RE: Greg Mulholland letter: Key changes needed for Govt to stick to its promise

18 August 2015
15:01

Subject	**RE: Greg Mulholland letter: Key changes needed for Govt to stick to its promise**
From	Swinson MPST
To	Swinson MPST Correspondence; [REDACTED]
Cc	McLynchy Julie (CCP); [REDACTED]
Sent	23 February 2015 12:41

MCB2015...

MCB2015...

Hello All,

This meeting will take place with Greg Mulholland at 13:00 – 13:30 on this Wednesday.

Kind regards,

[REDACTED]

From: Greg Mulholland [REDACTED]
Sent: 20 February 2015 13:48
To: Message from Vince Cable; Swinson MPST Correspondence
Cc: SPAD Cable MPST; [REDACTED]
Subject: Fwd: Key changes needed for Govt to stick to its promise

Dear Vince and Jo,

Sending this again as my office were given incorrect emails by Jo Swinson's office.

Best wishes,

Greg

Greg Mulholland MP
Fair Deal for Your Local Coordinator
MP for Leeds North West

[REDACTED]

Begin forwarded message:

From: Greg Mulholland [REDACTED]

Date: 20 February 2015 12:38:40 GMT
To: [REDACTED]

Cc: Ian Swales [REDACTED]

Subject: Key changes needed for Govt to stick to its promise

Dear Vince and Jo,

Attached are the key changes, as agreed by the Fair Deal for Your Local steering group, that we would need to see to the Small Business, Enterprise and

Employment Bill market rent ***only*** option (currently legally incorrectly described as a "market rent" option) for us to be able to say that the Government has not reneged on its commitment to accept the will of the House of Commons.

The Fair Deal for Your Local campaign supporting organisations realise that some of the changes made to our clause will not be reversed and we are prepared to accept that, but only on the basis that fundamental things are now corrected - because at the moment the Government's clauses do **not** guarantee that the market rent ***only*** option will be delivered in a way that will ensure it can be triggered by tenants and with them having a clear right after a finite and reasonable process to opt to pay the market rent only process. In other words, as drafted, it is not actually in the bill that the market rent only option will come in at all, as it could be watered down or neutered in the secondary legislation process of the consultation over detail of the code.

We are taking further legal advice which we are happy to share with you. I and we hope that this time, unlike when we made this offer after our meeting on 17th December, that BIS take up this offer.

I look forward to discussing this further with you at the meeting between me, George Scott and BIS officials and Minister this coming week, though I note that we are still awaiting a date and time for this (Monday afternoon, Tuesday or Wednesday) so I hope this will be confirmed today.

I have copied Ian Swales MP in as Vince's PPS.

Best wishes,

Greg
Greg Mulholland MP
Coordinator, Fair Deal for Your Local campaign
MP for Leeds North West

-
www.gregmulholland.org

There are two overall serious concerns about the Government's replacement clauses (that replaced Clause 42 as voted through by a majority of MPs) in the bill that need addressing:

1. The first (and most serious one) is that the BIS MRO clauses are drafted in a way that does not ensure **that the Market Rent Only option will actually come in in a meaningful, workable way that tenants could exercise at agreed and definite trigger points and with a finite length of time before they can exercise their right to pay market rent only.** There are also dangerous flaw in how BIS are defining the market rent only option.

2. Secondly, the way the replacement clauses are drafted, BIS have created **dangerous loopholes** that the pubcos could and will seek to exploit, to circumvent the legislation. It is worth remembering that the 1990 Beer Orders were diluted at Lords' stage as a result of self interested 'industry' lobbying and as a result a loophole resulted in making way for the creation of the pub companies.

The specific problems – and changes needed are as follows:

(a) The replacement clauses include a "market rent" option (NB **NOT** a Market Rent ***Only*** option – which is what MRO stands for) but as currently re-drafted, the principle is almost meaningless because there is no clear right for tenants to trigger the MRO option at certain very key points, with no certainty that there will be a reasonable **time-limited** period in which negotiations must conclude.

- **BIS has removed the words "must" in the old Clause 42 and replaced them with "may" which gives no certainty that the Market Rent Only option will actually be introduced in any meaningful way,** leaving the possibility open that the next Government could water down, neuter, or even remove the all-important right for tenants of the large pubcos to request an independent rent review with the right to take a deal on this basis.
- **The re-drafted Government clauses have entirely removed any legal stipulations of what the MRO process will be from primary legislation.** It has (and is) so often the case that endless negotiations and litigation renders tenants broken and bankrupt. Whilst there may be a concern about the possibility of legal challenge without consultation on full detail of how the Market Rent Option would work in practice, there **must be basic clarity on the face of the bill** as to (1) when a tenant can demand the right to an independent rent assessment, what stages are involved (including allowing for negotiation between the two parties) and a finite length of time for the whole process will take from serving notice to being able to only pay the independently assessed market rent.

Changes needed:

(i) The bill needs to be corrected so that it is it is always the 'market rent only' option - clearly legally laying down that it is the right to choose to *only* pay an independently assessed market rent.

(ii) The word "may" must be replaced with "must" or "shall" – or there is no certainty that the Market Rent Only option will actually come in as intended, which is essential.

(i) To ensure that the MRO process defined in detail in the Statutory Code will be a "finite and reasonable" timescale. These or similar words need to be included in the bill.

(b) BIS are redefining what "market rent" is (when it is already established in existing law) and allowing a potentially non market rent to be set in law as a market rent, which is very dangerous.

- 44 (2) (b) it suggests that the pubco and tenant can "agree" the "market rent". They can of course agree any rent they wish on a tied, part tied or free of tie basis – and always can do this – but any agreement they make is NOT the "market rent". **This shows fundamental misunderstanding of the market rent only option – which is basically just a right to have an independent assessment of what the rent would be on a free of tie basis.** The way the Govt clauses are drafted (and the proposed process), if a tenant accepts a figure presented to them by the pubco as a "market rent", then in law it becomes the "market rent" even if it is far higher than a real commercial FOT rent! That is wholly unacceptable and undermines the whole MRO concept – and the right to an independent rent assessment. The implications of this are even worse due to the Government insisting on the code only applying to tied tenants, as what it means is that a tenant, having taken this "market rent" (without it being independently assessed) as well as binding themselves to an unreasonably high immediately they put themselves outside the remit of the statutory code, with no protection - and no right EVER to have another independent rent assessment to check if their rent is fair and actually "market based!
- **BIS have also sought to define 'market rent' which provides conflict with the existing understood definition and has dangerous consequences.** Market rent is well defined in Royal Institute of Chartered Surveyors Practice Statements and Guidance Notes, in legislation (Landlord and Tenant Act 1954 Part II s34) and in the agreements themselves. **It is the market rent only option and how it can be triggered and how it will work that needs laying down on the face of the Bill, not the concept of "market rent" (and correctly not as currently in the Bill).**
- 43(2) (e) means the statutory code provisions can override the process of an independent assessor determining what the market rent is following existing law and guidelines, which is dangerous, so this needs to be changed.

Changes needed:

(i) The section suggesting that an agreed rent can be a "market rent" must be changed or deleted. The Bill should make clear that whilst specifying that there will be negotiation and that the two sides are free to agree any kind of new lease or tenancy, it will not be a "market rent" unless it as assessed as such by an independent expert with the back up of the adjudicator in the event of dispute.

(ii) We suggest that BIS delete their new definition of "market rent" and replace it with one based on existing law.

(iii) 43(2) (e) Must be changed to that we revert to the independent assessor having to follow existing law and guidelines to assess the market rent, with disputes about the process or outcome being referred to the adjudicator.

(c) Taking out sale of the title of the pub as a trigger point for MRO

- BIS have failed to address how, without this, there would be any protection for tenants or any way of stopping developers who buy pubs from pubcos exploiting tied agreements to force out tenants. The current BIS clause clearly allows this to carry on happening – as developers would not of course ever own 500 or more tied pubs and therefore and not covered by the code at all. This is a highly dangerous loophole and one that BIS must rectify.

Change needed:

(i) Reinstate the MRO trigger of sale of the title of the pub (and it must be a definitive statement, shall or must).

(d) Having no protection for tenants of the large pub companies who choose to go free of tie.

- **It is regrettable that the Government took out the section that said that tenants who choose MRO must not be discriminated against.**

(i) We would ask that the Government reinserts wording that says that tenants who choose MRO are not discriminated against.

(j) The Government should also say at Lords' Report Stage how they intend to draft the statutory code to prevent non tied tenants being subject to unreasonable (and above market) rent increases and excessive costs for insurance.

Department
for Business
Innovation & Skills

1 Victoria Street
London
SW1H 0ET

T +44 (0) 20 7215 5000
E enquiries@bis.gov.uk

www.gov.uk/bis
Our ref: MCB2015/03157

Greg Mulholland MP
House of Commons
London
SW1A 0AA

23 February 2015

Dear Greg,

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL

Thank you for your letter of 10 February addressed to Vince Cable, Nick Clegg and me, and for your subsequent email of 20 February, about the Pubs Code and Adjudicator measures.

I am sure that you will have seen my response of 9 February, which addressed the concerns raised in your earlier letter of 20 January. As I noted in my response, I am pleased that you said that you found the meeting which you had with Ashley Lumsden, BIS officials and Parliamentary Counsel on 17 December to be constructive. That meeting was of course preceded by another which you had with Ashley Lumsden and a senior official on 26 November, shortly after Commons Report Stage, and was followed by the meeting which Vince Cable and I held with you on 21 January. I therefore cannot share your view that Baroness Neville-Rolfe's reference in Lords Committee to there having been 'several meetings' between you, Ministers, advisors and officials since Commons Report was misleading.

As Baroness Neville-Rolfe made clear at Lords Second Reading of the Bill, the Government accepts the introduction of Market Rent Only (MRO). Like you, we are committed to ensuring that the MRO option is introduced in a meaningful and workable way, which allows tenants to exercise their MRO rights at agreed trigger points and sets out a finite time period before they can choose to pay a market rent only. That is why Baroness Neville-Rolfe made clear in Lords Committee that we intend to follow the MRO process which was outlined in the clause introduced at Commons Report. Setting out the detail of this process in secondary legislation will allow us to consult to ensure that the process works as intended, that it captures scenarios such as where the independent assessor is taken ill and unable to provide the MRO assessment within the time permitted, and that we pick up on any unintended consequences.

As I mentioned in my letter of 9 February, my officials met with Simon Clarke, George Scott, Dave Mountford and Jonathan Mail of CAMRA on 4 February to discuss the Market Rent Only (MRO) option. They had a subsequent meeting on 11 February, which was also attended by a representative of the Federation of Small Businesses (FSB), and I know that officials were grateful for the constructive discussion that was had on both occasions.

Many of the issues which you raise in your letter have been part of the helpful discussions which officials have held with tenant representatives, and I address these in turn below. You may also find it helpful to see the table attached at Annex A, which shows how the various elements of the MRO clause introduced into the Bill at Commons Report are translated across into the Government amendments agreed at Lords Committee.

I can assure you that where the terminology in the Bill refers to the 'market rent option', this sets out the right for the tenant to pay a market rent *only* to their pub-owning company, free of product and service ties. References to 'MRO compliant' agreements in the legislation put in place protections to ensure that the agreement the tenant signs when they opt for MRO is indeed for a market rent *only*, and is also fair, does not include unreasonable terms and conditions and is not a tenancy at will. The draft Statutory Code makes clear that any attempt by a pub-owning business to discriminate against a tenant as a consequence of the tenant attempting to exercise his or her rights under the Code – which will include their right to MRO - constitutes a breach of the Code and can be referred to the Adjudicator for arbitration and enforcement.

You also raised concerns about the potential for pub-owning companies to attempt to circumvent the legislation by creating smaller subsidiaries which fall under the 500 tied pub threshold. We are alive to this risk and have already provided protection against this sort of scenario in Clause 69 of the Bill. This clause ensures that for the purposes of determining whether a pub-owning company is above the threshold of 500 tied pubs, pubs which belong to subsidiaries or members of the same group undertaking count towards the total number of tied pubs the company owns. The clause also has an anti-avoidance power to address other reorganisations that pub-owning companies might use to escape regulation in the future.

The concerns you raise around protections for tenants when their pub is sold, the definition of 'market rent' and the MRO process, the use of 'may' and 'must' with regard to MRO triggers and the phrasing of the principle that tenants should be no worse off have also been the subject of discussions which officials have held with Simon Clarke, George Scott, Dave Mountford, Jonathan Mail and other stakeholders. In advance of Lords Report next month, Ministers are continuing to explore these as well as other issues raised with us by stakeholders on all sides of the debate, to make sure that we get this right.

The administration trigger for MRO has also been the subject of much discussion with tenants and with pub-owning companies. As the discussions have progressed it has become clear that a pub company administration is not of itself the main source of concern for tenants. Rather, their concern is about the protection available to tenants in

the event that their pub is sold to a company outside of the Statutory Code, whether that sale is the result of an administration or is part of the normal course of business. Stakeholders therefore recognise that this is where we should focus our thinking rather than on the administration process, where attempting to require MRO for any pub which is part of an administration could jeopardise a successful rescue of the company and result in even worse outcomes for tenants.

You also raised a concern that the Government has not adequately reflected your intention to ensure that brewers which own MRO pubs have the right to insist on their pubs selling their own beer. This protection for brewers is indeed contained within the Bill, but rather than include it in the MRO clauses, the Government has inserted the provision in the definition of a tied pub (at Clause 68 (6), (7) and (8)).[1] The provision works because Clause 43 (4) stipulates that an 'MRO-compliant' tenancy or license must not 'contain any product or service tie...', and Clause 68(5) defines such a tie. Clause 68(6) then goes on to say that a 'stocking requirement' does *not* constitute a tie, and such a requirement would therefore be permissible in an MRO tenancy or licence. Clause 68(7) defines a stocking requirement as one which 'relates only to beer or cider (or both) produced by the landlord', which 'does not require the tied pub tenant to procure the beer or cider from any particular supplier' and which 'does not prevent the tied pub tenant from selling at the premises beer or cider produced by a person not mentioned in paragraph (a)' (ie an alternative brewer). This drafting achieves the same intention as the original provision in the MRO clause introduced in the House of Commons.

The brewers who will be covered by the Statutory Code have raised with us their concern that the stocking requirement as drafted is too narrow. In particular they would like exclusivity – namely, to be able to require their MRO pubs not to sell beer produced by a competitor. Legal advice is that pub companies may use the 'stocking requirement' as currently drafted to restrict sales from competitors but the companies would have to assure themselves that they were complying with all aspects of the law – notably competition law. As part of ongoing discussions with pub-owning companies and tenants representatives, we are exploring the extent to which we can give brewing pub-owning companies more comfort as to the requirements which can be included in a stocking requirement.

I hope that this response is helpful and look forward to discussing these issues further with you on Wednesday 25 February. I very much hope that you will also be able to take part in the stakeholder discussion which Baroness Neville-Rolfe and I will be chairing between 14.00 and 15.00 on Thursday 26 February.

JO SWINSON MP

Minister for Employment Relations and Consumer Affairs

---

[1] This approach ensures that an indirect purchasing obligation of the sort described in the clause introduced into the Bill in the House of Commons is not interpreted as a tie. If it were, then a tenant exercising his or her right to MRO could reject it, and the clause would therefore not succeed in enabling brewers to require their MRO tenants to sell their products.

FW: Partnership Investment Agreement - pubs

12 August 2015
11:41

Subject	**FW: Partnership Investment Agreement - pubs**
Attachments	PIA propo...

From: siclarke
Sent: 19 February 2015 14:59
To: McLynchy Julie (CCP); [redacted]
Subject: Fwd: Partnership Investment Agreement - pubs

BIS mentioned that the pubcos are making MRO opt out in the Bill a priority objective but no details of their proposal had been disclosed. I believe it will go without saying that any organisation genuinely representing tenants would find the thought of an opt out of MRO rights unacceptable.

Since we spoke further details of the proposal have been disclosed and I have been asked to offer my thoughts. In the interests of transparency I thought I should share these thoughts with BIS officials contemplating Bill amendment proposals.

The Partnership Investment Agreement (PIA) document is well thought out and written but helpfully assists in demonstrating just how easy it might be to 'sell' an apparently benevolent agreement to unsuspecting tenants who, as we know, are less sophisticated than the pub owning businesses. Let us not forget that there are examples of tenants being persuaded to opt out of the security provisions offered by the Landlord and Tenant Act protection without realising the consequences.

To the third party reader, fresh to this debate, and unaware of the past activities of some of these pub owning companies, the proposal may seem perfectly plausible. The use of key words, like 'partnership', are essential to propagate behavioural biases, e.g. optimism bias.

Firstly, I think this is a proposal put forward by what many of us would call a Cartel but perhaps wisely presented on behalf of the group by one of the apparently less controversial members in an effort to make it appear more benign. We believe it is more likely to be an attempt to nibble away at the MRO, before it even comes to pass, and introduce the concept of opting out as a spring board for future proposals. If this were allowed to pass we expect to see attempts to introduce further reasons for opt out over time, increase the period of opt out and decrease the amount of investment considered 'significant'.

Essential elements missing from PIA proposal
If PIA were to be considered additional provisions should be required :

- The Secretary of State should have powers to render them unenforceable at a future date on a group or individual basis under certain circumstances.
- The offer of a PIA should be accompanied by an offer of MRO option (i.e. PIA is an MRO option trigger).
- A PIA should be accompanied by a parallel rent assessment (PRA).
- A PIA should be accompanied by a clear indication of how the investment return would be achieved, a calculation of the tenants estimated P&L before and after the investment takes place - it would be essential that full transparency be disclosed in order for the tenant to make an informed decision.

- PIA should result in no increase in dry rent, product prices reduced to free trade equivalent and capable of early termination on repayment of loan.

One question, before even considering such a proposal would it not be appropriate to have a full and detailed knowledge and disclosure of the investments that these pub owning companies claim to have made. [redacted]
I particularly note a few points which reveal some of the inconsistencies, issues we have been presenting for many years. Using their headings :

Summary
In the first paragraph the proposal acknowledges these are difficult times and that consumer expectations have risen and that pubs need to meet changing demands. The consumer demands are increasingly for more choice and micro/craft beers so how can a proposal seeking to restrain this choice possibly be a solution ? Investment is not the lifeblood of pubs - trade (sales and viability through net profit) are the lifeblood of pubs. As the FSB survey demonstrated with profitability comes investment. What the PIA is offering is little more than a protection racket, forcing tenants to exclusively sell a product and demanding a sum of money over and above the rent.

In their second paragraph they say "Many tenants have benefitted from significant investment..." bearing in mind this legislation may offer MRO to over 15,000 tenants, how many of those have benefitted from significant investment in say the last three years ?

What is PIA ?
In the second paragraph they claim the '...approach ensures that the pub company has the certainty of knowing what the commercial variables will be...', no they won't, the dry rent is the only fixed variable for a term, they say, of 5 years (between reviews) the wet rent (profit taken on inflated tied product prices) is utterly uncertain, as the document later confirms under the heading "Why is it needed ?" in the first paragraph. Wet rent is variable and dependent on trade, that is the point the pubcos keep making, and therefore uncertain making return on the investment unclear contrary to what they conclude is necessary for investment. It follows that they DO have the certainty of return required by increasing the dry rent - the potential profit on wet rent would be a bonus.

Why don't pub companies simply increase dry rent by the amount required to ensure an adequate return on investment within the required period of time?
Pub companies do "...not simply increase dry rent by the amount required to ensure an adequate return..." because they can't. Pubs are valued on a profits method, the dry rent is a factor of pubs profitability not an arbitrary amount desired by the pubco. What they should be doing here is leaving the rent at market rental value and agreeing a clear and open loan repayment in the form of periodic (monthly ?) payments.

Why don't tenants simply borrow from other sources? Why do they need pub companies to make investment?
Most tied tenants do not borrow from other sources because the tied model is considered toxic by lenders - the MRO option severs this reputation and offers tenants an opportunity to make a sustainable and viable profit and present a proper proposal to a bank which can then consider the reasonable prospect of repayment instead of business failure and a debt to write off.

Why choose investment from a pub company over another source of finance ?
- **Expertise** - how many of the 'many tenants' who have 'benefitted from significant investment', recommended by their pubco are still in their pubs ?
- **Lower risk** - the risk for the tenant is limited only to the increase in dry rent for the remaining period of the tenancy or lease. So it is a loan to be repaid over the life pan of the agreement and can never be repaid before hand which increases costs and diminishes net profitability.
- **Shared benefit** - as outlined earlier the increase footfall and improvement in margins is likely to need to be huge before the tenant sees any benefit as a result of the investment. The pubco has already allowed for return on investment in dry rent and has the added potential benefit of profit on

increased expected sales. Unless substantial any increased sales that materialise that could be derived by the tenant simply go towards the increased dry rent.

How does pub company investment differ from other sources of finance?
Brewery loans to free trade customers take the form of a 'loan tie' the operator commits to acquiring brewery supplied products for a set period of time, at a competitive price, in return for investment, a little like agreeing a phone contract and getting a free handset. Unlike this PIA proposal, there is no increase in dry rent and product prices generally reflect those available in the free trade not inflated as much as 70% more. The 'loan' can be terminated early on the payment of a fixed sum. The operator in a brewery load situation is practically unaffected financially by the burden of the loan.

How would a PIA work?
The pubco's objectives here are two fold, 1. to sow the seeds for future dilution of the MRO option, the PIA is a Trojan Horse for future 'opt out' proposals, and 2. 'control'. Having signed away the MRO option rights at rent review and rent reviews are 5 yearly, and bearing in mind the PIA is proposed to last 5 years, the tenant has at least until their next rent review before the right can be reinitiated, e.g. if a tenant has four years before their next review then their PIA will last 9 years.

Taken at face value, the document basically confirms that that the average purported investment of £50,000 will be recovered over a period of 5 years from the tenant. It follows that this investment return is expected from an increase in dry rent, over and above market rental value, and the wet rent (the variable and uncertain income stream, they claim discourages investment). Moreover this amounts to an anticipated £10,000 per annum, plus interest, to be taken from the 'average' tenant who accepts the PIA. To put that in perspective, the tenant would have to see an estimated increase in trade sales of around £100,000 per annum to support such a transaction before they could anticipate an increase in their own tenants earning at all. If an investment does not see the expected increase in sales the tenant is now committed to an increased dry rent over and above market rental value, the tenants loses the pub company has their return regardless.

Proposal for a Tenant Opt in to Partnership Investment Agreement (PIA)

Summary
Pubs in the UK operate in a hugely competitive and challenging environment. Competition for leisure spending continues to increase with other sectors such as coffee chains continuing to expand and grow their businesses. Consumer expectations have risen and to compete with other sectors and tempt people back in to the pub, significant investment is needed to ensure that pubs meet changing consumer needs today and in the coming years. Investment is the lifeblood of pubs and without it there is a risk that many will simply wither on the vine.

We accept the will of Parliament that tenants should have the right to a Market Rent Only option at specified trigger points. To ensure that introducing this right does not have the unintended consequence of reducing investment in pubs, we propose the introduction of a tenant opt in to a Partnership Investment Agreement (PIA). Many tenants have benefited from significant investments from their pub company and others who have investments planned are keen to see these continue. PIA offers a simple route to ensure that investment continues. This paper outlines why this is needed; how it would benefit tenants, communities and pub companies; and importantly how tenant rights would be protected and the will of Parliament delivered.

We propose that an amendment to create a PIA opt in should be laid at Report stage. This note sets out our proposals for its operation. The detail should be consulted on and confirmed in the Pubs Code.

What is a PIA?

A PIA is a simple joint agreement between a tenant and pub company to proceed with significant capital investment in a pub. The tenant must 'opt in' to the partnership which would last for a mutually agreed period of time (generally not exceeding five years see below for details). The tenant must take appropriate professional advice before entering a PIA. A tenant opting in to a PIA would agree to defer their right to an MRO rent review trigger during the period of the PIA only. Other MRO trigger events including significant price increases or material change in local economic circumstances would remain available to the tenant for the duration of the PIA.

This approach ensures that the pub company has the certainty of knowing what the commercial variables will be during the period of the PIA. This will provide the conditions required to go ahead with investment.

Meanwhile the tenant continues to benefit from a lower risk investment by keeping fixed costs low. By maintaining MRO trigger rights on significant price increases and material change in circumstances, tenants have the comfort that they retain protections from significant external events during the PIA. As the tenant would only be agreeing to defer the MRO rent review trigger during the period of the PIA all other protections of the Code and the Adjudicator would continue as normal.

Why is it needed?

The six pub companies affected by the Bill invest a combined £200m per annum to improve their pubs to the benefit of tenants and pub companies. The introduction of a Market Rent Only option means that a tenant could choose to exercise an MRO shortly after a significant investment is made. As the 'loan' is currently split between dry rent and wet rent, were this to happen the pub company would be asked to commit significant capital as part of an investment where the commercial variables would be unknown and open to significant change. This makes the return on investment less clear, but critically, the lack of certainty at the start of the investment would mean fewer investments made. Where significant investments happen they would be guided by how long a tenant has left before rent review and not the needs of the pub at that time. If all the

investment return was to be recovered through increased dry rent only, this would add significant fixed cost to the tenant's business, and significantly shift the balance of investment risk on to the tenant. We do not believe that is the intention of the Bill. This would lead to significant investments not being made, tenants choosing not to take the risk, and the terms offered to tenants deteriorating.

How do pub company investments currently work?

Pub companies and tenants have a shared interest in investment. The model works by splitting the loan between dry rent and wet rent. This lowers the risk at the outset of the investment for tenants. If an investment does not generate the expected increase in custom and sales, the tenant repays less. If the investment is successful the pub company sees a better return on investment through increased beer sales. The tenant also benefits because the dry rent is lower than if they had been able to secure a commercial loan and increased sales and custom will benefit them. Often the investment means the introduction or expansion of a food offer to the pub where the tenant benefits directly from food sales with pub companies taking no direct share of these profits.

The environment created by the decoration and fitting out of pubs is key to their appeal to consumers. The sale of alcohol and requirement for consumer safety is significant meaning that the cost of refurbishing pubs is comparably higher than other mainstream real estate uses like retail, offices or industrial.

Why don't pub companies simply increase dry rent by the amount required to ensure an adequate return on investment within the required period of time?

As with all investments there is no guarantee of success or that expected returns will be achieved. At the time investments are made it is unclear as to the overall impact that it will have on the value of the pub. Therefore it would not be possible to increase the dry rent by the amount required to repay the investment in a reasonable period of time. There is also a very high risk that tenants - particularly in a tough market - would be reluctant to bear the risk of such an increase in dry rent without certainty that the investment will be successful.

Why don't tenants simply borrow from other sources? Why do they need pub companies to make investment?

For many small businesses accessing capital from banks and other lenders is difficult in the current climate. There may be some tenants who are able to source investment for the pub themselves. In this case they would not require to opt in to PIA and would remain covered by all MRO triggers.

However, most tenants do not have access to significant capital to invest in their pubs. Banks remain reluctant to lend to the pub sector given the macro trends and perceived risk. Tenants do not own the property and so cannot secure a loan against the building. For those tenants whose trade is under pressure, it can be very difficult to take a longer term view to divert current income to fund investment with no guarantee of success. Pub Company funding tends to be significantly cheaper than borrowing money from the bank, repaying the capital and interest.

The PIA would be a way for a tenant who is not able to source significant investment themselves (or who finds that the cost, terms or risk profile is less attractive than the deal available from the pub company) to opt-in to a pub company resources to invest.

Some tenants may of course not wish to receive any investment at all and would therefore not choose to opt-in to PIA.

Why choose investment from a pub company over another source of finance?
Pub company investment brings a number of significant benefits for tenants:

- **Expertise** - the experience of hundreds of investment projects across the country means that pub companies can advise tenants on what does and does not work and what investment is needed to drive returns;
- **Lower risk** - the risk for the tenant is limited only to the increase in dry rent for the remaining period of the tenancy or lease. At the end of this period there is no 'repayment' to be made and no debt transfers. This stands in contrast with a bank loan with a fixed period which would have to be repaid in full no matter the performance of the business or whether the tenant remains in the pub - the debt and interest would be borne directly by the tenant and would transfer with them until it was paid in full;
- **Shared benefit** - the right benefit can transform a pub, increasing footfall and improving margins. As sales rise the pub company benefits too. This allows pub companies to take a broad view of the benefits of investment - for example investing in a kitchen to allow the tenant to benefit from food sales - which in turn improves footfall and therefore wet rent.

How does pub company investment differ from other sources of finance?
All commercial and personal loans have clear terms and conditions. These cover repayment terms, interest, redemption charges, penalty clauses etc. In the pub industry many brewers already offer loans to free trade customers. These generally include an agreement to purchase their beer or cider for a period of time, minimum purchase requirements, and in many cases exclusivity clauses that the tenant agrees to accept in return for investment.

How would a PIA work?
We propose that a tenant should have the ability to opt in to a Partnership Investment Agreement (PIA) with a pub company. This principle would be established in primary legislation, however the detail and operation of the PIA would be subject to further consultation and would be set out in the Pubs Code. We recognise that there is concern that tenants could be pressurised in to signing away existing rights under the Code in return for investment. The PIA would set out clear terms and conditions which protect tenant rights and ensure that investment is used for mutual benefit.

Key elements of PIA
- A tenant opting in to PIA would agree to defer their right to an MRO rent review trigger during the period of the PIA only;
- the Pubs Code would clearly set out what can and cannot be included in a PIA;
- Tenants would continue to enjoy all the protections of the Pubs Code and Adjudicator;
- No tenant could enter in to PIA without having first taken appropriate professional advice to ensure that he/she is aware of the terms and taken advice on its suitability for their business;
- The tenant must choose to opt in to PIA (ie has the right to refuse to enter in to a PIA);
- The tenant has the right to complain to the Adjudicator should they feel that unreasonable pressure is being put on them to enter in to a PIA;
- PIA would only apply to "significant investments" which would be defined in the Pubs Code (see below for examples);
- PIA could not be used for incidental investments or for maintenance and repairs which are the responsibility of the pub company
- PIA would operate for a mutually agreed period of time;
- The Pubs Code could set a maximum period of time for a PIA if appropriate. We expect that most PIAs would run for a maximum of five years, however some flexibility may benefit both tenants and pub companies dependent on the scale of investment and length and nature of existing lease arrangements;
- For the avoidance of doubt, during the PIA the tenant will retain their right to exercise all other MRO triggers including significant price increases and material change in circumstances as defined in the Pubs Code
- At the end of the PIA all MRO trigger rights would apply as normal

Why don't tenants and pub companies simply agree to start a new tenancy or lease in order to achieve the certainty and time period without MRO required?

- For tenants on short term tenancies, a new tenancy may be the most cost effective and straightforward option. This would effectively put back their rent review at which the MRO option could be exercised providing the certainty and time required. Stamp duty costs are relatively low for these transactions
- There are concerns, however, that without the Bill specifically allowing this to take place then such a new tenancy could be subject to challenge. The PIA clause ensures that both parties can enter in to agreements with certainty and removes uncertainty and doubt. It also ensures that such tenanciesare covered by the Pubs Code and provides tenants with greater protection.
- Some tenants part way through an tenancy may not wish to enter in to a new 5 year agreement, but would like to see investment for the remainder of their existing agreement. PIA offers more options.
- For longer term tenancies or leases the cost of stamp duty payable by tenants if a new agreement is reached can become quite significant, so variation of the existing lease is a much more effective way of delivering the same result.
- Overall a partnership investment approach limits transactional costs for the tenant, and allows both parties flexibility to deliver a mutually beneficial commercial outcome.

What constitutes a significant investment?

"Significant investments" will generally exceed £50k with many major refurbishments and kitchen investments ranging from £100k up to more than £500k. We propose that there is further consultation to define 'significant'. This recognises that there are wide variations in the size, value and performance of pubs. For some smaller community pubs investments below £50k could be significant versus value, turnover, profit etc and it would be wrong to reduce the likelihood of investment in these important community assets by establishing an arbitrary threshold in primary legislation. Incidental investment or general maintenance for which the pub company is responsible would not constitute 'significant investment'.

FW: Thursday's meeting

12 August 2015
11:51

From: Kate Nicholls [redacted]
Sent: 24 February 2015 18:54
To: McLynchy Julie (CCP)
Subject: Thursday's meeting

Julie

I have managed to juggle internal diaries to ensure that ALMR is represented at Thursday's meeting. Unfortunately, I won't be able to be there personally, but my colleague, [redacted] who works with me as a communications consultant will be there.

I will separately drop you a note as promised.

Kate Nicholls
Chief Executive

[redacted]

FW: Pubs stakeholder meeting in advance of Lords Report

04 August 2015
14:59

From: Jonathan Mail [redacted]
Sent: 24 February 2015 09:23
To: [redacted]
Subject: Re: Pubs stakeholder meeting in advance of Lords Report

Dear [redacted]

Thank you for the invitation. Myself and my colleague, Emily Ryans, look forward to attending.

Also, would it be possible to extend an invitation to the MD of the Society of Independent Brewers, Mike Benner? His email is: [redacted]
Many thanks

Jonathan Mail
Head of Public Affairs
CAMRA, The Campaign for Real Ale

[redacted]

On 20 February 2015 at 13:42, [redacted] wrote:

Really sorry about this but the time of the meeting has been changed and will now be from 2pm to 3pm. It will take place in Committee Room 6 in the House of Commons.

[redacted]

From: [redacted]
Sent: 20 February 2015 11:36
To: Simon Clarke; Dave Mountford[redacted]; George Scott [redacted]; Tim Page [redacted]; 'Jonathan Mail'; 'Chris Walker'
Cc: [redacted]; McLynchy Julie (CCP); [redacted]
Subject: Pubs stakeholder meeting in advance of Lords Report

Dave, Simon, George, Tim/Jonathan, Chris

In advance of an invitation letter from Ministers, I wanted to give you a heads-up of a further stakeholder meeting we are planning before we table amendments for Lords Report. The meeting will be co-chaired by Baroness Neville-Rolfe and Jo Swinson and will be at 4.45pm on Thursday 26 Feb. Venue to be confirmed, either BIS or Parliament. The meeting is for representatives from across the industry, as well as interested Peers and MPs. The list of invitees is attached. While we won't be in a position to share our amendments with you in advance, we expect to be in a position to explain the Government's plans for Lords Report and the intentions behind our amendments.

I hope you will be able to attend.

Regards

[redacted]

Min Bespoke - Pubco (Greg Mulholland to Jo Swinson - FDFYL) (1) & (2)

18 August 2015
15:12


MCB2015...


MCB2015...


MCB2015...

25 February 2015

Dear Vince,

Thank you for your support in upholding the will of Parliament in November so that the Small Business Bill includes a **Market Rent Only** option for tenants of large pub companies. We are writing to urge you to ensure the Market Rent Only option is delivered **in line with what Parliament voted for last November.**

At Committee Stage in the House of Lords, the Government introduced new clauses **which deleted the clause voted for and replaced it with these other clauses which are not only substantially weaker, but do not actually deliver a workable market rent only option.** As the Bill stands today, we do not believe that the Government has properly honoured its promise to accept the will of the House of Commons - and as drafted **the Bill is now not what MPs voted for**.

This letter sets out our concerns and how they should be addressed.

It is important that the Bill sets out definite trigger points at which tied tenants have the right to opt for a non tied agreement. The Government's new clause (now clause 43) needs to be amended to state that **tenants "must" rather than "may" be entitled to a non tied agreement at agreement renewal or rent review.** In addition the Bill needs to set out that the Market Rent Only process is conducted within a reasonable timeframe to avoid pub companies dragging out the process over several years, as has been a very significant problem in the industry to date.

It is fundamentally unfair that tied tenants will face losing protection of the Code, Adjudicator and the future right to a Market Rent Only option immediately if their pub is sold to any body outside the scope of the Code. This was why we included the essential sale of title as a trigger point in the original clause. We urge you to support reinstating sale of title as a trigger point. In the absence of this, it is vital that provision is made for tied tenants to preserve their rights under the Code (including future rights to a non tied agreement) and Adjudicator if their pub is sold to a company not covered by the Code.

We understand that consideration is being given to allowing pub companies to require tied tenants to waive future rights to become non tied in exchange for promises of investment. We are very concerned that this would allow pub companies to pressurise tenants into waiving their future rights. We urge you to oppose adding this potential loophole into the Bill – it echoes the mistakes made in the 1989 Beer Orders caused by tinkering by industry vested interests.

In summary, we are calling for the Government:

- To reinstate the requirement that tied tenants "**must**" have the right to opt for a non tied agreement at rent review or agreement renewal. The Government's use of the word "**may**" provides no certainty.
- To change '**market rent** option' to the correct '**market rent only** option' – the word 'only' is critical - and the bill is laying down in law what the '**market rent only**' option is.

- To reinstate the requirement that the Market Rent Only option process **is completed within a reasonable timescale.**
- To reinstate the requirement for tied tenants to be able to **opt for a non-tied agreement in the event that their pub is sold on to any other body**.
- To reject proposals to **weaken the Bill** by making provision for **tied tenants to waive their rights to a Market Rent Only option** in exchange for investment.

Thank you in advance for your help in addressing this. It is essential that the above points are addressed appropriately in order to deliver a wholly workable MRO option as originally envisaged by the House of Commons. We are happy to discuss the details further, and remain grateful to you for your role in ensuring this legislation has got so far.

Yours sincerely

Greg Mulholland
Co-ordinator, Fair Deal for Your Local campaign
Brian Binley
President, All Party Parliamentary Save the Pub Group
George Scott
Administrator, Fair Deal for Your Local Campaign

And:

Fair Deal for Your Local campaign
February 2015:

The Federation of Small Businesses
CAMRA (The Campaign for Real Ale)
The Forum of Private Business
The GMB
The Guild of Master Victuallers
Fair Pint
Licensees Unite the Union
Pubs Advisory Service
Justice for Licensees
Licensees Supporting Licensees
Parliamentary Save the Pub Group

Jo Swinson MP,
Minister for Employment Relations and Consumer Affairs
Department for Business, Innovation & Skills
1 Victoria Street
London
SW1H 0ET

25th February 2015

Dear Jo,

Thank you for the meeting today with you and officials and [REDACTED].

George Scott and I felt it was a productive meeting and that you do seem prepared to make changes necessary for the Department and the Government to fulfil its clear promise to accept the will of the House of Commons and include a meaningful 'Market Rent Only' option in the Small Business, Enterprise and Employment Bill. This kind of dialogue, which BIS had promised then refused to have with us between 17 December and the day the replacement clauses were tabled, is clearly helpful to trying to achieve our shared outcome – to ensure that the Market Rent Only option included in the Bill is workable and meaningful which is what BIS committed to in November.

Just to recap our discussion, what we need is to do is to ensure that we have this meaningful Market Rent Only option in the Bill - and as I explained, what that basically means is three legal rights for tenants covered by the code:

1. The right to serve notice to trigger the Market Rent Only option process.
2. The right to have an independent rent assessment as part of that process.
3. The right to pay the independently assessed market rent at a set point at the end of a reasonable, finite and not lengthy process.

The Bill currently doesn't include the key rights, 1 and 3, which it must, to be a meaningful Market Rent Only option.

As I, and we, have stressed continually what the Market Rent Only option simply means – which is the right to trigger a process including an independent assessment of the market rent of the pub, on a free of tie basis and then have the option to pay that rent only. So this must be clear and unequivocal in the Bill. The detail around how, and following what process, this right is exercised can then be determined in the Pubs Code, but the basic concept and legal right clearly must be in the primary legislation.

So, I and we are very heartened that you told us that you intend to make the following changes:

(a) That the use of the word "may" will be changed to "must".
(b) That the correct phrase "Market Rent Only option" will replace "market rent option" throughout the Bill.
(c) That BIS will come up with a form of wording that does make clear, on the face of the Bill, that the process from a tenant triggering the process to being able to opt to pay only the independently assessed market rent to the pub owning company must be finite, not lengthy and reasonable.

As I acknowledged, we did indeed make a mistake in our original clause, 42(7) when we wrongly suggested there could be a Market Rent Only settlement, so we acknowledge that this may have caused confusion. We were therefore keen to make clear, and were pleased that you understood that

market rent is an existing concept in law, with guidelines, and cannot be a concept agreed by two parties. Consequently, sections which suggest that the pub owning company can "offer" a market rent, or that the two parties can agree a rental figure which then becomes the 'market rent' are not appropriate. This anomaly occurs, and should be corrected in, Clauses 19, 43, 44, 45 and 62. This is legally wrong and indeed very dangerous as that would indeed become a (very probably skewed) market rent despite not necessarily being a genuine market based rent. As we have always been clear, both parties may agree a new agreement at any stage, including during the Market Rent Only process – and that if they do, - then that ends the process. Once a new deal is signed, on any basis, the clock starts again and the right to trigger the MRO process is then at the rent review (normally five years from the date of the signing of the new agreement).

Regarding the issue of the MRO option opt-out for investment, I and we think that the argument being put forward for [REDACTED] is something of a red herring. As I have already explained, we have always been clear that the two parties can agree a new deal (tied, part-tied or free of tie) at any stage. Such a deal could involve investment (on the part of one or both party). Signing up to such a new agreement would then constitute a new deal with new terms – and would therefore by default mean that the right to trigger the market rent only option process would be pushed back to the first scheduled rent review on this new agreement (normally 5 years). So in essence, if drafted properly, there is by default an opt-out for investment on the basis that this means a new agreement on usual terms. So the argument being put forward that it would not make sense to invest in a pub three or four years into an lease as people would then have the right to trigger the MRO process one or two years later (the five year rent review) is simply not the case - and a red herring - as both parties signing the new agreement would then delay the automatic right to the MRO option process as being five years from then – which is what pubcos are arguing for! So there is no need to an an opt-out, because signing a new deal including investment in the pub would effectively mean an opt-out of the right to trigger the Market Rent Only option process for 5 years anyway. So we urge you to resist this as it is clearly not necessary – as well as being dangerous.

Not only does an opt-out allow for the pubcos to unfairly seek to stop tenants having the right to the MRO option, but it also allows them to present any investment as a reason for denying this right – even though the tenant is actually paying for the investment through increased rent and prices! Plus the pubcos often present as 'investment' in a pub, necessary repairs they have had to make between tenants, just to get the pub into a fit state for anyone to want to take it. For that to be used to then deny tenants the basic right to an independent rent assessment is completely unacceptable. It also must be understood by BIS that any investment made to a pub is of course then paid back by the tenant anyway, in the terms of new deals signed with additional rent or pricing for the company to reasonably recoup their genuine investment. The right to trigger the Market Rent Only option process, if there, is then an additional significant change of prices - or a significant change of circumstances beyond the tenant's control, and is still required, however, as those things could then make the new deal unviable and unreasonable.

You mentioned the reintroduction of the parallel rent assessment process, which I and we welcome and believe this has an important role to play for tenants who choose to remain tied; or who are not at a trigger point for the Market Rent Only option process. However, we do need to be clear that there is a potential danger of including a parallel rent assessment in the Market Rent Only option process, which is not necessary and could make the whole process too long to be of value. One aspect that some people have failed to understand is that the Market Rent Only option – the right to have an independent assessment of the market rent on a free-of-tie basis and the right to then pay that rent only – does not mean that people are obliged to, or have to then take this option. If when the independent assessment of the market rent is produced and they do not wish to take it and would

rather remain on their existing agreement, then they can - so they cannot be forced to take the new deal.

Similarly when people ask "how will they know if they would be better off on a Market Rent Only agreement?" the point with the right is that they don't need to know; it is a clear and absolute right to ask for an independent assessment of their market rent, which they can do at the specified trigger points. So there does not need to be a prior process (PRA or otherwise) to pursue this right, nor must the right be in any way **dependent** on the pub-owning company carrying out a parallel rent assessment first. The right to commence the Market Rent Only option process must be there for people to take, at the specified trigger points without relying on other factors or assessments. As always envisaged, we do agree that there should be a short and reasonable period of negotiation between the two parties before an independent assessor is appointed and the independent rent assessment commences; but there should not be an additional stage involving another assessment here unless both parties request it (so PRA in a specified timescale could be an optional part of the process, but must not be a mandatory one).

Finally, we touched briefly on including the sale of the freehold title of a pub as a trigger for MRO. Clearly we would like to see this in the Bill. However, if BIS are insisting on not reinserting this for legal reasons, then it is vital that provision is made for tied tenants to preserve their rights under the Code (including future rights to a non-tied agreement) and Adjudicator if their pub is sold to a company, organisation or individual not covered by the Code. This is essential to deal with the problem of developers (who clearly do not have 500 or more tied pubs) from using tied leases to force tenants out to enable them to close and demolish and/or redevelop pubs, something that is happening and must be stopped.

One point that we didn't have time to mention was the need (I think already acknowledged) is that in Clause 42(3) (b) "the principle that tied tenants should **be no worse off as** a result of any product or service tie" is incomplete and therefore meaningless. It is essential that this be amended to what it is supposed to read according to BIS's own key principle, so it needs to be: "no worse off as a result of any product or service tie ***than a tenant who is free of such ties***".

So thank you again for the time and the helpful discussion. I now hope that BIS will indeed proceed with the changes you said it intended to make, that do indeed need to be made and that we can then all feel that there is the meaningful, workable Market Rent Only option as envisaged by the House of Commons on 18th November 2014, which is what the Government promised.

Yours sincerely,

Greg Mulholland MP

cc Vince Cable MP, Secretary of State for BIS
[REDACTED]
George Scott, Administrator, Fair Deal for Your Local campaign

Department
for Business
Innovation & Skills

1 Victoria Street
London
SW1H 0ET

T +44 (0) 20 7215 5000
E enquiries@bis.gov.uk

www.gov.uk/bis

Greg Mulholland MP
House of Commons
London
SW1A 0AA

4 March 2015

Dear Greg,

SMALL BUSINESS, ENTERPRISE AND EMPLOYMENT BILL

Thank you for meeting with me on 25 February to discuss the Pubs Code and Adjudicator measures, and for the subsequent letters which you and the Fair Deal For Your Local campaign sent to me and Vince Cable on 25 February setting out your concerns about the Market Rent Only (MRO) option in the Bill.

I was grateful for the constructive discussion which we had in our meeting last week following the continued engagement between my officials and stakeholders from across the sector, and am writing to inform you that the Government has today tabled amendments for Lords Report stage of the Bill. These amendments are attached here, together with a more detailed explanation of the amendments. As you will see, the amendments we have tabled reflect the discussions which we have had, and demonstrate the Government's commitment to ensure that the MRO option is introduced in a meaningful and workable way.

JO SWINSON MP

Minister for Employment Relations and Consumer Affairs