statutory code – ensuring contracted out tenants have a notice of intent prior to the end of the agreement and advance notice of rents. At that point, they would have a parallel rent assessment, access to the adjudicator and the potential for MRO triggers in the future.
>
> I will write to you separately about this once I have done some more investigation with lessees

to determine how broad a problem contracting out is and whether the potential downside risks are outweighed.

- Insurance – I have seen some commercial leases refer to an insurance rent which allows a landlord to charge a 'fair proportion of the amount the Landlord will incur in complying with the requirement to have adequate insurance'. This is then normally expressed as a lessee and landlord covenant where the latter covenants to ensure the building is insured and the latter covenants to do nothing which would vitiate an insurance policy and to pay on demand a sum to the landlord. These type of leases are usually more detailed and go on to set out what happens if the building is damaged and uninhabitable ie rent suspension or termination. The other type of lease I have seen simply refer to a tenants covenant to pay a share of common expenses and again there is reference to a fair share. I think that the Statutory Code could provide additional protection here by extending price matching to tenants who exercise an MRO and in making sure that any charge is fair, evidence based and justified.

- Supply ties – again, the small sample of leases that I have looked at express the purchasing obligation as a tenants covenant or liability to purchase product from the landlord or his nominated supplier. There may be some leases which contain separate supply agreements, but it would not be common

- Common terms – other common clauses include each clause being severable, so that if the term becomes invalid eg exclusive purchase obligation, the rest of the lease continues as before; most commercial leases have a requirement to pay quarterly up front payments of rent, service charge (insurance is usually an annual up front charge, non redeemable); depending on the length of lease there will be covenants with regard to keeping the premises in good repair, decoration and dilapidations provisions; in commercial leases there will be a 'yield up' clause which gives the landlord the unfettered right to take back the premises at the end of the agreement. You also asked about break clauses – these are usually inserted by negotiation and set a point at which the landlord or lessee could exercise their right to break, giving one months' notice.

I hope that this is helpful, but please come back to me if you have any further questions. I am afraid I didn't take your colleague's email address down so I should be grateful if you could share with her.

Kind regards
Kate

Kate Nicholls
Chief Executive

[redacted]

FW: Discussions

30 July 2015
11:46

From: [redacted]
Sent: 16 January 2015 08:31
To: Kate Nicholls; Martin Caffrey; Tim Hulme
Cc: [redacted]
Subject: Discussions

Kate, Martin, Tim,

I've spoken to you all over the last few days and it has all been very helpful indeed.

You have all offered to seek to put a shared note to us on the renewal piece that you raised at the meeting last week with the Minister. If you were able to do so that would be excellent. If you have differences of view (I wouldn't expect your interests to be exactly the same) then some explanation of that would be also be helpful.

As we have discussed, some explanation of numbers of contracted out agreements would be great. Kate you have already provided a version of this so it may be a case of what the shared view is on that note.

On the general principle we'd like to go beyond your understanding of what the Bill does to the merits of what it should do in this area including your views on unintended consequences of the scope (whether broad or narrow).

Wherever you have got to by Monday lunchtime would be great. Don't worry too much if it's not a fully shared or complete view (I.e please don't work on the weekend on my account) but whatever you provide I'm sure will have moved us along.

Many thanks again for your time and input. Please call if you wish to discuss

Best Regards,

[redacted]

FW: Simon Clarke Phone Call Readout

30 July 2015
15:01

From: [redacted]
Sent: 19 January 2015 17:02
To: McLynchy Julie (CCP); [redacted]; Goh Binnie (LEGAL B); [redacted]
Cc: [redacted]
Subject: Simon Clarke Phone Call Readout

Hi all,

I spoke with Simon Clarke of Fair Pint etc. this afternoon. It was helpful. Ostensibly to pick up the discussion on how the MRO is carried out but it gave me a chance to ask about renewals. Some of this may help with our Q & A and other briefing. These are the main points:

1. **MRO and Renewals** - He confirmed that as a drafter of 42 it wasn't his intention that contracted out tenants be given the right to MRO in the event of a renewal of his or her tenure at the pub. He said that although it's not something he normally found himself doing he thought that to do otherwise would be unfair to pubcos. I replayed it back to him twice more and he confirmed the position. He said there was nothing stopping the tenant from trying an negotiate an MRO but that they should not have the right to trigger it. At one point when I represented it by saying " ....and in the case you are contracted out and wish to exercise the trigger...." ' . He is expecting pubcos to provide more short term contracted out tenancies but seems to think that that trend won't be universal.
2. **Briefing Lords** - He is briefing Labour Lords sometime tomorrow, he was not sure of the cast list but thought that Lords Stephenson and Snape would be there and possibly Berkeley. This is to explain the intention behind clause 42 and to offer a critique of Lord Hodgson's amendments.
3. **Lord Hodgson's amendments** – he thinks that in some areas the drafting is poor. For example he seems to think that the amending of the threshold implies that the Code will only apply to POBs with exactly 500 pubs. On the amendment to the stocking requirement he thinks the drafting would mean that only 'brewer' products could be stocked and nothing else which he thinks can't have been the intention.
4. **Threshold** - **He said his main concern at the moment was the sense he got from the stakeholder meeting that Government might revert to a threshold of 500 tied pubs**. Within this the main concern is that free of tie tenants would not be in scope of the Code. He has been thinking of a wheeze which would keep mention of free of tie tenants of the face of the Bill but still protect them where necessary. This was on the basis of the SoS's power to rule as void and unenforceable any lease provisions that are contrary to the Code. I didn't get into a detailed discussion but my understanding is that this wouldn't work.
5. **Avoidance through splitting up pubco** – this is his second main concern. His comments chimed with some we have heard from ' that POBS (') are setting up numerous companies that they'll use to get below the 500.
6. **Market Rent Definition** - He is relaxed about Lord Berkeley's amendment 90a* - definition of market rent although he had only just read it from my e-mail. He thinks that RICS guidance already caters for the effect intended which is good as that had been my assumption. As long as the market rent assessment is on the assumption that the premises are to be a pub then RICS guidance would rule out taking into account other uses. I put to him that POBs may try to game by amending their leases to theoretically allow other uses for the premises but he thought that was unlikely as it may lead to unintended consequences for the POBs e.g. tied tenants subletting parts of the building for other uses.
7. **Free of Tie Terms Post MRO** - He sees the MRO as being essentially the same as a rent review i.e. the POB needs to justify its calculations. His assumption therefore is that absent the tie all

other lease terms will remain the same. I pushed a little on this and he was prepared to agree that where Scorfa is set out in the lease (and is given on the understanding that the tenant is tied) then the POB would be in their rights to remove such benefits if MRO is triggered. He thinks that where SCORFA benefits both parties e.g. provision of SKY TV then the POB may decide to continue to offer it in exchange for a reduction in the rent. (The more I think about this the more I wonder if we are not going to need some kind of consultative group to inform the drafting of the MRO process).

In summary Simon had just got back from skiing and was catching up and it was all a bit of a stream of consciousness but he seemed sure of his ground. I was most surprised about the confidence that MRO will change the market for the good and that both POBs will have to improved tied offers and if they did tenants would take them in large number.

BTW – he offered to talk with us on any issue and would make every effort to help given the importance of where we are in the process.

Cheers

[redacted]

Greg Mulholland to Jo Swinson - Info Only

18 August 2015
14:27

Jo Swinson MP
Parliamentary Under Secretary of State
Department for Business, Innovation and Skills
1 Victoria Street
London
SW1H 0ET

20th January 2015

Dear Jo,

Further to our meeting with BIS lawyers and Parliamentary Counsel on 17th December, on I am writing to you on behalf of the Fair Deal for Your Local campaign.

We found that meeting to be constructive and believed it to be part of a forthcoming dialogue to see if there were areas of Clause 42 that could be changed, without any material change to the clause.

However I and we are disappointed and concerned that we haven't heard anything from BIS since that meeting and specifically that we have not had the legal arguments from BIS lawyers that BIS agreed to send to us. We are very concerned that with the Lords Grand Committee stage of the Bill next week, Wednesday 28th January, that we are running out of time to have the kind of discussions that we had believed you wished to have.

Our concern is made the greater due to the fact that at the meeting, a number of claims were made as to legal or consequential problems with sections of Clause 42 – yet at the meeting, not only was no evidence provided, but it was clear that the lawyers did not actually know if those assertions were correct. So we are troubled that, nearly five weeks later, we still don't have this information and therefore don't know if it exists.

So you are clear, in the absence of any agreement on changes, the default position of the Fair Deal for Your Local campaign and its supporters is that we will oppose any amendments that change Clause 42 in terms of its content, applicability or process. This includes the Government seeking to substitute our applicability of the market rent only option (being available to all tenants and lessees of companies with 500 or more pubs) with the (changed) Government applicability of applying to companies with 350 or more tied pubs. As we have said, only allowing tied tenants the right to trigger an independent rent assessment means that there is carte blanche for pubcos to increase rent above market level, knowing there is

nothing that the tenant can do about. This would create an obvious and very dangerous loophole – something that BIS has claimed that it wants to avoid doing. It also would be a serious U turn by BIS, who have recognised that the problem is the behaviour of the large pub owning companies, taking too much from individual pub profit's (through high beer prices and *high* rents), to now say that the only issue is tied pricing. All tenants of the large companies deserve the right to be protected from exploitation, which means that the right to an independent rent assessment – at the agreed trigger points – is essential for all.

We remain happy to seek to work through the issues to see if we can agree any changes to the Clause, but we need to finally have the information we were promised, to have any chance of that happening before the Lords Grand Committee stage.

I look forward to discussing this with you on Wednesday, but please can I and the campaign finally have the information we were promised five weeks ago and before the meeting (so by tomorrow morning) so we can have a meaningful dialogue on Monday.

Yours sincerely,

Greg Mulholland MP
Coordinator, Fair Deal for Your Local campaign

FW: Info: Intention behind Clause 42

30 July 2015
14:49

Subject	**FW: Info: Intention behind Clause 42**
Attachments	[ATTACHMENT WITHHELD - ALREADY PUBLISHED]

[redacted]

From: Simon Clarke
Sent: 19 January 2015 19:01
To: [redacted]
Subject: Re: SMALL BUSINESS BILL - PART 4

Dear [redacted]

As requested the RICS Red Book excerpt on Market Rent. I tried attaching the whole Red Book but it was too big !

I don't know if the extract below is of use to you but it is from a draft discussion document I did seeking to explain the MRO option in practical application before we finalised the draft new clause with input from other member groups.

Obviously there were some subsequent tweaks before the final Clause 42 was drafted but it may assist with your thought process.

It is part of a larger document which had attachements so if there is some disjointed bits or you have any questions please let me know.

Regards

Simon

Practical application

The supply tied tenant, aside from paying property rent and in some cases a share of machine income, also pays the wholesale prices of the supplying landlord, which are usually higher than those the lessee would pay in the open market. The tenant may compare its own property with the circumstances of being free of a supply tie and consider the profit achievable under those circumstances.

If, on the notification or occurrence of a specific circumstance[1], a tied tenant considers their tied circumstances are unfair they may, by the service of notice, notify the pub owning business of their intent to activate the MRO option. The parties may then seek to reach a negotiated settlement, that settlement could take the form of revised tied terms or a Market Rent reflecting the revised terms following the severance of tied purchasing terms.

If after one month of service of such notice the parties have not agreed terms then either party may apply for the appointment of a surveyor acting as an Expert.

The Expert will determine a MRO rent and during the period of determination the tenant will continue to acquire tied products and will continue to pay the tied rent prevailing at the time the notice was served. Should the pub owning business alter the price or product list during the Market Rent determination period the tenant may refer any proposed revision of purchasing terms to the Adjudicator for consideration under paragraph 38(2) of the *draft* Bill.

On establishing the Market Rent, either by agreement between the parties, or in the event of failure to reach agreement by Expert determination. The tenant may continue under the terms of the tied agreement that prevailed before the MRO notice was served or elect to discontinue with the purchasing and service obligations and pay the Market Rent established. Any difference between the tied rent before notice was served and the Market Rent established will be reimbursed to the respective party.

Should the tenant elect to implement the MRO option a memorandum[2] (just like at any normal rent review) will be signed and attached to the tenancy or lease recording the variation in agreement terms.

WHY SHOULD MARKET RENT ONLY OPTION BE IMPLEMENTED ?

This is the only tabled solution that can deliver the Governments commitments. It has been the recommendation of 4 select committees, has the support of ten tenant and consumer organisations and has overwhelming support both in parliament and from the public, as evidenced by the now 'annual' pubco behaviour debates and the public consultation. The only resistance to the option comes form the very businesses it is designed to regulate and the only reasons not to implement it have been presented by research papers admitting that their conclusions are based on evidence supplied to them by the pub owning businesses themselves, instead of genuine research. The London Economics report, on which the pub owning businesses are hanging their hat and the Government have based their reluctance to include the MRO option in the Bill, acknowledges they would like to "....thank the pub companies who supplied us with confidential data, ...Andy Tighe at the BBPA who provided key assistance. The report basis its results on the pubcos viability not the pub (a pub does not close because it is no longer providing a pubco with the same income, this shows an utter lack of understanding of the provisions of Landlord and Tenant Act legislation and a false basis for conclusion), and concludes with the caveat "In particular, the size of the transfer from pubcos to tenants resulting from the 'no worse off' principle is very hard to estimate,.....and "...it is hard to determine which pubs will close."

Even now some Ministers, MPs and officials seem to be working under the illusion that the Market Rent Only option is a complex and radical idea. It is not, indeed most tied agreements contain provisions for just such an option to be implemented in certain circumstances but only at the request of the pub owning business not the tenant.
A "tied licensee" is obliged to acquire products **from the company that own the pub**, such as beer, **in addition to paying rent.** The idea is that if the price of 'tied' products are higher than the open market price then the tied rent is lower, to 'countervail' the disadvantageous pricing structure, i.e. the tied licensee should be no worse off than if they were free of tie.
Put simply, the Market rent Only means a tied licensee can choose whether to remain in the same tied agreement, paying extra for tied products and a lower rent to compensate for them or swap on to an agreement under which they simply pay a market rent and acquire products from any source if they consider the tied rent is not fairly reflecting the tied product prices.

Quite the contrary to opening a potential floodgate of applicants, it is proposed that this 'option' could be activated at various trigger events, to be defined in the Pubs Code - not, as has been suggested, at any time during the agreement period, for example:

(a) at rent review or lease renewal;

(b) if the Pub Company makes a significant alteration to the product choice or price at which it supplies tied products to the licensee;

(c) if there has been an event outside of the Tenant's control and unpredicted at the time of the previous Rent Assessment that impacts significantly on the licensee's ability to trade;

(d) if a pub owning company obliged to honour the Statutory Code propose a sale of their property interest (ensuring developers can not exploit tied terms to evict a licensee).

Dispute on interpretation of any of these events should be capable of referral to the proposed industry Adjudicator.

The tied model is in itself regulatory, placing a burden and red tape upon the tied licensees, if it is to remain and survive, along with our nations pubs, a mechanism needs to be in place curtailing the abuse the model and requiring it to operate fairly.
It is too naive to expect this to be delivered by a periodic formula simply comparing a pub licensees profitability both on a tied and free of tie basis. The difficulty is that rent assessments are usually at 5 yearly intervals whereas tied product price increases can be more than one a year. A 5 yearly reassessment allows a party, of a mind to abuse the opportunity to manipulate the dominant position afforded to them by the tied agreement and simply increase product prices, to gain on the swings what they lost on the roundabout.
One question the Government sought responses on is whether their commitment of 'fairness' and 'a tied tenant being no worse off than if they were free of tie' could be delivered by offering tied licensees a free of tie option, a recommendation originally put forward by the Business and Enterprise Select Committee in 2009 and re endorsed by the Business and Innovations committees of 2010 and 2011, chaired by Adrian Bailey.

The free of tie option proposed by four successive All Party Parliamentary Select Committees is the Market Rent Only option, not some spurious forced property interest swap but simply an option for lessees, not pubcos, to determine and consider their tied agreement and sever the purchasing obligations, if they are not fairly reflected in the tied rent, in exchange for a straightforward, normal, commercial agreement like most other businesses enjoy.

Simplicity

Tied agreements already contain Market Rent Only options but are only operable by the pub owning business. Most tied agreements contain a 'Tie Release' provision, whereby the pub owning business can implement a Market Rent Only option on exactly the same terms as we propose. All tied agreements contain a provision allowing for a Market Rent to be determined, at the pub owning businesses behest, in the event the tied terms are regulated as proposed. We are simply seeking to make these option operable by either party not just one.

The tied licensees requirement to purchase products and services from the pub owning company are called 'Purchasing', or 'Service' , 'Obligations' these are individual provisions within tenancies and leases and have been deliberately drafted as separate clauses or schedules so that, if necessary, they can be deleted without damage to the remainder of the document.
It is perfectly simple to sever these provisions from the main document leaving the remainder in force, just as legislation has provided in the Competition Act 1998, with anti competitive provisions, or the Unfair Contract Terms Act 1977, when considering unfair contract terms in consumer agreements. The possible eventuality of just such an event - by including a Market Rent Only option within the Bill - has been pre considered by the pub owning companies and their agreements already contain provisions triggering the equivalent of a Market Rent Only rent review (rent recalculation to reflect changing circumstances) if the tied terms are rendered unenforceable. Given the latter there is no necessity to alter lease or tenancy agreements in any way.
A typical provision would read:

(Example provision from an existing pubco lease - summary)

Changes in the Tie
We may give you notice in writing at any time (and more than once) to:

> *(a) release you from all or any of your purchasing obligations under clause 18.1(**Purchase of Drinks**) ; or*

*(b) vary any of Your purchasing obligations in clause18.1 (**Purchase of Drinks**) in order to take into account any law which may make the relevant obligations unenforceable;*

with effect from the date in that notice and We may then choose to review the Rent to the Market Rent by serving a Review Notice on You and if any Rent Concessions are still applicable at that time they will cease to apply from the date of Our notice to You releasing or varying Your purchasing obligations.

(Example provision from a tenancy - summary)

The pub owning company may vary the provisions of the Purchasing Obligations in order to take into account any enactment whereby any of the provisions might be or become, in whole or in part unenforceable or restricted in scope or effect in the event of such a variation the rent firstly reserved shall be reviewed in accordance with the agreement terms.

There is a misguided view that a whole new process would be necessary, adding cost and complication, this is quite incorrect. MRO can 'piggy back' existing legal mechanisms and frameworks. Most of the necessary procedures are in place, either in the existing leases or legislation (Landlord and Tenant Act 1954 Part II). All that is needed is a right to the MRO option, which can be in the statutory code at certain trigger points, and a form of appeal, beyond what exists, to the Adjudicator, should there be any doubt over the proper application of the statutory code or the principle that a 'tied tenant should be no worse off than if they were free of tie'.

This is how the system can operate using existing procedures and mechanisms. Timing, court procedures, appointment of third parties and apportionment of costs are all present in existing leases and/or legislation. All that is needed is the right to an MRO option and a right to appeal to a superior authority - the Adjudicator - where the application of the statutory code is in question.

-----Original Message-----

From: [redacted]

To: siclarke
Sent: Fri, 9 Jan 2015 10:29

Subject: RE: SMALL BUSINESS BILL - PART 4

That's fine Simon.

More detail later would be good, but for now what you were able to say yesterday on the independent assessor, relevant experience and guidance was helpful.

Have a good break and let's speak when you return.

Best

[redacted]

From: [redacted]
Sent: 09 January 2015 09:52
To: [redacted]
Subject: SMALL BUSINESS BILL - PART 4

Dear

Good to meet yesterday.

I appreciate we rarely get to discuss the detail perhaps we would like on specific subjects.

You mentioned as we were leaving that you had some queries and would like some clarification on Clause 42.

I'm afraid I am on hols from 11th Jan to 18th but can meet up when I am back or if you want to put pen to paper and outline your areas of query I will try and get some answers together for immediate response on my return.

S

FW: Position statement

04 August 2015
16:35

Subject	**FW: Position statement**
Attachments	 BII FLVA a...

From: Kate Nicholls [redacted]
Sent: 20 January 2015 09:03
To: [redacted]
Cc: [redacted]
Subject: Position statement

[redacted]

I am sorry that this is later than I had hoped, but we only received final confirmation from all parties that they were happy with the final text late last night.

We do not intend to make this paper public and its purpose is to inform your thinking as Government decides next steps on the broader policy intent behind the clause. We have sought to provide factual information on the nature of contracted out agreements as well as our joint assessment of likely impact of decisions on this issue and any risks arising to tenants. We believe these risks to be potentially broad but it is obviously difficult to quantify the impact at this stage.

In terms of the numbers of contracted out agreements, my previous note explained that there is not necessarily a discrepancy between the figures provided by Martin – which are a snapshot survey of 200 new lets in the past year – and my discussions with you about the proportion of the entire estate which will be contracted out. There is no doubt that figures vary from company to company, but I think we would have to conclude that there are no definitive figures on the number of contracted out agreements in place at the present time.

If there are any additional questions, please do not hesitate to contact us.

Kate Nicholls
Chief Executive

[redacted]

the almr BII BRITISH INSTITUTE OF INNKEEPING FLVA

SMALL BUSINESS, ENTERPRISE BILL – NEW CLAUSE 42

New clause 42 of the Bill seeks to introduce the right for a tenant or lessee to request a Market Rent Only at certain points during their relationship with their landlord. It is agreed by all parties that the right does not apply to new agreements but is only available as an option to exercise once an agreement is under way – almost as a form of break clause.

The clause introduces the right in respect of renewals, rent reviews or 5 years from the date of previous rent review, at a significant price increase, when there is a change of title or the company goes into administration or when there is an event outside the tenant's control.

This paper summarises the views of the ALMR, BII and FLVA – the only national trade bodies representing lessees – on the implications of these trigger points.

Renewals

- Clause 42 of the Small Business & Enterprise Bill introduces a new right to request a Market Rent Only option in certain circumstances. During discussions, it is clear that the policy intent of the clause is to apply MRO triggers to existing agreements and not to allow an MRO request to be tabled at the start of new lease negotiations.

- We believe that the reference to 'renewals' in this clause is potentially confusing and has been subject to very different interpretation by various parties to the debate. We are keen to ensure that the policy intent is clarified and that an appropriate form of words is used to deliver it.

- While many long leases and tenancies have a right of renewal, an increasing number of shorter leases and tenancies are contracted out of the Landlord & Tenant Act and have no security of tenure. It is worth noting in this context that many pub commercial leases are will also be contracted out and have no right of renewal. At the end of a contracted out agreement, the landlord has the right to determine the property as they see fit – taking it into direct management, contracting with a new tenant or issuing a new agreement to the existing one.

- We have taken legal advice on the wording of the Bill and it is our understanding that a reference to renewal in primary legislation could not override the provisions of the lease and the agreement to contract out and waive the renewal right and would therefore not trigger an MRO request. In short, as currently drafted, the Bill would not apply to the renegotiation of a contracted out lease or tenancy, this being, in effect a new agreement.

Potential Risks of Extending the MRO provision

- There are potential risks of leaving contracted out leases/tenancies outside the scope of an MRO trigger, notably that it could encourage greater use of contracting out by pubco landlords. However, if the fact that a contracted out agreement would not be subject to an MRO right at the point of renegotiation it could have the added benefit of discouraging lessees from signing up to contracted out agreements without understanding the consequences – a point raised at the recent round table – and increasing the value of a contracted in arrangement, thus increasing lessee protections.

- The risks of unintended consequences for lessees of bringing these re-negotiations inside the scope of the MRO provision could potentially be that they place an incumbent lessee seeking to negotiate a new lease/tenancy with their landlord in a different position to a new entrant. Granting a new lease/tenancy to the former would require the landlord to open up the outlet and agreement to a free of tie option whereas granting a lease to a new entrant would protect the tie on an ongoing basis. If the MRO trigger encompassed was extended to contracted out lease/tenancy renegotiations, pub company landlords could use the end of the agreement to reduce their exposure to MRO risk by taking the premises back into their managed estate (more common in the case of leases than tenancies), only grant a very short term agreement or that they seek a new tenant. In both cases, there is a substantive risk of lessees being ejected from business premises in which they have made substantial investment and in small business failure. There are already examples within our collective membership of this happening.

- It is worth noting in this context that the lessee renegotiating a contracted out lease/tenancy would receive the same protection as a new lessee – namely the right to receive a parallel rent assessment and refer the rent to a Statutory Adjudicator to ensure that a fair tied deal was reached if the breakdown in negotiations was attributed to the rental valuation. They would also be subject to subsequent MRO triggers.

- We believe it would be helpful to strengthen the statutory code in this respect to require a landlord to provide an incumbent lessee with a notice of intent to issue a new lease, or otherwise, and to enter into negotiations with the existing tenant. This could be aligned to the dilapidations requirements and the rent negotiation timetables.

Conclusion

- We urge the Government to clarify their policy intent in this area.

- It is our view that property law is clear and unambiguous – a reletting of a contracted out agreement is not a renewal it is the issuing of a new agreement and the Bill as drafted is consistent with this

- Should government wish to extend the MRO trigger to the renegotiation of contracted out agreements, then the Bill will need to be amended. However, we believe that the risk of tenant and lessee failure, business uncertainty and the impact on investment decisions mean that there will be unforeseen consequences as a result of this.