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Pub companies, pub tenants & pub closures: introducing statutory regulation (2014-15)

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Summary

Over the last twenty years the number of pubs across the country has fallen significantly, an issue that has aroused considerable popular interest as well as much activity within the House and its Committees. The trend has been associated with an overall decline in beer sales and the growth in the off-licence trade, particularly in the sales of alcohol by supermarkets. For many commentators the most striking aspect of the pubs sector has been the continued market strength of the pubcos – the small number of companies which lease out their pubs – despite consistent complaints that the system for regulating the legal relationship between the pubcos and their tenants is not fit for purpose.

In June 2014 the Coalition Government announced that it would legislate 'at the earliest opportunity' to establish a Statutory Code and Adjudicator.[1] Under the Government's proposals all tied tenants would be covered by a 'Core Code', "providing them with increased transparency, fair treatment, the right to request an open market rent review if they have not had one for five years, and the right to take disputes to an independent Adjudicator." An 'Enhanced Code' would cover tenants who are tied to a pub owning company with 500 or more tied pubs; this would "require their pub owning company to provide them with a parallel free-of-tie rent assessment if rent negotiations for their pub fail."[2]

On 25 June the Government published the *Small Business, Enterprise and Employment Bill* (Bill 11 of 2014-15); part 4 of the Bill would introduce a statutory Pubs Code for England & Wales, and an independent Pubs Code Adjudicator to enforce it.[3] One controversial aspect of the Bill was that the Code would not include a 'market rent only option': provision to give all tenants the automatic right to choose a free-of-tie agreement. However at the Report stage of the Bill on 18 November 2014, the Commons agreed an amendment, tabled by Greg Mulholland, to make the 'market rent only' option a feature of the new regulatory regime.[4]

Subsequently the Government announced that it accepted this change 'in principle', and introduced a series of amendments to the Bill in the Lords, at both the Committee stage and at Report, to this end.[5] In addition the Minister, Baroness Neville-Rolfe, set out the Government's position on some issues of concern that had been raised during these debates in an open letter.[6] At Third Reading, speaking for the Opposition, Lord Mendelsohn said that, as a result of the Minister's letter, and the amendments made to the Bill, "these measures have our strong support and we are grateful to the Minister and the Government for listening and their positive response and detailed scrutiny of our suggestions."[7] These amendments were agreed by the Commons on 24 March, and the *Small Business, Enterprise and Employment Act 2015* received Royal Assent on 26 March 2015.

This note looks at the passage of this primary legislation to provide for the new Pubs Code. A second background note discusses the historical developments that led to this initiative.

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1 Department for Business, Innovation & Skills press notice, Publicans to get a fairer deal, 3 June 2014
2 Pub Companies and Tenants : Government Response to the Consultation, June 2014 p96, p3.
3 The Bill page on the Parliament site has the text of the Bill, the Explanatory Notes and its proceedings to date.
4 HC Deb 18 November 2014 c196, c238
5 HL Deb 28 January 2015 ccGC91-168 & HL Deb 9 March 2015 cc446-494
6 Letter from Baroness Neville-Rolfe, Library Deposited paper DEP2015-0365, 16 March 2015.
7 HL Deb 17 March 2015 c1004

1. Introduction

Over the last thirty years the number of pubs across the UK has fallen by about 30 per cent, from almost 70,000 in 1982 to around 50,000 today.[8] This is an issue that has aroused considerable popular interest as well as much activity within the House and its Committees. The trend has been associated with an overall decline in beer sales and the growth in the off-licence trade, particularly in the sales of alcohol by supermarkets.

For many commentators the most striking aspect of the pubs sector has been the continued market strength of the pubcos – the small number of companies which lease out their pubs – despite consistent complaints that the system for regulating the legal relationship between the pubcos and their tenants is not fit for purpose.

At present there are around 20,000 'tied' pubs across England & Wales.[9] In the context of the pubco/tenant relationship, there are three important features to all pubs: their ownership, their management, and who they can buy beer from:[10]

Table 1: Key differences between pubs

Type of pub	Ownership	Management	Buy beer from	Proportion of pubs in the UK[8]
Managed pubs	Pub Company	Pub company	Pub company	17%
Free house	Freeholder	Freeholder	Anyone	36%
Leased/tenanted pubs – Free of tie	Pub Company	Tenant	Anyone	
Leased/tenanted pubs – Tied	Pub Company	Tenant	Pub company	48%

Note: 8 Figures from CGA - no distinction is made is this breakdown between free of tie and free house pubs.

In 2004 the Trade and Industry Committee undertook the first in a series of inquiries into the pub sector. It noted that, "two issues were of particular concern" to tenants: "the exclusive purchasing obligation (beer tie) required by pubcos of their tenants, and the basis on which public house rents were calculated". The report gives a short description of these arrangements:

> The relationship between pubco and tenant is formalised through an agreement known as the lease. Each pubco offers a choice of leases, varying by type in length and conditions. The main conditions of these agreements are the repair and maintenance obligations, the ability to 'sell on' the lease (assignment) and the degree to which tenants are obliged to purchase products from their pubco—the so called 'beer tie'.
>
> The extent of the tie conditions in tenants' agreements determines the way in which their 'rent' is collected. Pubcos derive their income (total rental value) from public

8 BIS, Pubs Statutory Code and Adjudicator – Final Impact Assessment, January 2015 p3; this cites statistics published by the British Beer & Pub Association

9 Bill 11–EN, 25 June 2014, para 82. This was the initial estimate of the number of tied pubs that would have come under the Pubs Code, as *originally* proposed; for more detail see, Pubs Statutory Code and Adjudicator Impact Assessment, May 2014, para 51

10 *Pubs Statutory Code … Final Impact Assessment*, January 2015 p3. The % breakdown of types of pubs was provided by the consultancy CGA Strategy, which publishes statistics on pub closures with the Campaign for Real Ale (see, CAMRA press notice, CAMRA urges swift action to support pubs as closures rise to 28 a week, 3 March 2014). No distinction is made is this breakdown between free of tie and free house pubs.

> houses through three very different but related revenue streams. The wholesale profit (sometimes referred to as the 'wet rent') is the differential between the prices they pay their suppliers for tied products and the wholesale price for which they sell them on to tenants. Income from amusement with prizes machines (AWPs) in some cases goes solely to the pubco or the tenant but generally is shared equally.
>
> The dry (commercial or property) rent charged is decided by the pubco at the beginning of a lease and is subject to review at regular intervals. Together, these three streams of income plus any additional benefits offered by a pubco should equal the 'rent' which would be paid by a free from tie tenant. The income mix for each pubco differs.[11]

A central feature of these arrangements is the notion that the tied tenant will pay an above market price for their tied beer products in exchange for *countervailing benefits*. These benefits include the lowering of market rent through rent subsidy and other forms of support provided to the tenant at a rate lower than they can achieve in the open market.[12] This in effect is the means by which a tied tenant can be said to be no worse off than a free-of-tie tenant. The Committee's report said a little more about how pubcos and tenants negotiate the level of rents at the beginning of a lease:

> For new leases, pubcos calculate the rent on the basis of a projection of the fair maintainable level of trade (FMT) a competent hypothetical untied tenant would be expected to achieve. This includes total 'wet' sales and an estimate of additional income from food sales, room rentals and AWP machines. Similar projections are made relating to the likely costs of the public house in the hands of the same hypothetical tenant, excluding the tenant's salary, which are subtracted from the FMT. The rent valuation is assessed on the basis of a percentage of the remaining profit, known as the 'divisible balance'. Pubcos suggested to us that their share of these 'profits', the rent, reflected the market demand and specific agreement terms for a particular public house but were typically around 50 percent.
>
> If a pubco believes the share is inequitable for either side, they adjust the required rent to the requisite level. Expected AWP income is then deducted to arrive at the rent offer they present to an ingoing tenant. It was accepted by all parties that this was an imprecise science but was the standard industry method for the valuation of on-licensed premises, as supported by the Royal Institution of Chartered Surveyors (RICS).
>
> Once the required rent has been decided by a pubco, the rent an ingoing tenant actually pays follows further negotiation with the pubco through agreement of an appropriate assessment of FMT. Once the rent has been agreed it is indexed, increasing annually by the increase in the retail price index (inflation). Rents are also subject to review at prescribed intervals, usually three to five years, when the calculation is repeated.[13]

After a series of inquiries into the sector by the BIS Committee, in January 2013 the Government announced it would consult on introducing a statutory code of practice and an adjudicator, based on the model of the Groceries Code Adjudicator (GCA).[14] A consultation document was published in April 2013.[15] In addition to the written consultation, a shorter online survey was conducted. Three roundtable discussions were held with stakeholders, and officials held bilateral meetings with interested stakeholders on request.[16]

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11 Trade and Industry Committee, Pub Companies (second report of session 2004-05), HC 128, 21 December 2004, para 80-82

12 These benefits are often called 'special commercial or financial advantages', or SCOFRA; see, evidence submitted to the Committee by Enterprise Inns (HC 128-ii, Ev140, para 2.12 (iii))

13 HC 128, 21 December 2004, p41

14 The establishment of the GCA is discussed in Library note SN6124: *Supermarkets:* The Groceries Code Adjudicator, 28 June 2014.

15 Details are collated on the BIS Gov.uk site

16 BIS, Pub Companies and Tenants : Government Response to the Consultation, June 2014, p11

Initially the Government had anticipated publishing its response by the end of 2013, but this was subject to considerable delay, in part due the sheer number of responses received and the lack of consensus between respondents.[17] All told, the department received 1,120 written responses and more than 7,000 responses to the online survey.[18]

On 3 June 2014 the Government published its response to the consultation and announced that it would legislate 'at the earliest opportunity' to establish a Statutory Code and Adjudicator.[19] Setting out the Government's rationale for intervention, the Secretary of State, Vince Cable, wrote: "the evidence we have received shows that, while there is widespread responsible practice in the industry, many tied tenants continue to face unfair treatment and hardship. Self-regulation has not been able to effect the step change desperately needed in the industry to ensure that all tied tenants are treated fairly".[20] In particular, evidence gathered in the course of the consultation, as well as the enquiries by the BIS Committee, had shown that in many cases tenants had been unable to conclude a tied agreement that represented a fair share of risk and reward with the pubco:

> In practice the precise terms of tied agreements are determined by a negotiation between the tenant (or prospective tenant) and the pub owning company. This involves an assessment of the 'Fair Maintainable Trade' (FMT) of the pub and an estimate of the resulting profit after taking into account costs. This provides a 'divisible balance' which is then shared between the tenant and the company. The pub owning company's share is then paid as a rent by the tenant (often called the dry rent). If this process is fair, the final settlement should secure a fair share of risk and reward for both parties …
>
> The evidence of four BIS Select Committees and many tenant testimonials received by Government have clearly established that in too many cases tenants are unable to secure a fair share of risk and reward in their agreements. The April 2009 Business and Enterprise Select Committee [found that] … over 50% of the lessees whose pubs had turnover of more than £500,000 a year earned less than £15,000 … The same Select Committee also found that the notion that tenants were receiving countervailing benefits that compensated for higher tied beer prices was also questionable: "There is no evidence demonstrating that a tied lessee receives benefits not available to free of tie tenants or freeholders. Nor are we in a position to say with confidence that rents for tied pubs are invariably lower than rents for equivalent free of tie premises."[21]

Despite efforts by the industry since 2009 to improve self-regulation, the Government noted that there was evidence that problems had persisted, citing a benchmarking report prepared by the Association of Licensed Multiple Retailers (ALMR). In evidence to the BIS Committee in June 2013, Kate Nicholls, Strategic Affairs Director at the ALMR, had summarised the findings of this survey, in answer to a question from Mike Crockart:

> Last year, for the first time, rent as a percentage of turnover in the tied estate overtook the free-of-tie estate. The gap had been narrowing between the two. The average for the whole of the leasehold sector—and we have to remember that about half of the outlets covered in our survey are commercial leaseholds, so they are set on completely different rental terms—is about 11%. Last year the figures were around 12% of turnover for tied rents, and about 10.5% of turnover for free-of-tie rents. Some of those free-of-tie commercial rents will include peppercorn deals and

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17 As suggested by the Secretary of State during an Opposition day debate on this issue in January 2014 (HC Deb 21 January 2014, cc170-2)

18 The department published all of this material in December: Pub companies and tenants: introduction to consultation responses, December 2013. Some redactions were made to preserve individuals' privacy, to avoid prejudicing commercial interests, and to respect responses made in confidence

19 BIS press notice, Publicans to get a fairer deal, 3 June 2014

20 BIS, Pub Companies and Tenants …, June 2014, p3

21 *op.cit.* pp65-6

> reductions in the first year, which will distort that average, but as a percentage of turnover, and as a benchmark, that is what the results were showing us.[22]

Under the Government's proposals announced on 3 June 2014 all tied tenants would be covered by a 'Core Code', providing them with "increased transparency, fair treatment, the right to request an open market rent review if they have not had one for five years, and the right to take disputes to an independent Adjudicator". An 'Enhanced Code' would cover tenants who are tied to a pub-owning company with 500 or more tied pubs; this would "require their pub owning company to provide them with a parallel free-of-tie rent assessment if rent negotiations for their pub fail". In the response document the Secretary of State underlined why the Government had decided that the new Code should not give all tenants the automatic right not to choose a free-of-tie agreement:

> Despite the often polarised views in this industry, there is strong support for the tie as a business model. What is important to the Government is that there are protections which can operate within the tied model. Some tenant groups and campaigners support a mandatory free-of-tie option (also known as the market rent only option). The consultation responses raised concerns that this option would create uncertainty for pub owning companies, which would have an unpredictable impact on the wider pubs sector. While the mandatory free-of-tie option had undoubted attractions, there is insufficient support to proceed with it. Our proposals for a Statutory Code and Adjudicator will therefore rebalance the relationship between pub owning companies and their tied tenants, without pursuing this more radical option.[23]

The large majority of responses to the consultation had supported a mandatory free-of-tie option, though, looking at the detailed written responses, where the question was addressed, "views were polarised."[24]

Supporters of the market rent option had argued that only this "would incentivise the pub owning companies to work harder to ensure that the combination of above-market beer prices and 'dry rent' resulted in a fair share of risk and return". However, pubcos and breweries of all sizes had been "overwhelmingly opposed", in part because the decision of some tenants to go free-of-tie "could lead to a tipping point at which it would become uneconomic for companies to continue to sustain a mixed model of tied and free-of-tie leases". This view was supported by "a number of companies who are currently contracted by a pub owning company to supply services to that company's tied pubs". One reason for thinking that this risk was substantive was "the tone and context of responses" of tenants and their supporters and the "fractious nature of some pubco/tenant relationships" which suggested, "that there are a significant number of tenants that would take up the mandatory free-of-tie offer regardless of whether pub owning companies were to improve their tied arrangements in their favour".[25]

The consultation asked for other suggestions to ensure tied tenants were no worse off than free-of-tie tenants, but "the majority of responses to this question used the opportunity to reiterate views expressed elsewhere in the consultation".[26] That said, from the Government's perspective, tenants' views on this issue had underlined the importance of bringing greater transparency to the countervailing benefits provided by the beer tie.

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22 BIS Committee, Consultation on a Statutory Code for Pub Companies (fourth report of session 2013-14), HC 314, 22 July 2013, Ev17, Q113. Subsequently Ms Simmonds wrote to the Committee, and argued, "without more detailed knowledge of the data source, the numbers of pubs involved and the inclusion or not within the categories, it is difficult to assess these findings [from the ALMR survey] which appear to run contrary to the experience in the market being reported by our members." (Ev33)

23 BIS, *Pub companies and Tenants …*, June 2014 p96, pp3-4

24 *op.cit.* p67 (68% of responses to the online survey supported mandatory free-of-tie)

25 *op.cit.* pp69-70, p72

26 *op.cit.* p76

Overall the Government took the view that if a significant number of tenants went free-of-tie, pubcos might "genuinely take the decision that it makes business sense to leave the tied market".[27] This risk would be mitigated by giving tenants the option for parallel rent assessments:

> If rent negotiations between the pub owning company and tenant fail, the Code will require that pub owning companies prepare, on request, a parallel rent assessment that focuses on the circumstances of each pub and will not mandate an automatic formulaic rent adjustment. Nevertheless, in line with the long held industry view, the Government expects that the parallel assessments will show that the tenant will be no worse off under the tied agreement than if he or she were free-of-tie. In doing so it will directly address the incentives on pub owning companies to ensure they take a fair share of the profits from a tied pub business …
>
> The Adjudicator will ensure compliance with these provisions in the Code. If a tenant believes that a tied or free-of-tie assessment breaches the Code, they will be able to appeal to the Adjudicator. If the Adjudicator finds in favour of the tenant, then the pub owning company will be required to produce a new assessment.[28]

The Government proposed that the new system would be introduced gradually, "to ensure a smooth transition to the Statutory Code":

> We propose a rolling approach to the introduction of the right to request a parallel free-of-tie rent assessment. Tied tenants will be able to choose the option at the next rent review. The Code will limit the time that can elapse before the option may be exercised to five years after the previous rent review.
>
> We intend that tied tenants will be able to exercise their right to request a free-of-tie rent assessment after negotiations have taken place and agreement has not been possible. This will reduce the burden on business of having to produce two assessments when the tenant may have no need for the free-of-tie assessment …
>
> If the tenant requests a parallel free-of-tie rent assessment then he or she will pay a £200 fee to the Adjudicator, the purpose of which is to ensure that tenants consider carefully if the parallel free-of-tie rent assessment is necessary for the negotiation to be concluded successfully. However, at any stage, it would be open to the pub owning company to offer to provide the tenant with a simple estimated free of tie rent based on the pub company's knowledge of the market.[29]

In July 2013 the BIS Committee published its own response to the Government's consultation, in which it argued for a free-of-tie option.[30] During the debates on the Queen's Speech the Chair of the Committee, Adrian Bailey, noted the Government's decision not to introduce a mandatory free-of-tie option and argued that:

> … the failure to commit to introducing a mandatory free-of-tie option will leave publicans feeling let down and disillusioned … The fact is that the overwhelming number of tenants support a free-of-tie option and a mandatory rent review. According to the Government's consultation, 92% of tenants saw the beer tie as their biggest challenge. My conversations with tenants on this issue and the proposals in the Government response indicate that one of the key problems is the deep suspicion of the rent revaluations based on Royal Institution of Chartered Surveyors guidelines; their experience has not given them any confidence that this will significantly address issues that have been so long debated.[31]

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27 *op.cit.* p74. The response document noted that the last, major regulatory shake-up in the pub sector – the abolition of the beer orders in the period 1989-92 – had quite unintended consequences. For more background see, Library note SN6740, 25 June 2014 pp3-4

28 *op.cit.* pp74-5

29 *op.cit.* p75

30 Consultation on a Statutory Code for Pub Companies, HC 314, 22 July 2013para 31

31 HC Deb 11 June 2014, c591

In its response to the Committee's report, the Government reiterated its view that this would pose too great a risk to the tied market as a whole.[32]

[32] Government Response to the Fourth Report of Session 2013-14, Cm 8867, June 2014, p8; see also, HC Deb 1 July 2014, c541W

2. Legislation to establish a Pubs Code Adjudicator

On 25 June 2014 the Government published the *Small Business, Enterprise and Employment Bill*; part 4 of the Bill would introduce a statutory Pubs Code for England & Wales, and an independent Pubs Code Adjudicator to enforce it.[33]

2.1 Second Reading

The Bill received a Second Reading on 16 July 2014, and on this occasion many Members raised the issue of pubcos, and in particular, the Government's decision not to have a mandatory 'free of tie' option.[34] Some Members also raised concerns that smaller, family brewers would be adversely affected by having to comply with the 'Core' Code.[35] Introducing the Bill the Secretary of State noted that there were "many concerns about the details of [the statutory code]" and underlined that he would be "very happy to receive any representations … about those crucial details." The Shadow Business Secretary, Chuka Umunna, said that the Opposition was "far from convinced that what [the Government] propose goes far enough":

> We are not convinced that the limited transparency envisaged by the Bill will deliver the Government's own principle that no publican should be worse off than if they were free of tie. We will also seek to ensure that the Secretary of State gets the right to introduce the mandatory rent-only option for tied tenants in the near future, if these reforms do not deliver.[36]

Responding to the debate the Minister for Business and Enterprise, Matthew Taylor, argued that "the crucial action" the Government were trying to take was "to balance the need for changes and … not to undermine the tied-model as a whole, because we do not want the unintended consequences of large-scale closures":

> Several points of detail need to be addressed. The first is the issue of smaller pubs. There are, of course, two levels to the pub code, but it is important to make sure it works for smaller pub companies and the smaller brewers, as well as the big pubcos. On the issue of franchises, most also have ties, particularly for the beer arrangements, and that is why we have included them. Several Members asked for more details. We are consulting on the level of the fines and will bring forward more details in due course.[37]

2.2 Evidence sessions on the Bill

The Committee stage of the Bill began on 14 October 2014. The Committee heard evidence over four sittings, and in one of these sessions, took evidence on the Pubs Code from Fair Pint, Association of Licensed Multiple Retailers (ALMR), Camra and British Beer & Pub Association (BBPA). Generally all of the witnesses were supportive of the introduction of statutory regulation for tied pubs, though there were a variety of views on the principles underpinning the Code, the differences between the 'Core Code' and the 'Enhanced Code', and which pubcos should be covered by either Code.

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33 Library Research paper 14/39, 10 July 2014 provides an introduction to the whole Bill.
34 HC Deb 16 July 2014 cc906-970. For example, Adrian Bailey (c928), Greg Mulholland (c932), Brian Binley (c938), Catherine McKinnell (c941), Chris Evans (c947), and Toby Perkins (c964).
35 For example, Sheryll Murray (c936), Justin Tomlinson (c952), Andrew Griffiths (c956) & Richard Fuller (c959).
36 HC Deb 16 July 2014 c915, c921.
37 HC Deb 16 July 2014 cc967-8

Both Fair Pint and Camra were critical of the fact that the Bill did not make provision for the 'market rent only' option. The BBPA raised concerns over the procedure for parallel rent assessment, and the inclusion of temporary agreements in the scope of the Code. The AMLR also argued that temporary agreements – tenancies at will – should not be within the scope of the Bill: "they do not raise any particular risks and are not long-term measures that require somebody to invest"; including them would "slow up the market and we would see more closed pubs."[38] By contrast, Camra suggested that if this class of agreement or franchises were excluded, "companies could see them as a loophole to get out of what is intended." Fair Pint noted that in some cases tenancies at will had been used "to commit naïve tenants to an agreement without them having any pre-entry awareness training."[39] Both Camra and Fair Pint suggested if pubcos were concerned about temporary agreements coming under the statutory code, they could avoid this by running them under a free-of-tie arrangement.

The BBPA were also critical that the Bill would put a "disproportionate burden" on smaller companies. Other witnesses were supportive of a statutory regime applying to all, but indicated that certain elements of the Core Code could be moved into the Enhanced Code, to meet concerns about the impact of the Bill on smaller family brewers.[40] There was also some discussion of the likely costs of complying with a statutory code, as opposed to the current arrangements for self-regulation. The BBPA suggested that one reason that family brewers were "keen to continue with self-regulation" was that the system cost about £5 per pub, whereas "the cost under the adjudicator as set out in the consultation would be £95 per pub, plus of course, all the costs of compliance that ensure, such as code compliance officers, the training elements and so on."[41]

Camra expressed the view that the £5 figure given by the BBPA "suggests that the current system is fairly under-resourced, and perhaps that is why it is not operating in the way that it should … £90 or £95 a pub is a very modest amount of money to be considering to deliver the benefits of a fair and more flexible deal for both licencees and the pub-owning companies." The AMLR made a second argument for *not* excluding smaller pubcos from statutory regulation:

> Size is not an indicator of good or bad behaviour. It is an indicator of risk in the marketplace, because of the potential that you have to affect more people, but any individual lessee who is suffering—if the tie is not operating correctly for them or if they suffer abuse—needs to be dealt with fairly. That is why we support statutory regulation for everybody. We do not want to leave lessees of smaller companies unprotected.[42]

On its fourth sitting the Committee took evidence from Matthew Hancock MP, Minister of State for Business and Enterprise. In answer to questions from Toby Perkins, the Minister summarised the Government's rationale for basing the Pubs Code on the principle that tenants should be 'no worse off':

> When you go to take over a tenancy … the principle behind the tie and the beer being cheaper is that you get a lower rent, and therefore you improve your risk relationship, because you move some of your costs away from being overhead and on to being costs on the margin. In theory, that is a sensible contractual decision for someone to make ... What I hope that the proposal will do is to make it easier for people to make that assessment, so that we can be more confident that that assessment can be made on a fair and balanced footing and people can make the

38 PBC 16 October 2014 c86
39 PBC 16 October 2014 c86, c88
40 PBC 16 October 2014 c80
41 PBC 16 October 2014 c88
42 PBC 16 October 2014 c90

> judgment as to how much they are losing off their overheads in order to be having to pay more for their beer.[43]

Mr Hancock was asked why pubcos should be opposed to the Code providing tenants with a 'free of tie' market rent option:

> They make two perfectly reasonable points, one of which is a principled and one a pragmatic one. The point of principle is that the pub companies own the pubs. That is a principle of property rights. We have to be very, very cautious about breaking that, because the principle of owning something until you choose to sell it is an incredibly strong one … The second point is a practical one, which is that I want lots of successful pubs .... Whether we like them or not, we need to listen to the big pub companies when they say that something like this, if it did not work well, could lead to the closure of lots of pubs. The BIS analysis was well grounded when it came up with the figure of how many pubs would close.[44]

Stephen Gilbert asked Mr Hancock about the argument from some family brewers that some provisions of the 'Core Code' represented an unfair regulatory burden, and should be transferred to the 'Enhanced Code':

> **Q 302 Stephen Gilbert:** The only difference [between the Core Code and the Enhanced Code] appears to be the parallel rent assessment that is in the enhanced code and not the core code, which will apply only to the bigger ones. If you talk to family brewers … they will say that the burdens of recording conversations, the temporary closure regime and the need to involve highly paid chartered surveyors in making some assessments will put a disproportionate burden on them …
>
> ***Matthew Hancock:*** I heard that evidence and I thought that it was strongly put. Some reassurances are important; for instance, on having a compliance officer, it is important to be clear that that does not need to be a new employee, in the same way that the company secretary in a small business is rarely a separate employee; they often do that as well as many other things. Essentially, someone will be nominated as a compliance officer, but that does not need to be a separate person. The policy goal behind the provision that applies to pubcos with fewer than 500 tied pubs is that, if you run your chain well, essentially you should not be affected, and you should be supported in what you are doing.[45]

Finally, Mr Perkins asked about the decision to set out the details of the Code in secondary legislation, and if this would not create uncertainty for the industry:

> **Q 314 Toby Perkins:** … The Bill provides for a code that will be put in front of us in the next year or so, but there is no mention of the enhanced code ... Why was the decision taken to bring in the legislation in that way, so that the principle of the code will be established in this Bill, but the actual code will be a matter for secondary legislation?
>
> ***Matthew Hancock:*** That is often how legislation is introduced. Of course, the details of any secondary legislation will also be brought forward and we will work on them, talking to everyone about them. That is a pretty standard way of legislating.
>
> **Q 315 Toby Perkins:** … I wondered if you had made a specific decision to do it in that way, because one of the things that came across in numerous pieces of evidence was people in industry wanting some sort of certainty. I suggest to you that this would be another piece of temporary legislation. Actually, once the code is in place, future Governments might well decide to return to it and strengthen or weaken it, or whatever they like. I wondered if that was a matter of design by the Government, or is that something you think may happen afterwards?

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43 PBC 16 October 2014 c119
44 PBC 16 October 2014 c119
45 PBC 16 October 2014 c127

> ***Matthew Hancock:*** No, it is not a matter of design in that way. What we are designing is how we put in place a better system for regulating the pub industry than has been in place hitherto.[46]

2.3 Debate and amendment of the Bill in Committee

The Committee considered Part 4 of the Bill over three sittings on 28 & 30 October 2014. A series of amendments were tabled by the Opposition, mostly with the aim to strengthen the principle underpinning the Pubs Code that tenants of larger pubcos should be 'no worse off' by virtue of being 'tied'. A number of 'probing' amendments tabled by members of the Committee were also considered. None of the Opposition's amendments were agreed, though the Committee voted on a selection of these.

However, an amendment tabled by Sheryll Murray MP, to restrict the application of the statutory code to *only* pubcos with at least 500 tied tenants was agreed, on division. In effect the amendment removed the provision for there to be a 'Core Code' to cover all tied tenants. Ms Murray argued that this revision to the Bill was necessary to protect smaller family-owned breweries, which, in her words, "had been led to believe that they would not be subject to any legislation as the self-regulation was working effectively within their estates."[47] The Minister, Jo Swinson, argued that the amendment would "undermine the overall provisions of the Bill, particularly the important protections for the tenants and consumers who must be at the heart of our discussions … if [the amendment] succeeds, this opportunity to ensure that tenants are protected in primary legislation would be lost, and that protection would then be subject to us passing primary legislation in future. Tenants would not thank us for missing this opportunity."[48]

At an earlier stage of the debate Ms Swinson had explained that she was minded to make some revisions to the two codes – an issue on which she had written to members of the Committee. Ms Swinson suggested that "changing the split of what is in the Statutory Code and what is in the Enhanced Code" could answer concerns about the impact of the Bill on family brewers. It was her intent to publish a revised version of the Code before the Report stage of the Bill.[49]

Despite these arguments the Committee voted by 11 votes to 7 in favour of the amendment. Two consequential amendments moved by the Member were agreed without division. The following section of this note discusses these deliberations in detail.

The Adjudicator (clause 35, Schedule 1)

Clause 35 and **Schedule 1** provide for the establishment of the Pubs Code Adjudicator, and the principal features of their office. Introducing this clause the Minister, Jo Swinson, explained that the Adjudicator would be "a corporation sole who carries out functions on behalf of the Crown":

> This means that they can act formally as an office holder rather than an individual when entering into contracts and when suing or being sued. There should therefore be continuity when there is a change in the individual who happens to hold the office at any given time. The adjudicator will be appointed by the Secretary of State, who may also appoint a deputy adjudicator. The adjudicator may be appointed for up to four years initially and may have a further one or two terms of up to three years each. The Secretary of State may dismiss an adjudicator if they are satisfied that the adjudicator is unable, unwilling or unfit to perform their functions.[50]

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46 PBC 16 October 2014 cc131-2
47 PBC 28 October 2014 c348
48 PBC 30 October 2014 c375
49 PBC 28 October 2014 c305; PBC 30 October 2014 c376
50 PBC 28 October 2014 c290

The Minister went on to observe that "there is clearly a great deal of cross-party agreement that an adjudicator should be established", and in turn, Toby Perkins, speaking for the Opposition, said that "I robustly support clause 35 today … ensuring that tied licensees are just as able to earn a good living if they run their pub with vision, endeavour and enterprise as their non-tied equivalents is an important commitment for this House to support."[51]

The Committee went on to consider **Schedule 1**, and an amendment tabled by the Opposition, to preclude the appointment as Adjudicator of anyone who was a current or recent employee or shareholder of a large pubco. Mr Perkins had also tabled an amendment to **clause 50**, which sets out the procedure for the Adjudicator to recover costs from an investigation. Where an investigation is launched following a complaint about a pubco's behaviour, the Bill would allow the Adjudicator to recover costs from the person making this complaint if it transpired that the complaint was "vexatious or without merit." Mr Perkins suggested that the test for a complaint being "without merit" would create a disincentive for tenants to file complaints in the first place: "where people are making an honest complaint in good faith on which the adjudicator, after looking at the figures, sides with the landlord and finds that there is no merit in the case, I think that saying, "In those circumstances, you can be charged," would have the opposite effect to what the Minister intends."[52] Similarly, Mr Perkins argued, without ensuring the Adjudicator's independence from pubcos by putting this bar on potential applicants to the post, the Bill risked undermining tenants' faith in the new regulatory system.

The Minister, Ms Swinson, spoke against both amendments. She argued that barring certain categories of person from being appointed was unnecessary, as the appointment would be made "in an open recruitment exercise … candidates will be expected to demonstrate high standards of integrity and objectivity, and to show that they are free from bias and can act independently."[53] The Minister went on to oppose changing the test for procedure for recovering the cost of investigations, as well as some probing amendments tabled by Andrew Griffiths to widen the circumstances where costs could be recovered from complainants; in doing so, Ms Swinson underlined the difference between investigations and arbitrations:

> Unlike the Arbitration Act 1996 and the Groceries Code Adjudicator, the Bill does not provide for costs to be assigned to the tenant if they bring an arbitration case that is without merit. That is [because tenants] … might not have significant resources or be well versed in the law and therefore able to assess whether an arbitration case has legal merit. However, if they feel that there is a concern, they can take that to arbitration. That is quite different from a vexatious case, in which an arbitrator may assign costs to the tenant …
>
> Arbitration and investigation are not the same thing. As a result, we think they deserve to be treated differently. Investigations are about dealing with wider systemic breaches of the code, so typically not just an individual circumstance where a tenant has been badly treated ... Investigations are much more likely to look at a pattern of behaviour affecting lots of different tenants, perhaps by one or more pub companies … There is a different test for the adjudicator to start an investigation; there is a need for reasonable grounds to think that the code has been breached ...
>
> If enough evidence were presented to convince the adjudicator that there were reasonable grounds to suspect the code had been breached, but the claim turned out to be wholly without merit, that would suggest that something untoward had gone on … Perhaps such circumstances would mean that the adjudicator had been misled

51 PBC 28 October 2014 c291, c296. **Clause 35** was agreed without a division.
52 PBC 28 October 2014 c299
53 PBC 28 October 2014 c308

> to start with about the grounds for opening an investigation. That is the reason for the phrase "wholly without merit" in addition to "vexatious" for the test in question. We do not want campaign groups to go on fishing expeditions.[54]

In the event Mr Perkins withdrew the proposed amendment to **Schedule 1**, and, at a later stage in the proceedings, the Committee voted against his amendment to **clause 50**.[55]

In his contribution to the debate Mr Griffiths suggested that there was too much uncertainty over the form of the Pubs Code itself. In response the Minister pointed out that the draft version of the Code had been included in the Government's response to the consultation exercise, but went on to sketch out some revisions that she was minded to make:

> The Government response to the consultation on pub companies and tenants was published on Tuesday 3 June. On page 130 at annex F is the draft code for pubs, as has already been published …
>
> I wrote to Committee Members on Friday to set out how, as a result of the evidence sessions and discussions with hon. Members, I was already minded to make some revisions to the published draft code. I will also listen further to the Committee's views during our deliberations and publish a revised code before Report.
>
> The Government have always intended, for the sensible reason that the final code has to reflect the final form of the Bill, that the final code will be published after Royal Assent. After Royal Assent, the Government will quickly consult on the specifics of the code with a view to its being in place shortly afterwards. The point of publishing the draft code and a revised code is to enable as much discussion as possible to be done in advance.[56]

The Pubs Code (clauses 36-38) & other provisions (clauses 39-63)

Clause 36 provides for the Secretary of State to introduce the Pubs Code by means of secondary legislation. The remainder of the Committee's consideration of this part of the Bill consisted of debate on a series of amendments tabled by the Opposition, by Sheryll Murray and by Andrew Griffiths, to this clause.

Speaking for the Opposition Toby Perkins explained that the purpose of the two amendments he had tabled was to "tease out how Government will deliver on the principle of a tied tenant being no worse off than a free of tie tenant."[57] First, he proposed that the clause should stipulate that the Code would require large pubcos to "list on their websites the full package of benefits [for any tenancy agreement] and their estimated monetary value."[58] Second, he argued that regulations to be made under **clause 38** – which are to prevent pubcos including terms in tenancies to subvert the Code – should explicitly prevent a tenancy agreement allowing the pubco, and only the pubco, to insist the tenancy shift to a 'free-of-tie' basis: "the Opposition have not tabled an amendment containing the mandatory free-of-tie option for tenants … [but this amendment] ensures that the unilateral opportunity to send a pub from being tied to free-of-tie is not something that pub companies can have in their contracts and then deny the tenant the same right."[59]

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54 PBC 28 October 2014 c311, c313
55 PBC 28 October 2014 c318, PBC 30 October 2014 c386
56 PBC 28 October 2014 c305. The Minister's letter was published as written evidence to the Committee a few days later: Written Evidence: Minister for Employment Relations and Consumer Affairs and Minister for Women and Equalities SB84, 13 November 2014
57 PBC 28 October 2014 c319
58 PBC 28 October 2014 c330
59 PBC 28 October 2014 c331

Ms Murray tabled one probing amendment to ascertain the meaning of the 'no worse off' principle to underpin the Enhanced Code, as established by **clause 36(4)**.[60] Mr Griffiths tabled a number of probing amendments, concerned that the Bill might result in "a new free-of-tie option [being introduced] through the back door or by stealth." The Member raised concerns as to the way in which the Adjudicator would conduct parallel rent assessments, how precisely the benefits provided by the beer tie would be quantified, whether the scope of the final Code might be too broad, and whether the new office could enforce the Code, if it applied to all existing tied agreements.[61]

In response, the Minister, Ms Swinson, discussed what, exactly, the 'no worse off' principle would mean in practice:

> [The principle] does what it says on the tin, and says that a tenant should not be worse off as a result of being in a tied agreement. Basically, a tenant's projected profit under the tied scenario should be equal to or greater than their projected profit under a free-of-tie scenario. If that is not the case, it is up to the pub-owning company to provide a reasonable justification as to why the tied balance should be lower. In particular, this is the trade-off between the dry rent and the wet rent. If they are charging a tied tenant higher prices for beer, which is the basic situation of the tied model, that is compensated for by a combination of a lower overall rent and, indeed, quantifiable benefits to the tenant. That could be free goods such as a TV, or it could be other training and support or business practices which are provided.[62]

She opposed the amendments tabled by Mr Griffiths which, in various ways, would restrict the scope of the Code – excluding an assessment of the 'special commercial or financial advantages' in a parallel rent assessment, excluding franchise agreements from the Code, and allowing access to the Adjudicator for only those signing new tenancies or tenants who had reached an agreed break point in their tenancy.

The Minister also opposed the Opposition's amendments on the grounds that they were unnecessary. First, the purpose of parallel rent assessments were to ensure that tenants could obtain the information they needed when negotiations had broken down; when this process was working, there was no need to put an additional requirement on pubcos to publish information. In addition, "from a city centre pub to a very rural pub, circumstances will vary in terms of the size of the pub and son on, so there needs to be a requirement to take the specific circumstances into account."[63] Second, it was unnecessary to specify the scope of regulations to be made under **clause 38** in the way Mr Perkins had suggested:

> **Clause 38** is all about ensuring that tenants can have the protections of the code and will not be denied those protections as a result of having tenancy agreements that contain provisions which are inconsistent with the code. We are keen to consult on these regulations and will do so after Royal Assent. They will also be subject to the affirmative procedure. I encourage hon. Members to get involved in that exercise if they have ideas about the terms that should be in those regulations.[64]

The Committee proceeded to consider another series of amendments, tabled by Ms Murray, by Mr Perkins and by Mr Griffiths. Ms Murray argued that in order to "protect family brewers" the scope of the statutory code, as established by **clause 36**, should apply *only* to pubcos with 500 or more tied tenants:

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60 PBC 28 October 2014 c319
61 PBC 28 October 2014 c333
62 PBC 28 October 2014 c338
63 PBC 30 October 2014 c343-4
64 PBC 30 October 2014 c344. Both of these Opposition amendments were put to a vote at the end of the Committee's deliberations on Part 4 of the Bill, and both negatived (PBC 30 October 2014 c385, cc385-6).

> Family brewers running traditional tied pubs had been led to believe that they would not be subject to any legislation as the self-regulation was working effectively within their estates. Many of them … have operated with tied tenancy models for decades … they agree that individual tenants require protection and advice, and are fully committed to continuing on a voluntary basis the pubs independent rent review scheme and PICAS, which already exist within the voluntary code ...
>
> A survey of 2,971 tenants, about the voluntary code, was conducted by IFBB pubs, and 2,770 responded. It showed that in 2012-13 only two applications had been made to PIRRS; and none had been made to PICAS. Only five formal complaints were made about business development managers, all of which were settled by internal grievance procedures without the need for outside intervention.[65]

Mr Perkins proposed an amendment to specify that a Core Code, applying to pubcos with fewer than 500 tied tenants, would not include certain elements: specifically, requirements to retain a Code Compliance Officer and a business development manager, as well as a duty to provide parallel rent assessments. He expressed support for the principle behind Ms Murray's amendments, but raised concerns that this might "potentially create a lot of loopholes and undermine the potential of the legislation to achieve what we hope it will."[66]

Mr Perkins also proposed amendments to change the test for pubcos to fall under the Enhanced Code, to those companies "that own 500 pubs of any kind, something the all-party Save the Pub group has clearly and consistently called for during the campaign."[67] Finally, Mr Perkins spoke to a third set of amendments to **clause 59**, which specifies a number of tests to ascertain if a premises is to be classified as a 'tied pub', for the purposes of the Bill; these amendments would have added a test that the premises in question would have to be owned by a pubco, and was intended to be subject to the Code – "to ensure that hotels, restaurants and other premises are exempted from the Bill and are not … caught inadvertently.[68]

Mr Griffiths discussed two probing amendments he had tabled, to remove tenancies at will and tenancies of under 12 months from the scope of the Code, and, to prevent prospective tenants making applications to the Adjudicator at the very start of a negotiation:

> Tenancies at will are established in emergencies due to death, divorce or pestilence; when something goes wrong with a tenant, pub companies use them to fill the gap … In the evidence sessions, we heard about the due diligence that we all want pub companies to do to ensure that tenants are properly informed … The reality is that the people who go in for tenancies at will understand the situation … My real worry is that, if we do away with tenancies at will, as the Bill currently suggests, we will not only see more pubs closing in the short term—because the pub companies will have no choice but to lock the doors and board them up—but when the company does find a tenant to take over the pub, it will be more difficult for the tenant because, as always, if a pub closes, people go to the one down the road or in the next village …
>
> Companies such as Admiral Taverns tell me that they receive up to 5,000 inquiries every year. I am sure that it is not the Minister's intention that that should be covered by the Bill. The scope of this clause as drafted would, I think, impose unnecessary and excessive burdens on pub companies, with very limited benefit for tenants and prospective tenants. The clause should clarify that advisers to the principals in a negotiation are not themselves party to the negotiation and do not benefit from the provision. Yes of course, when a negotiation is begun, when substantive negotiations

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65 PBC 28 October 2014 c348
66 PBC 28 October 2014 c351
67 PBC 28 October 2014 c354
68 PBC 28 October 2014 c370. In the event the Committee voted against each of these amendments: PBC 30 October 2014 c384, c386, c388.

> happen, those people should be covered by the code. I accept that, but there needs to be some semblance of sense here that a negotiation begins when two parties begin intense negotiations, not when someone picks up the telephone.[69]

Mr Griffiths also discussed a new clause he had tabled to remove a certain category of franchise agreements from the scope of the Code. He argued that tenancy agreements being used by the company Marston's were "very different from the tied model", as "Marston's in effect supplies everything to the franchisee, who then dictates the choice of price at which to sell things." He went on to say he would not formally move the new clause, "because it is obvious to anyone that the Government need to look at this."[70]

Responding to the debate the Minister first discussed concerns that restaurants and other types of premises might fall under the scope of the Code:

> I am absolutely happy to confirm that we are legislating for a pub code and that the intention is that it should apply to pubs … We need to make sure that restaurants are not improperly covered by the pubs code and, importantly, that tied tenants of so-called gastropubs, which sell food, receive the protections we intend. I give the Committee an assurance that the issue merits further consideration, and I hope to give it more thought, to do more work on it and to return to it on Report.[71]

Ms Swinson explained why the Government opposed Ms Murray's amendments to remove pubcos with fewer than 500 tied pubs from the scope of the Code:

> I caution against the amendments, however well intentioned they are, because their unintended consequence would be to undermine the overall provisions of the Bill, particularly the important protections for the tenants and consumers who must be at the heart of our discussions … They would mean that 6,000 tenants would no longer have the protection of the statutory code … When we took evidence, Kate Nicholls from the Association of Licensed Multiple Retailers made a powerful point: "size is not an indicator of good or bad behaviour. It is an indicator of risk in the marketplace, because of the potential that you have to affect more people, but any individual lessee who is suffering—if the tie is not operating correctly for them or if they suffer abuse—needs to be dealt with fairly."[72]

Ms Swinson went on to argue that establishing a statutory code for the larger pubcos only would put the voluntary system at risk: "there is a real concern about their long-term sustainability, however, once the statutory code is in place, because the large pub companies, which provide the lion's share of funding for that voluntary approach, will no longer contribute towards it. The consultation evidence suggested that the risk to them was real and significant."[73] The Minister noted that it had been estimated that *continuing* self-regulation for this cohort of pubs would cost around £90-£100 a pub. The department's impact assessment indicated that the costs to setting up an Adjudicator, if shared across the population of 20,000 tied pubs, was about £90 a pub. Furthermore, as the Adjudicator would have to the power to vary the amount it charged different pubcos, rewarding a good compliance record, smaller family brewers who had always treated their tenants well might find that "the statutory system may cost them less than the voluntary system."[74]

The Minister supported the principle of shifting certain conditions from the Core Code to the Enchanced Code, reiterating what she had set out in the letter she had written to the

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69 PBC 28 October 2014 cc357-9
70 PBC 28 October 2014 c367
71 PBC 30 October 2014 cc369-70
72 PBC 30 October 2014 c371
73 PBC 30 October 2014 cc373-4
74 PBC 30 October 2014 c374

Committee the previous week, but she opposed amending the Bill as suggested by the Opposition, to make this explicit in primary legislation:

> I understand the Committee's concerns about the impact on family brewers ... I wrote to [the Chairs of the Committee last week] … advising that I have decided, in response to the strength of feeling from members of the Committee, to move the requirement for an annual compliance report to the enhanced code … Point 2 of my letter mentioned that the recording of business discussion requirements will be changed so that it relates only to discussions about rent, repairs and matters impacting on the tenant's business plan. We suggested making further drafts of the code so that it directly copies the existing voluntary code.
>
> As I said in my letter, it makes sense to give further consideration to the issue of the code compliance officer if people feel it is particularly onerous for there to be a named individual in that role and, indeed, for the Royal Institution of Chartered Surveyors valuer to have to sign off rent assessments, rather than them just having to be done in line with RICS principles. That could be moved to the enhanced code …
>
> I have a particular concern about the wording [of the Opposition's amendment] because it refers to "pub owning companies who own less than 500 premises". My concern is about a loophole, in terms of the ownership becoming the key issue, because clearly companies would be able to lease premises and so on … I think tenants will prefer having the code in secondary legislation with the flexibility that it provides.[75]

Ms Swinson also said she would reconsider the case for a second of the Opposition's amendments: changing the threshold for the Enhanced Code to pubcos owning 500 pubs of any kind: "I recognise the concerns that have been expressed and the argument that the total number of pubs that a company owns is a good indicator of its market share, so I am happy to consider that issue further, too."[76]

The Minister went on to discuss the amendments tabled by Mr Griffiths. She opposed the proposal to restrict access to the Adjudicator to prospective tenants:

> [The amendment] would mean that the transparency and information rights in the pubs code would not be available to prospective tenants until negotiations were virtually complete and they were on the point of signing their agreement with the pub-owning company. By that time, many of them would have invested considerable time, resource and commitment in the prospective contract and might find it harder to walk away if they discovered that all was not as they had assumed.
>
> It is important that we redress that imbalance between the two parties and ensure that tenants have quality, robust information from the outset, so that they can go into a situation with their eyes wide open and see whether it is right for them.[77]

She also suggested that excluding tenancies at will, and agreements of less than twelve months might create "a loophole where rolling short-term tenancies could be used to undermine the Code," though she would reconsider the matter:

> [This] is something that, again, I am happy to go away with, consider and return to on Report after seeing whether we may exempt from the code agreements that are genuinely temporary and short term. We might have to think about whether that is a 12-month period, as outlined by the hon. Gentleman, or whether a different period might be more appropriate. It would be helpful and wise to have further discussion with stakeholders on where the right level might be.[78]

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75 PBC 30 October 2014 cc376-8
76 PBC 30 October 2014 c378
77 PBC 30 October 2014 c378
78 PBC 30 October 2014 c379

Finally, Ms Swinson set out why she opposed the new clause tabled by Mr Griffiths, which would exempt franchise agreements from the scope of the Code, if accredited by the British Franchise Association:

> All the pub franchise models that we are aware of include the tying of beer and other products. Although they may have different means of financial transaction and charging, there is, therefore, the same potential for the relationship to be abused, so they should fall within the scope of our measures … We do not want to create loopholes for companies that are not keen on implementing the spirit of the Bill and so look for ways to get around it so that they do not have to comply with the protections …[and] I welcome the fact that my hon. Friend the Member for Burton has said that he is not minded to press [the new clause] to a vote.[79]

Mr Perkins moved two of the Opposition amendments to **clause 36** – to prescribe elements of the Code which would only apply to large pubcos, and to require those companies to publish details of the monetary benefits of their tied agreements. Both were negatived on division, and **clause 36** was agreed unamended.

The Committee proceeded to consider the remainder of the Bill without debate. Four other amendments tabled by the Opposition were moved, and each was negatived: specifically, to allow for regulations to prevent tenancy agreements allowing pubcos to remove the tie unilaterally (**clause 38**); to prevent the Adjudicator recovering costs for an investigation where a complainant's case was "wholly without merit" (**clause 50**); to add to the criteria to be used in determining if premises were a 'tied pub' or not (**clause 59**); and, to amend the threshold for the Enhanced Code to a pubco with 500 pubs of any kind (**clause 60**).

Sheryll Murray moved her amendment to **clause 60**, to remove smaller pubcos from the scope of statutory regulation. **Clause 60(1)** defines a 'pub-owning business' as a "person who is the landlord of one or more tied pubs." Ms Murray's amendment – revising this test to a landlord "of 500 or more tied pubs" – was agreed, by 11 votes to 7. **Clause 60(2) & (3)** define a "large pub-owning business" as, first, one that is landlord to 500 or more tied pubs in the year following the Pubs Code coming into effect, and, in later years, landlord to this number in the previous six months. Ms Murray moved two consequential amendments to remove the word "large" from this definition. Both were agreed without division. The remaining clauses to Part 4 were agreed, unamended.

The Committee proceeded to consider the remainder of the Bill from 30 October to 4 November.

2.4 Amendment of the Bill at Report stage

On 14 November 2014 the Government published a revised draft of the Code, and a summary of the main changes it had made to it:

> The main changes to the Code mean that the following requirements in the Code will apply only to large pub-owning businesses:
>
> designation of an employee as a code compliance officer and the requirement to produce an annual compliance report.
>
> ensuring that rent assessments are signed off by a qualified Royal Institution of Chartered Surveyors (RICS) valuer.
>
> requirements in regard to qualified persons set out in part 4 of the Code which now rest on the requirement that the tenant has completed accredited pre-entry training which meets the Qualification Curriculum Authority's standards.

[79] PBC 30 October 2014 c383-4

> requirements in relation to the training and practices of business development managers set out in part 9 of the Code. In addition the requirement for business development managers to record all business discussions and agreements with tenants has been qualified and it will now apply only to discussions about rent, repairs and matters impacting the tenant's business plan.
>
> requirement to inform tenants of the arrangements for treatment of their rent deposits.
>
> Other more technical changes relate to existing Code provisions but do not change their scope. They include:
>
> the requirement to explain the process by which an agreement 'contracted out' of the Landlord and Tenant Act 1954 might be renewed, including the timeframe of notification to renew or otherwise.
>
> the information provided to tenants for rent assessments. This should be accurate when it refers to historic data, and reasonable where projected data.
>
> clarification that disputes about repairs may be arbitrated by the Adjudicator.
>
> a requirement for pub-owning businesses to inform their tenants when they cross the 500 tied pub threshold. Currently the Code requires only the Adjudicator to be informed.
>
> further clarification of the application of parts 7 and 8 of the Code to tied pub agreements that charge payments in lieu of rent.[80]

To this end, the Secretary of State tabled amendments for consideration at Report, including amendments to bring pubcos with fewer than 500 tied pubs back into the scope of the Code,[81] and a series of other changes:

- To provide that the Pubs Code may require pubcos with 500 or more tied pubs to have rent assessments signed-off as defined in the Code. The intention is that the Code will specify a RICS-qualified valuer and RICS guidance. This includes assessments of money payable in lieu of rent, such as where a tied agreement charges the tenant via a percentage of turnover rather than through a rent.[82]
- To provide that only large pubcos covered by the Enhanced Code may be required to have a Code Compliance Officer and to produce an annual compliance report.[83]
- To allow the Adjudicator to make recommendations to businesses with fewer than 500 tied pubs about actions that such a business should take, even where the equivalent requirements of the Pubs Code may apply only to large pubcos.[84]
- To ensure that pubcos may not subvert the Code by requiring that any rent assessment can only be initiated by the pubco, or may only conclude that the rent may increase. The Bill provides for regulations to be made to prevent the inclusion of terms such as these in tied agreements. In this context, the reference to 'rent assessments' is to be amended to ensure it includes assessments of money payable in lieu of rent, such as where a tied agreement charges the tenant via a percentage of turnover rather than through a rent.[85]
- To ensure tied agreements are subject to the Pubs Code whether the pub premises are occupied under a tenancy or a licence to occupy.[86]
- To amend the definition of a 'tied pub', to specify that a tied agreement is one where the tenant is subject to a contractual obligation that some or all of the

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80 BIS, Main Changes to Updated Draft Pubs Code, 14 November 2014
81 Notice of Amendments, 17 November 2014 (amendments 41, 43 & 44)
82 *ibid.* (amendments 29,30,31)
83 *ibid.* (amendment 32)
84 *ibid.* (amendment 33)
85 *ibid.* (amendments 34 & 35)
86 *ibid.* (amendments 38, 39, 47-53)

alcohol to be sold at the premises must be supplied by the pub-owning business or a person nominated by the business.[87]

- To ensure that the definition of a pub-owning business can be sufficiently flexible to encompass adequately any parent or subsidiary companies.[88]
- To give the Secretary of State a power to define a parallel rent assessment in regulations in order to ensure that there is flexibility in how the Pubs Code deals with parallel rent assessments for different types of tied pub agreements.[89]
- To provides that all regulations under this Part of the Bill are subject to affirmative resolution procedure, with one exception (the regulations that may be made to abolish the Adjudicator if the Code itself has been revoked.)[90]

In addition the Secretary of State tabled a new clause to allow for regulations to be made to exempt from the Pubs Code dealings with a particular type of tenant, or in relation to particular types of pub premises. The regulations would be able to set out circumstances in which a particular tied pub is not counted for the purpose of calculating whether a company is a "large pub-owning business".[91] A further amendment was tabled to provide that any regulations made under this power which would otherwise be subject to the hybrid instrument procedure in the House of Lords would not be so subject.[92]

Alongside all of these amendments, Greg Mulholland tabled a new clause, to require the Code to include a mandatory 'free of tie' or 'market rent only' option, to apply to pubcos with 500 or more pubs of whatever description – though this option would cover tenanted and leased pubs only.[93]

The Report stage and Third Reading of the Bill were taken over two days, on 18 & 19 November 2014. Part 4 of the Bill was considered on the first day, when the Government decided *not* to proceed with the amendments it had tabled to reinstate all smaller pubcos within statutory regulation.[94] The Minister, Ms Swinson, also stated that when the Bill came to the Lords, the Government would move amendments, first to extend statutory regulation to only those pubcos with 350 or more tied pubs; and, second, to add a power to allow the introduction of a market rent only option to the Code after a review of the new regulatory system. However, the House voted *in favour* of Mr Mulholland's new clause – by 284 votes to 259.[95] At BIS questions two days later, the Secretary of State, Vince Cable, noted that "Parliament has spoken and we respect its views on the subject."[96]

During the debate, Ms Swinson set out the Government's position on the scope of the Code, and the case for having a market-rent only option:

> We are trying carefully to strike the right balance between helping smaller pub-owning companies and helping individual tenants and small business people who are struggling with some of the difficulties documented in the Select Committee reports.
>
> We have listened to all the concerns put to us and, on further reflection, have decided not to press amendments 29 to 33, 41, 43 and 44, which were designed to reinstate smaller pub companies within the scope of the statutory pubs code, albeit with lesser

87 *ibid.* (amendments 40 & 56)
88 *ibid.* (amendments 42, 36, 37, 45, 46, 54)
89 *ibid.* (amendment 55)
90 *ibid.* (amendment 57)
91 *ibid.* New Clause 6. As the Minister explained during Report, this would ensure the definition of a tied pub "does not inadvertently capture restaurant or hotel premises" (HC Deb 18 November 2014 c147).
92 *ibid.* (amendment 58)
93 *Notice of Amendments*, 17 November 2014 (New Clause 2)
94 That is, amendments 29-33, 41, 43 & 44.
95 HC Deb 18 November 2014 c196, c238. The Government's remaining amendments and New Clause 6 were all agreed without division (*op.cit* c195, cc201-203).
96 HC Deb 20 November 2014 c415

> requirements. Instead, we will bring forward amendments in the other place to change the exemption to those companies that own fewer than 350 tied pubs … [As a consequence of this threshold] three further businesses would fall into that category. It is obviously a fluid issue, because companies buy and sell pubs all the time, so that might change in future … none of those three is a family brewer …
>
> We recognise that many hon. Members worry that the pub companies need the very real threat of tenants going free of tie before they will offer their tenants a good tied deal. I can commit today that the Government will bring forward amendments in the other place to respond to this … we plan to add to the Bill a power to introduce a market rent only option after two years if a review concludes that the measures have not delivered sufficiently for tied tenants … It is clear that the "no worse off" principle is paramount and needs to be delivered. We believe that the parallel rent assessment will deliver that, but if it does not, we do not want to have to introduce another piece of primary legislation.[97]

Speaking for the Opposition, Toby Perkins, argued in favour of Mr Mulholland's new clause:

> In 2011, the Select Committee finally came to the conclusion that … the time had arrived for a statutory code with an independent adjudicator, open market rent assessments and a free-of-tie option. It is disappointing that it has taken more than three years to get from the Select Committee's conclusion to the Bill before the House. It will be an even greater disappointment if we have to move away from the Bill and are told that there will be a further review in two years' time to debate the whole thing again and decide whether we then need the free-of-tie option.[98]

In turn Mr Mulholland set out the case for this change:

> As drafted, however, the proposed statutory code will not deliver the Government's two key principles: fairness and the principle that a tied licensee should be no worse off than a free-of-tie licensee …
>
> The Fair Deal for Your Local campaign and the Select Committee are clear that this measure must not apply to smaller companies—those with fewer than 500 pubs—because that is not where the majority of the problems are. A "large pub company" must be defined as any company with 500 or more pubs of any type, with the measure applying to its leased and tenanted pubs only, not to tied pubs.
>
> [The new clause] would make for clear primary legislation specifying how the market rent only option would work in practice and exactly what it would be, and crucially—this is why Members can give it their support—it would come in gradually over five years and be triggered only at certain key points in the cycle of a lease or tenancy. It would be triggered at five-year rent reviews, on lease renewal, on the sale of the property title, if there was a substantial change in prices—mirroring BIS's own clauses—which would be for the adjudicator to decide, or if there were a change of circumstances, such as the opening next door of a Wetherspoon's offering cheaper beer prices, which should lead to lower rents, but often does not under the pubco model. The new clause would give the large pubco tenant the opportunity to go to the adjudicator to plead that it was a significant change in circumstances.[99]

Mr Mulholland was asked if the market rent only option might not include smaller pubcos. He noted that the wording of the new clause required the option to apply only to pubcos with 500 or more pubs: "[This test] cannot apply to any family brewer, and because it is in primary legislation, it cannot be changed in the future."[100]

The Chairman of the BIS Committee, Adrian Bailey, also spoke in favour of the new clause, opposing the Government's suggestion for bringing in further amendments in the Lords:

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97 HC Deb 18 November 2014 c148, c149, c192, cc150-1
98 *op.cit.* c159
99 *op.cit.* cc168-70
100 *op.cit.* c172

> [This] very well-researched clause is consistent with nearly 10 years of successive recommendations from the Business, Innovation and Skills Committee, and because I feel that it will address an issue that all the other proposals have failed to address: the unfair relationship between the pubco and the tenant … I oppose [the Government's proposed] course of action … the industry has already been consulted to death … the Government's last consultation received an enormous number of responses, and it took them a long time to reach their conclusions. I therefore see no grounds for any further consultation …
>
> I also understand the Government's circumspection about introducing a "big bang" approach, given that such a mechanism could potentially undermine pub companies and lead to even more pub closures, to the detriment of the industry as a whole … I do believe, however, that the well thought out, incremental and graduated approach proposed in new clause 2 will enable the market rent only option to be introduced in a way, and over a period, that will give the industry a good chance of adapting and making the necessary changes.[101]

By contrast Andrew Griffiths argued against the new clause:

> I would bring the House back to the fact that we find ourselves in this situation because of the beer orders. A Conservative Minister decided, with the best of intentions, that the Government should interfere in the market; the Government decided that they should split up the big brewers because they were acting in an uncompetitive way and the consumer was not getting a good deal. They broke up the big brewers. The reality is that that decision set us on this path we are on today with the pub companies. We should therefore be careful and cautious—and afraid—of unintended consequences … I understand the intentions behind [new clause 2] … but its fundamental aim is to break the tie.[102]

Responding to the debate, the Minister, Ms Swinson, alluded to the concerns raised in the consultation exercise over the market rent only option:

> It was interesting from the consultation, and almost unique in such a polarised policy area, that concerns were expressed by people on all aides of the debate about the impact of introducing that provision and the consequences it could have on the tied model as a whole. There would be some uncertainty and unpredictability, especially in relation to pub-owning companies and how they would respond …
>
> I can give an assurance that the [proposed review of the statutory system, once in place] will be rigorous and that, in response to it, there will not only be this power for the Secretary of State, but, if he finds that there is insufficient protection for tenants as a result of the parallel rent assessments and the system is not working as it should, a requirement for him to bring forward the market rent only option.[103]

However, as noted above, the House voted in favour of the new clause. The House also divided on an amendment tabled by the Opposition, to clarify that franchise agreements would be in the scope of the legislation. Earlier in the debate the Minister had argued that the amendments the Government had tabled would ensure "no loopholes are being created", and the House voted against this amendment by 302 votes to 238.[104]

2.5 Amendments of the Bill in the House of Lords

Amendments in Committee

Following the Bill's Third Reading in the Commons, it passed to the Lords for scrutiny. At the Bill's second reading on 2 December 2014, the Minister, Baroness Neville-Rolfe, confirmed that the Government was committed to retaining a 'market rent only option' (MRO) in the statutory code:

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101 *op.cit.* cc176-8
102 *op.cit.* c179, c182
103 *op.cit.* cc193-4
104 *op.cit.* c156, c203

> The Bill will address the imbalance in bargaining power between pub-owning companies and their tied tenants to ensure that the latter are treated fairly and are no worse off than they would be if they were free of tie. For the first time, tied tenants will have a statutory code that they can rely on, based on the industry's own voluntary code. It will be enforced by an independent adjudicator, who will have real sanctions at his or her disposal …
>
> Noble Lords will know that there was much lively debate on this subject in the other place. Members there voted against the Government to include in the Bill a market rent only option. This provision requires large pub-owning companies to offer their tied tenants the right to go free of tie in certain circumstances. The Government resisted this proposal partly on the basis that it could have unintended consequences for the sector. However, we recognise that a majority of Members in the other place believe strongly that pub-owning companies need the threat of tenants going free of tie before they will offer their tenants a fair tied deal. The elected Chamber has spoken by voting this into the Bill and the Government have listened.
>
> On that basis, I can confirm today that the Government intend to accept in principle the introduction of a market rent only option. Our focus now will be on making this option workable to ensure that tied tenants are no worse off than free-of-tie tenants and to minimise the risks of unintended consequences, such as job losses.[105]

Part 4 of the Bill was considered in Committee on 28 January 2015, when the Lords agreed a series of Government amendments.[106] Baroness Neville-Rolfe set out these amendments at the opening of the debate, noting that the Government planned to consult before specifying the details of the new MRO in secondary legislation:

> The amendments, which are split into three separate clauses for clarity, set out a clear framework for the market rent only option, make provision for the procedures needed to deliver it, and provide for the adjudicator to resolve disputes. Our amendments will provide tied tenants with the right to a market rent only agreement at a number of trigger points, including at a rent review; at a lease renewal; when there is a significant and unexpected price increase; or if a local economic event occurs that is outside the tenant's control. Although prospective tenants will not have the right to the market rent only option, our amendments provide that they will have the protection of the parallel rent assessment—PRA—which will show them how their tied deal compares with a free-of-tie deal ...
>
> I can assure the Committee that the Government are committed to making the market rent only provision workable and legally robust … The market rent only clause introduced in the other place provided MRO to tenants on entering administration. Rather than provide protection for tenants, this could hasten the route to company liquidation, which would certainly not be in the tenant's interests. The Government's amendments attempt to address such unwelcome effects, which I will cover in more detail as the Committee progresses ...I encourage the Committee to accept these amendments today to ensure that a workable framework is in place as the basis for further discussion on Report …
>
> Our new clauses provide for the details of the market rent only process and market rent only triggers to be set out in secondary legislation.
>
> For example, this includes the point at which the market rent will begin to be paid. I know some would prefer this detail to be set out in primary legislation but this would not allow for the consultation that is essential to get this right. There has been very limited consultation because of the genesis of this clause. I believe that that is a risky way to legislate. A full public consultation will help to ensure that the process works as we all intend. The use of secondary legislation for this purpose also allows some flexibility if a review later demonstrates the need for a change of process.[107]

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105 HL Deb 2 December 2014 c1422-3
106 HL Deb 28 January 2015 ccGC91-168
107 HL Deb 28 January 2015 cc92-3

At this time the Department published a revised version of its impact assessment; this states that the Code, including the MRO, would cover about 13,000 pubs:

> The code, including market rent only option, will apply to pub companies with 500 or more tied pubs. The code will only apply in England and Wales. We estimate the code will cover around 13,000 pubs. The government response to the consultation proposed covering all tied pubs to provide all tied tenants with the protection of a statutory code and adjudicator and because of the risk that self-regulation for the 6,000 tenants of the smaller pub companies, including 3,000 tenants of family brewers, would not continue if the larger pub companies were no longer involved.
>
> However, in the House of Commons there was strong support to exclude family brewers and all pub owning companies with less than 500 tied pubs. The risk of self-regulation ceasing was not considered great enough to justify covering companies that are not the main source of concern. The 29 members of the Independent Family Brewers of Britain (IFBB) have committed to continue funding the industry dispute resolution mechanisms, PIRRS and PICAS, and to keep the industry framework code up to date.
>
> The main difference between the statutory code and the current voluntary code is the inclusion of the market rent only option for existing tenants and parallel rent assessments for new tenants. At any rent review or lease renewal (or a number of other rarer trigger points), the pub company would have to offer a free of tie option to the tenant. There would first be a period of negotiation to find a mutually agreeable rent. If no such rent is agreed, there will be an independent assessment of the free of tie rent in line with the current process for assessing rent. The cost of this assessment will be split between tenant and pub owning company. This reduces the asymmetry of information that new tenants face, as pub companies will have to better explain the benefits of the tied model. Having a free of tie comparison will also make the differences in the models more apparent reducing behavioural biases due to complexity.
>
> The Market Rent Only option would not apply to new tenants. In order to help them better understand the difference between tied and free of tie deals they will have the option to have a parallel rent assessment. This will allow tenants to make a more straightforward comparison between the tied and free of tie business model. In setting out the free-of-tie assessment pub owning companies will be required to demonstrate that tenants are likely to be 'no worse off' as tied tenants than they would be if free-of-tie.[108]

In Committee, Lord Mendelsohn, speaking for the Opposition, supported the Government's amendments, subject to further changes at Report:

> Although we support the Government's approach, we take the view that some of their drafting has lost the strength and essence of the Commons amendment. We are keen to ensure that what is passed is workable and sensible and we are happy to work together on this … We are delighted that the MRO is now in the Bill, but we are also very aware of a need to strike a balance in the final legislation. Using the primary legislation to try and close every feasibly conceivable loophole while protecting tenants could put a straitjacket around the industry.[109]

Introducing the Government's three new clauses, Baroness Neville-Rolfe argued that the Mulholland clause – which formed clause 42 of the Bill – had three flaws:

> One effect [of the Mulholland clause] is that the MRO will come into force on Royal Assent, before the Pubs Code Adjudicator existed. Market rent only and the protections it brings can work properly only if it is introduced with the code and with the adjudicator …
>
> Secondly [the new clause] … would not allow us to consult on the MRO process … [Third] much of the detail of the triggers for MRO is more appropriate for secondary

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[108] BIS, Pubs Statutory Code and Adjudicator – Final Impact Assessment, January 2015 para 49-51
[109] HL Deb 28 January 2015 c122, c124

> legislation. Clause 42 as drafted provides no detail on the terms of the new commercial tenancy and what an MRO-compliant tenancy would be … Companies and tenants affected by market rent only need the opportunity to comment on the process, not just the authors of Clause 42.[110]

The Minister gave details of how the Government anticipated the MRO would work in practice:

> After the tenant requests a market rent only option, the first step will be for the pub-owning company to offer a market rent, which the tenant will accept or which will provide the basis for negotiation between the two sides. If the tenant and pub-owning company cannot agree a market rent only agreement within a certain period of time, the tenant and pub-owning company will jointly appoint and jointly pay for an independent assessor to determine the market rent for the pub.
>
> Our amendments allow the code to stipulate that the existing agreement between the pub-owning company and tenant will prevail until the market rent only procedure concludes … If in the end the tenant opts for a market rent only agreement, this will constitute a new agreement between the tenant and pub-owning company. The terms of the agreement will need to be clear to the tenant before he accepts the offer. To be clear, at this point the pub-owning company can remove from the MRO agreement any special commercial or financial advantages—SCORFA—that the tenant was entitled to under the tied agreement. As I said earlier, we intend to consult publicly to ensure that the process works as intended.[111]

Following on from her last point, the Minister underlined that the Government would also consult on how the code would define a 'trigger' for the MRO:

> In addition to consulting on the detailed process for MRO, we will consult on the detailed definitions of the trigger points for an MRO assessment. These will be set out in the statutory code, which is subject to affirmative resolution. Under our amendments the tenant would be entitled to the MRO option: at rent review; if the tenant renews their lease; when there is a significant price increase for tied products which was not reasonably foreseeable; and if an event occurs that is beyond the tenant's control and meets the descriptors set out in the Pubs Code. The headlines would rightly be in the Bill but we need to set out the details in secondary legislation.[112]

The Mulholland clause anticipated that the MRO could be triggered either by a transfer of title, or when a pubco went into administration. The Minister explained why the Government had not kept these two trigger points:

> In the case of the transfer of title trigger, the Government consider that other, more proportionate protections exist for tenants when their pub is sold to another owner, as any new owner would be bound by the tenant's existing contractual rights. If the sale makes little difference to the pub, there is no problem. If it makes a significant difference to the trading position, another MRO trigger is already available—the trigger for circumstances outside the tenant's control. The inclusion of the transfer of title trigger would have the unintended consequence of making the sale of pubs as going concerns less appealing to potential buyers, leading to fewer pubs and fewer pub tenancies ...
>
> The Government's amended clauses also remove the trigger when a pub-owning company goes into administration. During administration, the company in administration may continue to operate. Tenants will continue to have their existing obligations towards the company in administration, and the company will continue to have its existing obligations to the tenants, acting through the administrator. If any of the other triggers for MRO are met during this period, such as if the company brings in a significant price increase, the tenant will still have the right to MRO.

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110 *op.cit.* cGC127
111 *op.cit.* ccGC127-8
112 *op.cit.* cGC128

> The primary aim of administration is to rescue the company, and this preserves jobs as well as value. Giving all the pub-owning company's tenants the right to MRO at this critical point would be likely to reduce the value of the pub company's estate. Pub-owning companies below the threshold are unlikely to buy the company's pubs if the tenant could opt for the MRO option during the course of the sale. This would reduce the chances of rescuing the pub-owning company and could ultimately push the company into liquidation. Clearly, this would not be in the interests of the tied tenants, employees and suppliers of the former business and the creditors.[113]

The Minister was also asked about the threshold number of pubs that a pubco had to own to come under the Code, as the Government now proposed this would be 500 tied pubs:

> My noble friend Lord Stoneham asked whether the figure of 500 would be enshrined in primary legislation. The threshold of 500 tied pubs will be in the Bill. However, I should be clear that it can be amended by secondary legislation using the affirmative procedure, but only if Parliament agrees to alter the threshold if the market changes.[114]

Finally, in answers to concerns about the further delays to establishing a new regulatory regime, the Minister underlined the deadline that the Bill would set:

> Clause 41 places a clear duty on the Secretary of State to introduce the Pubs Code within 12 months of Royal Assent… [This would have to] include the MRO provision. The Government are completely committed to getting on with things and to swift implementation … Apparently it will take two months for the Bill to go through to Royal Assent, so the maximum is 14 months.[115]

Amendments at Report

The Government introduced a second series of amendments to these provisions at the Report stage of the Bill, on 9 March 2015.[116]

First, the provisions underpinning the operation of the Adjudicator's office were amended to allow the Adjudicator to take on secondees from the private sector. The rationale for this change, as the Minister, Baroness Neville-Rolfe explained, was to avoid the problems that had faced the Groceries Code Adjudicator in getting staff on secondment from the public sector: "there is no single reason for this, but both the niche nature of the GCA and the ongoing pressures on departmental staffing levels are factors."[117]

Second, the Minister introduced a series of amendments to underpin the MRO; as she explained, "[since the Committee stage] ministerial colleagues, officials and I have … had extensive discussions with noble Lords, honourable Members in the other place, and pub company and tenant stakeholders":

> I am pleased to say that we have now reached a position where the Fair Pint campaign and CAMRA are content with our amendments. I also met my honourable friend Greg Mulholland last week and he is supportive of the approach we are proposing ... I am also pleased to say that, although some differences remain, at a recent meeting that Jo Swinson and I hosted with stakeholders from all sides, pub companies, too, seemed to recognise that much progress had been made.[118]

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113 *op.cit.* ccGC132-3
114 *op.cit.* cGC130
115 *op.cit.* cGC126, cGC135
116 HL Deb 9 March 2015 cc446-494. As with the Government amendments agreed in Committee, all of these were accepted without a division. A number of other amendments were the subject of debate, but were withdrawn, and not put a vote.
117 HL Deb 9 March 2015 c446. Amendments were also agreed to ensure the Adjudicator's secondment policies were approved by the Secretary of State, and for staff to be "subject to the House of Commons Disqualification Act 1975, in common with staff of government departments" (*op.cit.* c447).
118 *op.cit.* cc448-9

As a prelude, the Minister set out what the MRO constituted:

> The principle of market rent only is that at certain trigger points a tied tenant should have the right to move to a free-of-tie agreement and pay a market rent for the property. A market rent will generally be higher than a tied rent, because a free-of-tie tenant is free to purchase all drinks and other products and services from wherever he or she wishes, rather than from the pub-owning company. The only exception to this is insurance, where it is common practice in any commercial lease for this to be arranged by the landlord and charged to the tenant.[119]

The Minister went on to set out three major changes to the Bill:

> [First, the Government's amendments] provide that the Pubs Code must specify a reasonable period in the market rent only process for both stages of that process. The first stage is where a tenant and their pub company try to agree a rent; this was over a 21-day period in the original MRO clause laid in the other place. The second stage involves the settling of a market rent by the independent assessor … [Related amendments] clarify that the term "market rent" applies only to a rent set in the second stage by an independent assessor.
>
> The market rent only clause introduced in the other place established the principle that, when MRO is triggered on a brewer's pub, the brewery should retain their route to market as long as tenants can buy the brewer's beer from any source. This route-to-market principle was accepted by all sides. [The second change to the Bill] … clarifies the requirements that may be placed on pubs in terms of stocking requirements after MRO has been triggered. The Bill as drafted already allows brewers to place conditions around the stocking of their own brands of beer and of cider in terms of volume and range. The amendment confirms that brewers may also protect their route to market by allowing some restrictions on the sales of competitors' products. Brewers will not be able to require that their market rent only pubs sell only their products; they will need to satisfy themselves that they are compliant with competition law …
>
> [In Committee there were concerns] about removing the sale of title and administration triggers for market rent only, which were in the original Commons amendment … [The third change to the Bill] extends the protections of the code—apart from the market rent only option—to tenants whose pub is sold by a "code company" to a company outside the statutory code. The protection will last until the next rent assessment and will mean that the tenants concerned will be able to refer any code breaches during that period to the adjudicator.[120]
>
> The Minister noted concerns expressed in the Commons about "overburdening family brewers through our provisions." As a consequence the Government did not "propose to include market rent only in the continuation of protections when a pub is sold":
>
> Nor [will] the adjudicator have investigatory powers relating to those companies. This is because the investigation function is designed to uncover systemic breaches of the code. It would not be right to include in that power companies that are obliged to follow the code only because some of the pubs they own used to belong to a "code company" and which are covered by the code only in respect of those pubs.[121]

Further Government amendments were concerned with a series of changes to the terminology used in the Bill:

- To "change the references in the Bill from "market rent option" to "market rent only option" to give reassurance that the intention is that a tenant who exercises market rent only should pay a market rent only for the pub and not for other services.

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119 *op.cit.* c448
120 *op.cit.* cc449-50
121 *op.cit.* c450

- To clarify "the comparator for the "no worse off" principle in Clause 42" without changing the substance of the clause.
- To change "the definition of "market rent" to bring it in line with the industry guidance prepared by the RICS."
- To provide "that all MRO triggers "must", rather than "may", be set out in the code. It is right to clarify "must" for the introduction of MRO triggers, as it clarifies for Members of the other place that we will honour the intent of the original MRO clause." As the Minister noted at the time, "this has the effect of constraining the flexibility of these powers but we think that this is an acceptable compromise to give clarity on this important point."[122]

Finally, the Minister explained why the Government had decided to reinstate the provisions for tenants to request a parallel rent assessment, in certain circumstances:

> Following the introduction of market rent only in the other place, the Government sought to restrict the scope of this assessment so that it applied only to prospective tenants … It is clear from discussions since Committee that tenant stakeholders actually like the parallel rent assessment and feel strongly that it should be retained for existing tenants. There are tenants who have no wish to exercise market rent only but who want to ensure that they have a fair tied deal. They would far prefer to gain this reassurance by requesting a parallel rent assessment, rather than by starting the market rent only process …
>
> Therefore [the last of the Government's amendments] seeks to reinstate the parallel rent assessment. We will consult on how best to streamline this with the market rent only provisions so that, as far as possible, the processes are integrated to help both pub companies and their tenants and to minimise bureaucracy.[123]

In general there was support for these amendments, though several Lords expressed concerns at the fact that pub tenants would not be entitled to an MRO, if their pub was sold, and the buyer was a pubco outside the Pubs Code. Lord Whitty argued, "the point of sale issue was one of the great many contentions put forward by Greg Mulholland in the Commons and was clearly one of the triggers which the House of Commons voted for. If that is pulled away, the will of the Commons will not be fully represented in that respect."[124] Speaking for the Opposition Lord Mendelsohn strongly opposed the change, rejecting the concerns that had been raised that, if retained, the provision could be challenged as being contrary to the European Convention on Human Rights:

> We do not accept the Government's legal arguments on these provisions—if they were retained—fettering rights, causing improper pre-emptions, being challenged on the grounds of affecting value or, in the Government's view, being uniquely placed for certain destruction under the weight of the ECHR … The Government's position on this needs much greater detailed scrutiny. I do not believe that the Bill as it stands on these issues would be consistent—with any justification—with the intentions of the Commons amendment. We should not allow the Bill back without addressing this flaw. It would be deeply flawed if we sent it back to the Commons in the knowledge that it should be, and would be likely to be, challenged.[125]

In response the Minister argued that extending the Code's protections in this way would not be proportionate, and that the risk of a legal challenge was substantive:

> In setting the threshold of 500 tied pubs for the code, the Government respected the wishes of the other place not to overburden smaller regional and family brewers. Therefore if we are to require that they are to be subject to the code in certain circumstances, this must be in a targeted and proportionate manner …

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122 *op.cit.* cc450-1
123 *op.cit.* c451
124 *op.cit.* c455
125 *op.cit.* c461, c463

> [Retaining this 'trigger'] would mean that despite not being subject to the code, a family brewer buying a code pub would be required to provide the market rent only option for that pub. This would potentially deny the family brewer the right to exercise their chosen model and discourage them from buying pubs from code companies for continued use as pubs. In addition, after taking advice from government lawyers and from external counsel … it is the Government's view that it would be a disproportionate infringement of the property rights of pub-owning companies for the market rent only protection to continue in the case of a sale …
>
> The uncertainty created by the possibility of MRO would negatively impact on the property's sale value. We have therefore sought a more proportionate way of protecting the tenant's interests, which I have already set out. Achieving a proportionate balance between the interests of tenants and pub-owning companies is important to successfully defend any legal challenge.[126]

In the event, as noted above, all of the Government's amendments were agreed, without division.

2.6 Final stages of the Bill

No further amendments were tabled to the Bill following the Report stage. On 16 March Baroness Neville-Rolfe wrote to Lord Stevenson and Lord Mendelsohn, to set out the Government's position on three issues: the prospective protections to be given to tenants when a tied pub was sold; the waiver of the MRO in cases of pubco investment; and, ongoing consultation on implementation; extracts are reproduced below:

> **Code protections when a pub is sold**
>
> When a tied pub owned by a company covered by the Statutory Code (a 'Code company') is sold to another 'Code company', the rights of the tenant under the Code will be unaltered and will continue seamlessly. This means that a tenant in this situation will retain the right to exercise the Market Rent Only option (MRO) if any of the MRO triggers are activated.
>
> Where a tied pub is sold by a 'Code company' to a company outside the scope of the Statutory Code (a 'non-Code company'), a Government amendment tabled at Report stage will enable the tenant to retain all the protections of the Code except for MRO until the end of the lease or until completion of the next rent review, whichever comes first. This means that if the purchasing 'non-Code company' offers the tenant new terms that differ from their existing terms, the tenant will have the right to a rent review in line with the statutory Code. If the tenant considers that the rent review breaches the Code (e.g. if the assumptions underpinning the Fair Maintainable Trade are unreasonable) then he or she will be able to refer the alleged breach to the Adjudicator for arbitration ...
>
> The Adjudicator will not have powers to use his or her investigation powers on 'non-Code companies' because the investigation powers are designed to address suspected systemic abuses of the Code across many tenants. It would not be appropriate or proportionate to apply the investigation powers to companies who are only covered by the Code by virtue of the fact that they own pubs that were previously owned by 'Code companies' and who are only covered in respect of those particular pubs. But as I have explained above, the Adjudicator will have the power to arbitrate on any alleged Code breaches by these companies during the Code continuation period and to provide redress to individual tenants where a breach is found …
>
> **Investment and MRO**
>
> Investment in tied pubs ... is key to the success of the industry, both for pub companies and for tenants … This is why the Government has committed to use the powers in clause 43 of the Bill to set out in secondary legislation how tenants and pub

[126] *op.cit.* c465

> companies can agree a waiver of two MRO triggers in exchange for significant investment in a tied pub. I would like to make clear that the waiver will apply only to the renewal and scheduled rent review triggers for MRO; all other Code protections will remain in place during the waiver period, including the two 'exceptional' triggers for MRO (a significant price increase or an economic event which impacts on the tenant's ability to trade) …
>
> **Consultation on implementation**
>
> I am happy to confirm that the Government is committed to a meaningful consultation on the pubs Code and the other secondary legislation that is required to deliver Part 4 of the Bill. Given the important detail that remains to be specified, proper consultation will be crucial ... It is also worth noting that the Code will be subject to a review 2 years after implementation and every three years thereafter. This will ensure there are ongoing opportunities to ensure that the measures are working as intended and to correct any deficiencies and make any adjustments necessary due to changes in the market.[127]

At Third Reading, speaking for the Opposition, Lord Mendelsohn said that, as a result of this, and the amendments made to the Bill, "these measures have our strong support and we are grateful to the Minister and the Government for listening and their positive response and detailed scrutiny of our suggestions."[128]

On 24 March the Commons briefly considered, and agreed, the amendments that had been made to the Bill in the Lords.[129] On this occasion the Minister, Jo Swinson, summarised how the Bill had been amended to honour the Government's commitment to introduce the MRO in the Code:

> We have before us a Bill that honours that commitment and remains true to the spirit and intention of the amendment introduced by this House on Report. For example, MRO must be provided for by the code, it must set out reasonable time scales for the process, and it must include certain MRO triggers …
>
> The amendments ensure that MRO is workable within the approach taken in part 4, is legally robust, and avoids unintended consequences. They are split into three clauses for clarity, one setting out a clear framework for the MRO option, one making provision for the procedures needed to deliver it, and one providing for the adjudicator to resolve disputes.
>
> Amendment 39 provides tied tenants with the right to a market rent only agreement at a number of trigger points: at a rent review, at lease renewal, when there is a significant and unexpected price increase, or if an event occurs that is outside the tenant's control and has a significant impact on the tenant's trade.
> Although prospective tenants will not have the right to the market rent only option, they will have the protection of the parallel rent assessment, so that they can judge if the tied deal they are being offered is fair. PRA will also be available to existing tenants and, through secondary legislation, will be streamlined with the MRO process.
>
> Amendment 40 sets out the procedure for the market rent only option and provides that the pubs code must specify a reasonable period for the two stages of the process. The first stage is where a tenant and their pub company try to agree a rent, and the second involves the determination of a market rent by an independent assessor.
>
> Amendment 41 provides the powers to enable the adjudicator to resolve disputes over matters such as the proposed MRO agreement, the independent assessor's determination of the market rent, and whether the MRO procedures have been followed.[130]

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127 Letter from Baroness Neville-Rolfe, Library Deposited paper DEP2015-0365, 16 March 2015. The Minister also set out these points on Third Reading (HL Deb 17 March 2015 cc1005-6).
128 HL Deb 17 March 2015 c1004
129 HC Deb 24 March 2015 cc1341-56
130 HC Deb 24 March 2015 cc1341-2

Ms Swinson explained why the Government had decided that the sale of a pub would *not* constitute a trigger for the MRO:

> The original MRO clause included triggers for MRO upon the sale of a pub or the administration of a pub-owning company. In discussions with stakeholders, it became clear that it was not the fact of sale or administration itself that was a concern; rather, it was the potential for a pub sale, whether as part of an administration or in the normal course of business, to result in adverse consequences for the tenant.
>
> After extensive consultation and discussion with stakeholders and debate in the other place, amendment 47 extends the protections of the code—apart from the market rent only option—to tenants whose pub is sold by a code company to a company outside the statutory code. To deter avoidance and ensure fairness we are also continuing code protections—excluding the market rent only option—until the next rent review for the tied tenants of pubs owned by a code company which, by selling a number of their other pubs, falls below the threshold of 500 tied pubs.[131]

The Minister went on to highlight the Government's commitments in three areas of concern: short-term tenancies, franchises, and investment:

> On Report in this House, I committed to consider calls to exempt genuinely short-term agreements from the pubs code. My noble Friend Baroness Neville-Rolfe confirmed that the Government would use the power in clause 68 to exclude from the code tied pubs that are operated on short-term tenancy at will and temporary agreements that do not extend beyond a certain limited period. We intend to consult on the length of the period for exemption …
>
> After much consideration, my noble Friend the Minister announced in the other place that the Government will use the power in clause 68 to exempt genuine franchises from the MRO provisions. The remaining code protections—for example, in respect of transparency—will still apply. Given the differences between traditional tied pubs and genuine franchise agreements, we consider this a reasonable exemption. We will consult on the precise definition of "genuine franchise", but we expect it to include criteria such as where a turnover fee rather than a rent is paid by the tenant and the share of the profit is unaffected by the price paid for tied products. This is important as these criteria can mean that the tenant's interests are arguably more aligned with those of the pub company because both rely on a fixed proportion of turnover. The tenant in such circumstances does not face the combination of the wet and dry rent, as tenants do in traditional agreements …
>
> The Bill as drafted does not prevent pub companies from issuing a tenant with a new lease alongside an offer of investment, and no amendment to the Bill is necessary to enable companies to do so. This would, in effect, provide a waiver from the rent review and renewal MRO triggers for five years. However, the Government recognise that significant investments may warrant a longer period of return on investment.
>
> My noble Friend the Minister therefore announced in the other place that the Government will use existing powers in clause 41 to set out in the code different rent assessment periods for different amounts of substantial capital investment offered. This will have the effect of deferring the rent assessment trigger for MRO for a longer period. It is important to note, though, that the other MRO triggers—that of a significant price increase and an economic event that impacts on a tenant's trade—will remain throughout the deferral period.[132]

Speaking for the Opposition, Toby Perkins, said the amendments "broadly achieve the objective of striking the devilishly difficult balance between proper protection for pub tenants while not imposing an overly rigid straitjacket on the industry with the potential to discourage future investment." Mr Perkins went on to raise concerns as to the third of the issues mentioned by the Minister – agreements between pubcos and tenants on waiving two MRO triggers in the event of substantial investment:

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131 *op.cit.* c1342
132 *op.cit.* c1343-4

> The letter dated 16 March from the Minister, Baroness Neville-Rolfe, to the noble Lords Mendelsohn and Stevenson details the Government's intentions with regard to new clause 43 and specifies that it must not be used to abuse the waiver. However, this will still leave those who fought this cause for many years with considerable unease that this creates the potential for too broad an exemption for too small an investment.
>
> We entirely agree with the Government that encouraging future investment in the stock of public houses is a crucial element in the future success of the industry, but, over four months since the original victory for clause 42, that still leaves a huge unanswered question about the scale of investment that constitutes "substantial".[133]

Three other Members spoke on this occasion. Andrew Griffiths, who had been critical of the proposals for statutory regulation, underlined the need to be aware of the unintended consequences of the new regime – particularly in relation to pubcos' decisions regarding investment:

> The reality is that people are drinking less and going to pubs less. We have to allow the industry to provide a product that encourages people to leave their homes and visit our pubs. Investment is essential if we are to achieve that. I therefore urge the Government to look carefully at the secondary legislation that they bring forward. We need the companies that are investing in our pubs to have certainty. Investing in a pub can cost more than £50,000 and in some cases as much as £150,000 or £200,000. If companies are to make that investment, it is essential that they have some certainty about the return on their investment.[134]

Greg Mulholland strongly welcomed the changes to the Bill, but raised a separate concern over the question of investment:

> I am delighted that there is a string of amendments from the other place which I and my colleagues on the all-party parliamentary save the pub group and the Fair Deal for Your Local campaign can support and welcome …
>
> The intention behind our clause was always that if two partners agreed an investment, there would be a new rent and therefore no need for a rent review for another five years. We must avoid any sense that the market rent only option can or will be waived for investment that happens before a tenant signs an agreement, or signs up to one during a tenancy at will. Often the previous tenant asked for that investment but it was refused, even if it should have been made anyway to keep the pub in a fit state to let in the first place. That is not the kind of investment we should be talking about.[135]

Finally, Neil Carmichael expressed his support: "small brewers need to be supported and promoted. The changes made to the Bill in the past few months will do exactly that. I therefore have great pleasure in signalling my support for the Bill today."[136]

In turn the House agreed to the Lords amendments without a division – and the *Small Business, Enterprise and Employment Act 2015* received Royal Assent on 26 March.[137]

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133 *op.cit.* c1345-9
134 *op.cit.* c1352
135 *op.cit.* c1353-4
136 *op.cit.* c1356
137 HC Deb 26 March 2015 c1682

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