


FW: Section 4 of the Small Business Bill

04 August 2015
16:34

Subject	FW: Section 4 of the Small Business Bill
Attachments	 Small Busi...

From: Kate Nicholls [redacted]
Sent: 01 December 2014 22:32
To: Neville-Rolfe MPST
Cc: [redacted]; McLynchy Julie (CCP)
Subject: Section 4 of the Small Business Bill

Thank you for sparing the time to meet with me today to discuss Section 4 of the Small Business Bill.

I have attached an internal briefing note which we have prepared in discussion with our multiple tied lessee members. This highlights their concerns about the potential consequences of the amendments passed during the House of Commons.

The ALMR has always made clear that it supports the tied house model. Operated fairly and professionally, it fosters entrepreneurship and a genuine business partnership whereby both sides invest together, work to maximise joint earnings and enjoy a fair share of the profits. We are concerned to ensure that any new regulatory structure supports and encourages mutually beneficial versions of the tie.

The ALMR did not support the mandatory requirement for a tied pub landlord to offer a free of tie, market rent only option. While this does not abolish the tie, as currently drafted we believe it could result in unforeseen consequences for tied lessees and we are therefore keen to work with the Government and others to address these and to ensure that any change is practical, workable and contributes to a successful pub sector going forward.

I have a meeting with your officials on Wednesday to discuss some of the practical drafting matters, but please let me know if there any specific areas where you would welcome additional information.

Kind regards
Kate

Kate Nicholls
Chief Executive

[redacted]

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Small Business, Enterprise & Employment Bill
Section 4 - Pub Companies

- Section 4 of the Small Business, Enterprise & Employment Bill has been substantially amended during Committee and Report Stages in the House of Commons. As a result those who work and invest in our sector are now unclear and uncertain about how the new regulatory structures will work in practice.
- Unless the proposed new regulatory structure around pubcos is clear, workable and capable of being swiftly implemented it will impact on the long term sustainability of the sector as a whole and undermine investment and confidence. More importantly, the new regime must ensure that fair, mutually beneficial models of the tie continue to be available and work to encourage and facilitate sustained joint investment in the property, people and offer of the individual pub to ensure the consumer does benefit from these changes.
- This briefing note outlines the key areas of concern and offers remedies for Peers to consider as the Bill continues its passage through the Upper House.

What the Bill should deliver

- Our objective for any new regulatory structure is that it fosters entrepreneurship. It should encourage commercial flexibility and competition amongst landlords; support the offering of genuine choice of lease terms and operating model – including a continuation of the tie where appropriate; equip lessees with the information they need fully to understand the commercial SWOT accompanying that choice; and provide for transparency in rent setting.
- The ALMR has always supported the tied house model. Operated professionally and fairly, it is an extremely valuable and beneficial business relationship which allows both parties to invest in the business, work together to maximise the earnings of the pub in order to generate an appropriate and fair share of the economic benefits for each. The ALMR has also long been clear that reform has been needed to address issues of concern. We believe the Government proposals in the Bill as originally drafted were sufficient to deliver this.
- In short, as the Bill progresses we need to ensure that it secures the best of the existing model, reforms what is needed and eliminates bad practice.

What needs to change in the Bill to deliver these aims

We would urge the Government to clarify and streamline the following:

- **MRO Definition - Code and New Clause 2:** The Bill gives the Secretary of State powers to establish a Statutory Code for tied pub agreements and a Statutory Adjudicator to regulate these agreements. New Clause 2 introduces a new right for lessees to be offered a free of tie agreement with no purchasing obligation and a market rent (MRO). There is some confusion amongst lessees as to the relationship between the two provisions and we believe that both the Code and MRO can apply simultaneously. The ALMR believes that the Bill should offer lessees a clear choice between a regulated tied agreement and an unregulated free of tie agreement; if they opt for MRO then Code protections are disapplied and rents will be set on commercial market terms.

Business Leasing Code revision: if MRO rents are to be set on purely commercial terms, then it is vital that the existing voluntary Code of Practice for commercial leases is updated to avoid creating new conflicts or aggressive practices which are all too common in the free of tie sector eg quarterly upfront payments, UORR, inappropriate rent comparables

- **MRO application:** In our view, the Bill should be used to encourage the development and offering of a range of flexible lease terms within the tied model. Whilst the clause is clear that MRO should be genuinely free of tie, there would be nothing to stop landlords from offering free of tie pricing arrangements, with variable rent and pricing terms and levels of support to benefit both parties. Effective, jointly discussed and agreed P&L modelling is key to getting a tied relationship right and combining greater economic benefit re pricing with the aligned commercial objectives to grow the retail trade and allow both parties the headroom to invest will deliver this. It is vital therefore that the Bill does not undermine this.

MRO within the Code structure: Keeping a distinction between tied agreements within the Code and free of tie without would give lessees a better understanding of the impact and full implications of their choice and any incidental changes to the nature of their agreement. We will be working with landlords to encourage innovative partnerships.

- **MRO Trigger:** The Bill allows lessees to request a MRO option at various stages in the relationship, particularly initial rent setting, regular rent reviews (as provided for in the lease), exceptional rent reviews (as provided under the Code) and at lease renewal. As noted above, our understanding is that the MRO and Code would be separate and therefore we do not believe it would be possible to choose a free of tie arrangement as a result of exercising a Code right to request an out of cycle rent review – this is an internal inconsistency which may need to be resolved. Giving the lessee the right to opt in or out of being tied on a regular rent cycle would undermine sustainable investment – by both parties – as a result of the short termism and uncertainty it introduces into the relationship.

Reduced triggers: The trigger point should only be at the granting of a new agreement for new lessees or the first rent review post introduction of the legislation for existing, and it should be a once and for all decision.

- **Threshold:** there are now two different definitions within the Bill to determine the scope of its provisions. The Code will apply to companies with more than 500 tied pubs but the MRO provisions will apply to companies with more than 500 pubs of any tenure and 1 tied pub. This means that a company may be caught by the MRO provision but not required to comply with the Statutory Code. It also means that the MRO provision will bring in a number of managed pub companies and franchise arrangements in the casual dining sector. Any threshold will create competitive pressures, creating a two tier market and resulting in some lessees being outside the scope of statutory protection.


Government revised proposal: It is vital that we have one clear and simple threshold to determine the scope of the Bill and to avoid unduly widening its scope. We support the Government's suggestion of a reduced threshold of 350 tied pubs

- **Timetable:** the Bill requires the Secretary of State to introduce a Statutory Code within a year of the Bill being passed but there is no timetabling requirement for other elements of the Bill. We see no reason why the adoption of a Statutory Code – which has been extensively debated and consulted upon – should be held up pending MRO implementation

FW: Please read - note of CAMRA meeting

04 August 2015

15:04

Subject	FW: Please read - note of CAMRA meeting
Attachments	 Note of M...

From: [redacted]

Sent: 05 December 2014 13:26

To: [redacted]; McLynchy Julie (CCP);[redacted]

Subject: Please read - note of CAMRA meeting

Hi all,

An interesting meeting with CAMRA today, see note for a summary but highlights include:

- Administration and sale of title triggers a red line – essential protection that won't be needed often.
- Covering FOT agreements a nice to have but not a priority for them (they hadn't realised that's the effect of drafting).
- Threshold preference is 500 plus pubs of any kind but only applying to tied pubs – against 350.
- Franchises definitely need to be covered –worried about loophole.
- MRO definitely shouldn't apply to new agreements.
- We should retain PRA so that tenants can secure no worse off without spending £2k on a valuation (won't die in a ditch over it).
- Misgivings about subsection 5 – i.e. protecting route to market – don't think it will work and could disadvantage real ale providers.

Cheers,

[redacted]

Note of Meeting with Jonathan Mail of CAMRA - 5th December 2014

Background

CAMRA were involved in drafting of clause 42.

Code

Complimentary about the Code, particularly parts 7 (rent assessment) and 8 (PRA). Glad about the commitment to having good profit and loss statements and pleased we will consult on the detail. Currently shadow p & ls are hugely misleading - overstate sales and costs - allowance for wastage - pleased our measures will allow tenants to challenge them.

Franchises

Pleased also at new sections 7 and 8 in Code that explicitly refer to fee based agreements as they agree Franchises should be in - not convinced by Marston's argument that they shouldn't be covered and very concerned about the unintended consequences i.e. a loophole.

At the same time they are not persuaded that the trigger in 6 (b) would need amending to allow for MRO being triggered when a franchise agreement was changed to increase the turnover fee given that at the moment those agreements don't allow for that possibility. They are satisfied that under the existing drafting in the Code any change in the turnover share could trigger a 'fee review'.

Parallel Rent Assessments

CAMRA would prefer to keep PRA as an option.

They think that a minority of tenants will go MRO so believe that PRA should remain especially as the fee would only be £200 as opposed the £2,000 costs of the independent market assessment.

Also concerned that pubcos might be more likely to take a tied agreement off the table in an MRO negotiation whereas if they can choose a 'PRA route' they are less likely to do so.

[They understand the simplicity argument but are concerned about the costs of MRO meaning the tenant ends up locking themselves in]

Trigger points

They think that the 21 day negotiation period would kick in after the contractual notice period and no later than the end of the tenancy.

Confirmed that they do not consider it workable to apply MRO for new tenancies. A pub company will always choose a prospective tenant who prefers a tied agreement over one who prefers MRO. When the tenant comes to the renewal trigger point they will have had ample time to understand the agreements they are in and the merits of it. If it is a good relationship with all else being equal you'd expect them to continue as a tied tenant.

CAMRA think 6 (a) should be redrafted to ensure that no more than five years pass between the MRO trigger. As it stands for agreements with no rent reviews built in the trigger would not apply.

They don't think those agreements exist now but pubcos could adopt this model. I think they have a point. Can our Code drafting help with this?

The change of title and administration triggers are a red line for CAMRA. If Enterprise sell a pub to Fullers as a tenant you are moving from ma company with a choice of beers available to one with none, where tenant choice is restricted.

They do not consider the admin trigger as unfair given that the pubco would get a market rent so the pubco is not disadvantaged. They agreed that a lack of flexibility in disposing of assets may devalue them but they are more concerned about the tenant's rights.

CAMRA - happy with our notion of 'local economic events' for the trigger on circumstances out of the tenant's control. They are not seeking this definition to include changes in local competition, this hasn't been a priority as it is not inevitable that trade would dip, different pubs offer different things.

[I put all the counter arguments here including legal concerns, they put a premium on protecting vulnerable tenants – I didn't explore other mitigations e.g. voiding lease terms where necessary]

Threshold

Code and market rent only should apply to the tied pubs of pubcos with 500 pubs or more of any kind. These are the companies with market power potential to cause harm to tenants and communities.

Their next preference would be 500 tied pubs. Very much against 350 pubs as this would risk capturing family brewers. 500 gives a safe margin into which family brewers can expand if they wish.

Covering free of tie pubs would be a nice to have but they recognise the potential legal difficulties in making that change now.

Route to Market Protection

Have strong misgivings about clause 42 subsection 5. They helped draft it and persuaded others (greg) that it should read 'may' rather than 'must'. Could result in pubs being free of tie for lager but not real ale (except for Star pubs of course) with say Marston's requiring their tenants to only stock Marston's real ale. I did flag whether or not there could be competition issues.

Also concerned at further brewery tactics e.g. "What stops Enterprise Inns buying a brewery and not releasing the beer onto the wholesale market. The tenant would be tied to Enterprise under subsection (5) but not able to secure free of tie prices.


Concerned also that under MRO big brewers would come in with the brewery loan arrangement (i.e. what the pubcos have warned us about). While raising that they recognised that pub companies may address this in their lease agreements i.e. prevent their FOT tenants from entering into long term tie agreements with other suppliers [is that possible?]

I agreed we should stay in touch.

5th December 2014

FW: FLVA Readout

04 August 2015
12:39

Subject	FW: FLVA Readout
Attachments	 Pubs - Not...

From: [redacted]

Sent: 12 December 2014 09:52

To: [redacted]; McLynchy Julie (CCP); [redacted]

Subject: FLVA Readout

Hi

Please find attached a note on my conversation yesterday with Martin Caffrey.

They have a particular concern about how the two tie market will play out at an individual pub level. They think it is unfair to tenants who do not have the MRO option as they will find it harder to compete with FOT tenants. I think that view may evolve as FLVA think through the new changes

Cheers

[redacted]

Note of Phone Call with Martin Caffrey of FLVA 11th December 2014

Summary

Consistent with past feedback Martin's main preoccupations are: transparency of rent assessment process, costs of dispute resolution, availability of support and advice services for tenants.

His new concern is the impact of the two tier treatment of tied pubs. Thinks that at the individual publican level those who are tied to family brewers will be disadvantaged if they can't respond in kind to neighbouring pubs taking MRO. Accepts that family brewers will be able to adopt strategies to compete but in his own mind is clearly finding it hard to compute as to how the market will react.

MRO and Prospective Tenants

Hadn't appreciated that prospective tenants not in scope of MRO. Not overly concerned at this except has a very significant concern as to the implications for agreements that are contracted out under the Landlord and Tenant Act 1954. Explained that a renewal of a contracted out agreement is basically a brand new agreement negotiation. As this would constitute a new agreement would it therefore would fall out of scope of MRO. He even wondered if this was behind the BBPA's decision to 'accept' MRO because contracted out tenancies are so prevalent at Enterprise (90% plus) and Punch.

Sale of Title Trigger

Is against the sale of title trigger. If it applies when sale is to another pubco he thinks this will depress values and reduce the number of deals. Thinks it is less of an issue for sales for other uses as Tescos for example will only buy the pubs if they have the freehold.

Event outside Tenant's Control

In principle is supportive and pleased we will consult. Thinks we should consider if the test for this trigger could take account of the difference between a temporary issue and a longer term issue. Thinks that road works for six months should not constitute a trigger for MRO. If it did then it might disincentivise POBs from providing shorter term support packages.

Two Tier Market

Very concerned. Not for pub companies but rather the tied tenants of smaller POBS that don't have the MRO option. Thinks that there will be unfair competition at the pub level. Would prefer all companies to be covered as per our original proposal.

Free of Tie Agreements in Scope

Accepts that there isn't evidence of mischief with regard to FOT agreements. Was concerned that after going FOT any disputes would be more costly to resolve than if under the code or the voluntary code (I pointed out that the voluntary code doesn't apply to FOT agreements now).

Note of Phone Call with Martin Caffrey of FLVA 11th December 2014

Independent Assessment at point of MRO

Had got the wrong idea about how the rent setting process would work under clause 42. I explained that the 21 days negotiation, the ninety days independent assessment and any referral to the adjudicator would all happen before an agreement was signed. This seemed to answer the concerns to some degree.

Will the assessment be capped as with PIRRs?

Thinks that 21 days is not long enough for the first period of negotiation under the triggers, should be at least 28.

Parallel Rent Assessment

Understands the rationale for not continuing this as a separate option and agrees in principle with this however shares CAMRA view that there might be an issue in that the independent assessment might cost £1/1.5k whereas PRA was £200 (of course it is independent).

Thinks we should require POBs to provide a detailed profit and loss account to support their initial MRO rent bid i.e. provide the same level of justification and explanation as part 7 of the Code does for the tied rent assessment. This is to expose pubco assumptions to challenge. Accepts that if we ask the independent assessor to do this it could be very costly.

Support for Tenants

Remains a significant concern for FLVA. Highlights the imbalance in skills and experience of tenants to secure a good deal and the need to provide more comprehensive support and advice at the point of MRO. Concerned that tenants may choose MRO without thinking through all the implications of a higher fixed rent with probably an RPI adjusted rent and/or in a world where upward only rent reviews are reintroduced.


Other Comments

Had bumped into Mike Benner of SIBA at the DCLG meeting. SIBA are very concerned that their members will be squeezed out in an MRO world.

FW: FOI - FW: Invitations to pub roundtables

05 August 2015

10:57

Subject	FW: FOI - FW: Invitations to pub roundtables
Attachments	 Small Busi... [ATTACHMENT WITHHELD - OUT OF SCOPE]

From: [redacted]

Sent: 19 December 2014 11:48

To: [redacted]; McLynchy Julie (CCP); [redacted]

Cc: [redacted]

Subject: Invitations to pub roundtables

For info - invites to the two roundtables have now gone. [redacted]

[redacted]

Invitees to roundtable for tenants' representatives on Thursday 8 January 11.30am to 12.30pm at BIS:

Kate Nicholls, Chief Executive, Association of Licensed Multiple Retailers (ALMR)

Martin Caffrey, Operations Director, Federation of Licensed Victuallers Associations (FLVA)

Simon Clarke, Fair Pint Campaign

Tim Hulme, Chief Executive, British Institute of Innkeeping (BII)

Tim Page, Chief Executive, Campaign for Real Ale (CAMRA)

Inez Ward, Justice for Licensees

Val Spencer, Licensees Supporting Licensees

Dave Mountford, GMB Union

Chris Walker, FSB

[redacted]

[redacted]



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18 December 2014

Dear Kate,

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL: PUBS CODE AND ADJUDICATOR

As you know, during Report Stage of the Small Business, Enterprise and Employment Bill the House of Commons voted to introduce a Market Rent Only option, which would give tied tenants of large pub companies the right to go free-of-tie in certain circumstances. The Government resisted the clause partly on the basis that it could have unintended consequences for the sector. However, the Government recognises the strength of feeling in Parliament on this issue and understands that many people believe that pub-owning companies need the threat of tenants going free-of-tie before they will offer their tenants a fair tied deal. That is why the Government confirmed at Second Reading of the Bill in the House of Lords on 2 December that we accept in principle the introduction of a Market Rent Only option.

Our focus now is on making this option workable, to ensure that tied tenants are no worse off than free-of-tie tenants and that we minimise the risks of unintended consequences. I am grateful for your engagement with officials to make sure that we get this right. As part of this work, I am keen to hear your views on how we make the Market Rent Only clause workable, as well as any other comments you may have on Part 4 of the Bill. I would like to invite you to a round table meeting with tenant organisations on Thursday 8 January from 11.30am to 12.30pm. The meeting will be held at the Department for Business, Innovation and Skills, 1 Victoria Street, London, SW1H 0ET. I will also be hosting a separate round table for large pub companies.

I do hope you or a colleague will be able to attend. Please contact kate.nicholls@bis.gov.uk (or [+44 20 7215 5000](tel:+442072155000)) to confirm your attendance, or to nominate an alternate if necessary.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jo Swinson', written in a cursive style.

JO SWINSON MP



Department
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to confirm your attendance, or to nominate an
alternate if necessary.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jo Swinson'. The signature is written in a cursive, flowing style with a large initial 'J'.

JO SWINSON MP



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1 Victoria Street
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FLVA
The Raylor Centre
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JO SWINSON MP

Jo Swinson MP
Minister for Employment Relations and Consumer Affairs



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1 Victoria Street
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Val Spencer,
Licensees Supporting Licensees

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SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL: PUBS CODE AND ADJUDICATOR

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Our focus now is on making this option workable, to ensure that tied tenants are no worse off than free-of-tie tenants and that we minimise the risks of unintended consequences. As part of the work to make sure that we get this right, I am keen to hear your views on how we make the Market Rent Only clause workable, as well as any other comments you may have on Part 4 of the Bill. I would like to invite you to a round table meeting with tenant organisations on Thursday 8 January from 11.30am to 12.30pm. The meeting will be held at the Department for Business, Innovation and Skills, 1 Victoria Street, London, SW1H 0ET. I will also be hosting a separate round table for large pub companies.

I do hope you or a colleague will be able to attend. Please contact [redacted] to confirm your attendance, or to nominate an alternate if necessary.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jo Swinson'. The signature is written in a cursive, flowing style with a large initial 'J'.

JO SWINSON MP

Jo Swinson MP
Minister for Employment Relations and Consumer Affairs



Department
for Business
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1 Victoria Street
London
SW1H 0ET

Chris Walker
FSB

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18 December 2014

Dear Chris,


SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL: PUBS CODE AND ADJUDICATOR

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JO SWINSON MP

Jo Swinson MP
Minister for Employment Relations and Consumer Affairs



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Innovation & Skills

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18 December 2014

Dear Tim,

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL: PUBS CODE AND ADJUDICATOR

Further to my letter recent about the Pubs Code and Adjudicator measures in the Small Business, Enterprise and Employment Bill, I would like to invite you to a round table meeting for tenant organisations on Thursday 8 January from 11.30am to 12.30pm. The meeting will be held at the Department for Business, Innovation and Skills, 1 Victoria Street, London, SW1H 0ET. I will also be hosting a separate round table for large pub companies.

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JO SWINSON MP