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Small Business, Enterprise and Employment Bill: Committee stage report

Bill No 11 of 2014-15

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This is a report on the House of Commons Committee stage of the Small Business, Enterprise and Employment Bill. A separate Library Research Paper (RP14/39) was published for the Bill's Second Reading in the Commons. The Bill's Report stage will take place on 18 November 2014.

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Research Paper 14/62

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Contents

1 Introduction

The *Small Business, Enterprise and Employment Bill* received its Second Reading in the House of Commons on 16 July 2014. The Committee stage ran from 14 October to 6 November 2014. The Bill, as amended in Committee, contains 148 substantive clauses and 11 Schedules, which in the main seek to reduce regulatory burdens and facilitate the inception, financing and growth of business. The Bill's scope includes access to finance; exports; regulatory reform; competition; public sector procurement; the Pubs Code; childcare and education; transparency of company ownership; company law; directors' disqualification; insolvency; and employment law.

The Ministers during proceedings were Mathew Hancock and Jo Swinson; the Opposition spokespersons were Toby Perkins and Ian Murray.

2 Committee evidence stages

First sitting

Witnesses from Federation of Small Business (FSB), CBI, British Chambers of Commerce (BCC) and Institute of Directors (IOD).

The session began with a discussion on **late payment of debts** and general agreement amongst the witnesses that the situation for small firms was getting worse. Witnesses disagreed on the scale of the amount unpaid but estimated between £30 and £46 billion.[1]

Toby Perkins asked what the Bill could achieve that the EU late payment directive and the prompt payment code had failed to.[2] Witnesses were divided on the efficacy of a mandatory code. The FSB had reversed their opposition to it made during the Bill's consultation period. Suggestions were made that as well as giving the code 'more teeth'[3] good behaviour should be recognised by some sort of kitemark scheme. Witnesses agreed that it was feasible for the award of this kitemark to be linked to public procurement exercises in the way that many other things are asked for in the pre-contract phase of negotiations.

There was broad support for the access to **financing, invoice financing and cheque imaging provisions** of the Bill. The CBI witness said that their internal discussions revealed, to their surprise, what a problem late payment was for large companies as well as small ones.[4]

The FSB supported the **pubs code,** but had doubts that it would work in practice. They thought that it was the structure of the industry that needed changing rather the actions of individual landlords.[5] The pubcos were seen as the main problem but the Bill could impose unnecessary regulations on small family brewers who were not the problem.[6]

The IOD thought the Bill 'very good', focusing their discussion on the Bill's proposed requirement for companies to have **natural persons as directors.** This clause and the provisions about individuals with significant control were supported by the BCC as well. All

1 PBC 14 October 2014 cc5-7
2 PBC 14 October 2014 c7
3 PBC 14 October 2014 c8
4 PBC 14 October 2014 c12
5 PBC 14 October 2014 c15
6 PBC 14 October 2014 c17

witnesses stressed the importance of and commitment to openness and transparency of UK business practice.[7]

Both the CBI and BCC supported the changes to the employment tribunal regulations citing the increasing bureaucracy involved with tribunal hearings and the costs and inconveniences of postponed hearings.[8]

Witness from Thompsons (Employment) Solicitors

The witness urged caution over the **whistleblower** provisions in the Bill. Care, he said, was needed with the definition of what whistleblowing was.[9] He supported measures to provide for **penalties for non-payment** of Tribunal awards. He thought the £5,000 maximum was likely to be an effective deterrent in many dismissal cases but less so in discrimination cases where the awards can be much higher.[10] He indicated that up-front fees for Tribunal claims had significantly reduced the number of Tribunal claims – "overall claims lodged with employment tribunals dropped by something like 79%, a very high level".[11]

He thought the provisions on **zero-hours contracts** were lacking, noting that 65% of people on zero-hours contracts had been so for more than two years, arguing that the contracts were being used inappropriately rather than for short-term flexibility.[12]

Witnesses from Forum of Private Business and Institute of Credit Management

Witnesses were questioned about the **late payment** clauses and said the biggest hindrance to improvement was small firms' fear of taking on bigger customers. They did not believe the Bill implemented parts of the EU Directive on late payment allowing anonymity for complainants. They cited examples of highly misleading 'average' payment times quoted by companies.[13] One witness argued that figures which 'average' diverse payments – rent, electricity, groceries, etc. – are unlikely to produce a good guide to the treatment of specific sectors.

Second sitting

Witnesses from Law Society

Witnesses commented on the complexity of the **significant persons regime**, arguing that it would often be unclear whether or not someone fell within the definition.[14] They said the transparency proposed in the Bill would come at the cost of extra regulatory burden, making the UK a less attractive destination for companies deciding where locate their operations. They noted, with respect to aspects of the transparency agenda, e.g. **bearer share warrants**, that Crown Dependencies were ahead of the UK.[15]

Witnesses from GMB, Unite and Unison trade unions.

The Bill was described as failing "on all counts" to deal with the problem of **zero-hours contracts**.[16] The Bill's remedy – the ending of exclusivity – in contracts would not work as there are "endless loopholes, whether they be short hours or false self-employment, that will

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7 PBC 14 October 2014 c19
8 PBC 14 October 2014 c24
9 PBC 14 October 2014 c25
10 PBC 14 October 2014 c29
11 PBC 14 October 2014 c30
12 PBC 14 October 2014 c29
13 PBC 14 October 2014 c33
14 PBC 14 October 2014 c43
15 PBC 14 October 2014 c46
16 PBC 14 October 2014 c47

be introduced as a consequence of the ending of exclusivity".[17] The witness noted a recent trend whereby employers used 'minimal hours' contracts; it was put that the Bill should reflect this because, as currently drafted, the prohibition of exclusivity would not apply to these.[18]

They agreed with previous witnesses that the penalties for non-payment of **Tribunal awards** had been set too low to be effective for all types of claim.

The witnesses praised the Bill's provisions on the **Pubs Code**: "it is a massive stride forward for campaigners who have managed to drag this issue from the darkness to the light."[19] However, what the Bill lacked, they argued, was "a market-rent only, free-of-tie offer. We believe it is the only thing that will actually do what the Bill is intended to achieve."[20]

Witness – Police

The witness said the new transparency provisions and **significant persons regime** will assist the police, for whom lifting the 'veil' of incorporation by shell companies and the like is the first step to prosecution. He said the provisions would add another layer to the self-policing of the business community, analogous with money laundering legislation.[21] The witness said that the Bill would help "solve more crimes, stop more illegal transactions and protect British businesses better."[22]

Witnesses from TUC and Chartered Institute of Personnel and Development

The CIPD gave a more positive view of **zero-hours contracts** but welcomed the Bill's measures, arguing that more rights should be given to workers, such as compensation for short-notice shift cancellation.[23] Both witnesses acknowledged that the Bill's exclusivity provisions could be easily circumvented. The TUC witness argued that a total ban on the contracts was unrealistic but that, for example, care workers provided with erratic work in 20 minute slots was clearly wrong and should be addressed.[24]

Third Sitting

Witnesses from Fair Pint, Association of Licensed Multiple Retailers (ALMR), Camra and British Beer & Pub Association (BBPA)

Evidence was taken on the **Pubs Code**. Generally 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.

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."[25] By contrast, Camra suggested that if this class of agreement or

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17 PBC 14 October 2014 c47
18 PBC 14 October 2014 c48
19 PBC 14 October 2014 c55
20 PBC 14 October 2014 c56
21 PBC 14 October 2014 c62
22 PBC 14 October 2014 c63
23 PBC 14 October 2014 c64
24 PBC 14 October 2014 c70
25 PBC 16 October 2014 c86

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."[26] 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 impose 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.[27] 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."[28]

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.[29]

Fourth Sitting

The Committee took evidence from Matthew Hancock MP, Minister of State for Business and Enterprise. One of the issues raised was the **Pubs Code**. In answer to questions from Toby Perkins, the Minister summarised the Government's rationale for basing the 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 judgment as to how much they are losing off their overheads in order to be having to pay more for their beer.[30]

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26 PBC 16 October 2014 c86, c88
27 PBC 16 October 2014 c80
28 PBC 16 October 2014 c88
29 PBC 16 October 2014 c90
30 PBC 16 October 2014 c119

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.[31]

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.[32]

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

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31 PBC 16 October 2014 c119

32 PBC 16 October 2014 c127

> 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?
>
> ***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.[33]

3 Bill consideration stages

3.1 Access to finance (Part 1)

Part 1 of the Bill includes measures which address long standing problems of small firms' access to finance. The broadest measures provide for future regulations which can impose duties on firms to comment on their bill payment record in their annual reports and measures to facilitate the entrance of new lenders to the small firms finance market by allowing them access to a firm's credit record and VAT data. Barriers to the use of specialist alternative finance in the form of 'receivables' finance would be removed. Banking reform also features in a clause that would allow cheques to be presented electronically. Part 1 would also extend the Secretary of State's powers to support exporters.

Clauses 1 and 2

Both clauses were debated (briefly) on a stand part basis. The Opposition spokesman, Toby Perkins, supported clause 1 'as far as it goes'.[34] The Minister, Matthew Hancock, pointed out that the clause applied only to a narrow impediment to firm's finance namely invoice financing:

> Currently, some business contracts contain a barrier that inhibits small businesses from accessing invoice financing. A clause in those contracts prevents the assignment of a payment that is due under the contract. Businesses often use that ban on assignment clause as a general catch-all to prevent suppliers from subcontracting services due under that contract, meaning that the small business's ability to use invoices issued under that contract for invoice financing is unintentionally inhibited. The clause will tackle that specific barrier.[35]

Clause1 and 2 were agreed to.

Clause 3: Companies duty to publish Report on payment practices

All Members agreed that late payment was a serious issue especially for small firms. Toby Perkins pointed out that the Government had not followed through on its pledge to 'name and shame' large companies with poor practice:

> In 2012, when he was a Minister in the Department for Business, Innovation and Skills, the right hon. Member for Sevenoaks (Michael Fallon) said he would write to the FTSE 350 companies to warn them that they would be named and shamed if they did not sign up to the prompt payment code. By May of this year, that still had not happened. I have tabled a series of written parliamentary questions to find out whether any companies are due to be named and shamed, given that we have had almost 15 months in which to do that. On the very same day that those questions were due to be answered, the Minister—through *The Times*—reported that they had officially U-turned

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33 PBC 16 October 2014 cc131-2
34 PBC 21 October 2014 c140
35 PBC 21 October 2014 c141

> on the commitment and ruled out the naming and shaming of companies not paying on time. Far from taking progressive action to do something, they renege on the commitments made in February 2012.[36]

Opposition amendments would have forced business to report their payment record; identify specific late paid bills and confirm, to HMRC, that interest had been paid. This would save small firms from having to choose between, on the one hand, prosecuting and annoying their customers, or on the other, losing money:

> The point is that a quarterly report goes to Her Majesty's Revenue and Customs. The hon. Lady is slightly ahead of me, but I will take up the challenge. There is a quarterly report to HMRC, in which a big business says, in the same way that it signs off VAT records, "The following payments are the only ones made more than 30 days late and we confirm that we have paid interest in line with the terms and conditions of the legislation, which is 8% APR above the Bank base rate". It is up to the financial director of the big business to make a proper claim. In the same way that a business might lie on its VAT return or on anything else, it could be discovered in the future that a business had made a false report because of a report to that business.[37]

In Response, the Minister said that much of what the amendments called for was already in the Bill and there was a danger that large firms would simply extend their terms so they were not paying late. Further consultations were due on the details of the legislation and this could cover the points raised. When asked how the Bill does away with the need for small firms to take action, he replied:

> It is because we are bringing about transparency over payment practices and therefore that information on the length of payment time will be published. Precisely how that transparency happens and what information is published is very important and we look to get the details of that right. I take entirely the point that a simple, single-figure average payment term would not be enough. None the less, it does the job that he asked for in that case.[38]

The amendments were defeated on division. Clause 3 was agreed to.

Clause 4: Provision of credit information on SMEs

The Minister introduced an amendment and two new clauses to the Bill.

The Minister said that the aim of a range of measures taken by the Government and furthered in the Bill was to 'bust open' the market for small firms finance.[39] Clause 4 would give all lenders access to the credit information now only open to large banks. The Minister described the innovations introduced by the amendments:

> At the moment, many small businesses that need finance go straight to their main bank first, and if their bank says no, they often give up on getting the borrowing they need. That is widely acknowledged. We want to make sure that those businesses know what other options are available to them. There is a missed opportunity on both sides when this does not happen, because while these business are unaware of alternative lenders that may be willing to finance them where their banks would not, the alternative lenders are similarly unaware of the businesses that need to borrow.

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36 PBC 21 October 2014 c150
37 PBC 21 October 2014 c154
38 PBC 21 October 2014 c165
39 PBC 21 October 2014 c165

> The amendments seek to address that problem by bringing the two sides together. They enable regulations that will require designated banks—especially the bigger banks—to offer small businesses that they reject for finance the option to have their key information shared with online platforms. Those platforms will be designated by the Treasury on the advice of the British Business Bank, and will help businesses to be linked up with alternative lenders. Designation of platforms will be made on the basis of their meeting clear criteria and operating standards. Chief among these will be the responsibility to ensure that the businesses remain in control and that their information is properly protected. I stress that such information will be shared only should the small business wish it to be shared. There may well be circumstances where they do not, and that must be respected.
>
> The system will have a number of significant benefits. Smaller businesses will have improved access to alternative finance providers. The system will support greater competition in the provision of finance to small and medium-sized businesses, and should lead to better-quality products and services for those businesses; and we hope that alternative lenders will benefit from greater visibility to smaller businesses. It opens up opportunities to support business lending to small and medium-sized businesses.[40]

The government amendment was agreed to.

The Opposition moved a series of amendments which sought to enhance the flow of credit information between banks and other lenders by requiring banks and credit reference agencies to declare their criteria for determining credit scores. The Opposition spokesman, Ian Murray, noted:

> we often hear small businesses saying that they had no comprehension of why they were turned down. If they had been given a specification of why they were turned down, they may have been able to correct that by going back to the credit committee for a second bite at that funding cherry.
>
> Businesses themselves are often not clear why they are refused credit from the lender. It is critical to have transparency between the lender and the credit reference agency, to identify why the business was turned down and even to identify steps to improve their credit score. The best way to get cheaper funding is to have a good credit score.[41]

A further amendment would have extended the role of the Financial Ombudsman, allowing it to deal with complaints by larger firms than at present.

The Minister declared that he supported the spirit and 'tone' of many of the amendments. He felt however, that transparency had already been improved and the lending appeals process had educated businesses about how their behavior affected their credit scores. He thought the concerns the amendments addressed were

> best dealt with through transparency and strengthening the responses of the credit reference agencies to their customers, rather than by primary legislation.[42]

The amendments were defeated on division. Clause 4 stood part of the Bill. Clause 5, which enables the FCA and Treasury to enforce clause 4 was agreed to with minor government amendments.

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40 PBC 21 October 2014 c175
41 PBC 21 October 2014 c186
42 PBC 21 October 2014 c192

Clauses 6-7: Disclosure of VAT information

There was broad agreement on this provision despite discussion of an Opposition amendment to **Clause 6** to strengthen data security. On the stand part debate the Minister indicated the sort of data which the clause covered and why:

> Clause 6 provides a power for HMRC to release non-financial VAT registration data to qualifying parties. That will enable the assessment of creditworthiness, fraud risk and compliance with regulation related to financial matters. It has strict restrictions on further disclosure when HMRC has explicitly consented to that disclosure, and limits the use of the data to the purposes that I have set out. […]
>
> For example, research from HMRC in liaison with credit reference agencies has demonstrated the potential to release up to £1.8 billion in additional trade credit for businesses. We hope that the take-up will be between just over £500 million and £1.4 billion, the main beneficiaries being smaller businesses. Such data gives lenders more confidence in their credit assessment of those businesses. […]
>
> No financial data will shared, but other data, not including financial data, can help a potential credit provider to assess the creditworthiness of the business. The VAT registration number and the name are straightforward examples. I do not want to fetter the judgment or to prejudge, but a potential example might be how long a business has been around for and in the VAT system. Other non-financial data are available.[43]

Both clauses were agreed to without debate.

Clause 8: Disclosure of export information

This clause would give HMRC powers to publish some data on exporters while maintaining taxpayer confidentiality. It was agreed to without debate.

Clause 9: Government support for exporters

Clause 9 would broaden the Secretary of State's powers to support exports. There was discussion of an Opposition amendment which would require the Secretary of State to commission an independent assessment of the functions and powers of UK Export Finance (UKEF) and an assessment of ways of improving awareness of UKEF among SMEs. In response, the Minister pointed to the recent expansion of UKEF and argued that the amendment was unnecessary. The Committee voted against the amendment by 10 votes to 6.[44]

Clause 10: Further amendments to the Export and Investment Guarantees Act 1991

This clause would make a number of largely technical amendments to the 1991 Act. It was agreed to without debate.

Clause 11: Electronic paying in of cheques

Clause 11 would allow electronic images of cheques to be used as substitutes for the paper version. A Government amendment to clarify the repeal of the physical need for presentation was discussed and agreed to. An opposition amendment to improve the 'assurance over the validity of the cheque system' was withdrawn after debate.

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43 PBC 21 October 2014 c203
44 PBC 21 October 2014 c213

Clause 12: Payment system regulators

A technical amendment to extend the power of the Payment Services Regulator to infrastructure providers was agreed to.

3.2 Regulatory reform (Part 2)

Clauses 13 and 14 would introduce a statutory target for the government to introduce new and simplified ways for companies to register themselves electronically, and for progress on this to be reported to Parliament. Both clauses were agreed to after short debates.[45]

Clause 15: Review of regulators' complaints and appeals procedures

The clause and amendment focused on the treatment of or effect on a small firm which had challenged a regulator's decision or ruling. An Opposition amendment would have required steps to be taken if any report required under clause highlighted unfair treatment of complainants. The clause was agreed to without amendment.

Clause 16 was agreed to after a drafting amendment; **clauses 17 – 22**, to do with small business regulation, were agreed to without debate.

Clause 23: Business impact target

The clause would introduce a target for deregulation at the start of a Parliament. Debate focused on the Opposition's support, or otherwise, for a quantitative 'one in, two out' approach favored by the Government, as opposed to an emphasis on the quality of regulation.[46] The Opposition argued that the focus should be on the burden of a regulation, not the number of regulations.

The Minister responded by illustrating the impact on business of the regulations his government had removed (£1.5 billion a year). He acknowledged, however:

> I take very much the spirit of the amendment, but I want to go further than I have in response to some other Labour amendments. We want to ensure that the scrutiny mechanisms for the target are as robust as possible, and, given the debate we have had, the more robust, the better. We are content to take away the amendment and consider further opportunities for strengthened parliamentary scrutiny. There is a complex interdependence between making something subject to an affirmative resolution and the consequences for the legislation in question if it is outwith the target. Nevertheless, I understand the starting point and principle behind the amendment.
>
> We want as much scrutiny as possible, especially if a Government propose to loosen the one in, two out regulatory structure. I therefore propose to return to the principle of the amendment on Report, but I am glad to hear the broad and widespread support for the clause as a whole and for the group of clauses, which will make it a legal requirement for every Government from now on to publish their deregulatory target and how they will reach it. We will publish further details on how that will be implemented, but on that basis I hope that the hon. Gentleman will not only support the clauses but withdraw the amendment, and that he will await the proposals, which I am happy to discuss with him, on how we can increase public and parliamentary scrutiny of the target.[47]

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45 PBC 23 October 2014 c227
46 PBC 23 October 2014 c241
47 PBC 23 October 2014 c250

With the promise that the matter would be looked at again on Report the amendment was withdrawn and the clause agreed to.

Clauses 25-29: Secondary legislation: duty to review

Clauses 25 to **28** were agreed to without debate. **Clause 29** was agreed to after a brief debate.

Clause 30: Definitions of small and micro firms

Government amendments and a new clause were debated. The Opposition amendment would have created five definitions of business in the UK:

- ""Micro business" - a business with 1-9 employees
- "Small business" - a business with 10-49 employees
- "Medium-sized business" - a business with 50-249 employees
- "Large business" - a business with 250-1000 employees
- "Super corporate" - a business with over 1000 employees".[48]

This, they argued, would end the current 'lazy' practice of lumping firms in an unhelpful SME category. In future regulations could be tailored more closely to the type of firm they needed to capture. The Opposition spokesman, Toby Perkins, pointed out that the Government's suggested definitions were complicated in comparison:

> Under Government amendment 22, the headcount part of the definition stays in place. Small businesses still need fewer than 50 employees, and micro-businesses still need fewer than 10. However, under Government amendments 23 and 24, the limits on the size of balance sheet or annual turnover will now be defined by the Secretary of State at a time of their choosing. Limiting the definition to being about employees, imperfect as that is, is probably the clearest way of achieving the definitions. I am worried that, far from bringing the clarity that the situation requires, it brings confusion and raises a worrying possibility that the definitions in law may be stretched or redefined by a future Government to bring different companies into new regulations they may set. It is important that we have specific definitions.[49]

Conservative Member Anne Marie Morris agreed with much of the Opposition's concerns and explained how the adoption of European definitions had left the application of them in "a bit of a mess at the moment".[50] The Minister praised the work of his colleague in bringing this issue into the Bill. He said that it would be a great improvement to have criteria established by the UK for its use. He explained the Department's choice of micro being 0 – 10 as opposed to 0 – 5 (favored by his colleague) on the grounds that it was used by the UK's main trading partners too. The amendments were withdrawn and the clause agreed to.

Clause 31: CMA recommendations

The clause was debated (briefly) on a stand part basis, and agreed without a division. The Minister, Jo Swinson, explained that the Government's intention in giving the CMA this power was to ensure that "the effect on competition [will] be properly considered before

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48 PBC 23 October 2014 c257
49 PBC 23 October 2014 c259
50 PBC 23 October 2014 c261

Government legislation is introduced." The Minister underlined the fact that the power to make recommendations is to be "entirely at the CMA's discretion." Asked by Toby Perkins how this would work in practice, Ms Swinson noted that the CMA had already set out its approach earlier in the year, when it stated that "it would prioritise according to its principles of whether something has a degree of impact, the strategic significance, the risk and the resources."[51] The amendment would require any change to the business impact target to be laid before Parliament and approved subject to the affirmative procedures.

Clause 32 was agreed to on a stand part basis.

3.3 Public sector procurement (Part 3)

Clause 33 would allow the Government to make regulations – under the negative resolution procedure – placing duties about the conduct of public procurement on contracting authorities.

The Government ran a consultation on the regulations to be made under this clause from 16 October to 13 November 2014.[52]

Two amendments from Opposition members went to the vote:

- One aimed to add to the list of duties that regulations might impose, to include more potential requirements relating to social and economic objectives, for example reporting on apprenticeships and training provided as a result of procurement or on the amount spent with small or local businesses. The Minister suggested that the overarching aim of public procurement was achieving value for money, but also said that the Government remains "very open to views on transparency measures", pointing to the consultation that was being run on the regulations that could be made under this clause.

- Another amendment aimed to ensure (a) that the payment performance of potential contractors are known before contracts are entered into, and (b) that contracts require companies providing goods and services to public sector contracting authorities to pay their own suppliers promptly. In his response the Minister pointed to clause 3, which could be used to require companies to publish their payment practices, and to new regulations that are expected to be introduced as part of the UK transposition of new EU directives on public procurement. These are expected to include a requirement that 30 day payment terms are passed down the supply chain through a standard clause.

Neither amendment was passed.

Another proposed Opposition amendment would have increased the level of parliamentary scrutiny for regulations under the clause by replacing the negative resolution procedure with the affirmative resolution procedure. The Minister indicated that he would look again at the case for this, exploring the impact of the change in procedure and the likely frequency for changes to these regulations. This amendment did not then go to a vote.

In the debate on the clause as a whole, the Local Government Association's view was raised that the clause acted contrary to the principle of localism by allowing central government guidance and regulations to be imposed on local government. The Minister said that is

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51 PBC 23 October 2014 cc267-8. For details see, Competition & Markets Authority, *Summary of responses to consultation on CMA Annual Plan 2014/15 and Prioritisation Principles*, April 2014

52 Cabinet Office & Crown Commercial Service, *Consultation document: Small Business, Enterprise and Employment Bill – reforms to public procurement* (16 October 2014)

important to improve public procurement in all public authorities, through high-quality public procurement rules that apply across the whole of the public sector. The clause was passed without a vote.[53]

Clause 34 would put the Government's Mystery Shopper scheme, which probes public sector procurement practice, on a statutory footing. The Opposition indicated their support for the principle of the scheme and the clause was passed without a vote.[54]

3.4 The Pubs Code Adjudicator and the Pubs Code (Part 4)

The Committee considered Part 4 of the Bill over three sittings. The Opposition tabled a series of amendments, 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, 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."[55] 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."[56]

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.[57] 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.[58]

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 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":

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53 PBC 23 October 2014 c271-283
54 PBC 23 October 2014 c283-284
55 PBC 28 October 2014 c348
56 PBC 30 October 2014 c375
57 Written evidence from Jo Swinson MP, Minister for Employment Relations and Consumer affairs and Minister for Women and Equalities (SB 84)
58 PBC 28 October 2014 c305; PBC 30 October 2014 c376

> 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.[59]

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."[60]

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."[61] 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."[62] 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 …

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59 PBC 28 October 2014 c290
60 PBC 28 October 2014 c291, c296. **Clause 35** was agreed without a division.
61 PBC 28 October 2014 c299
62 PBC 28 October 2014 c308

> 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 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.[63]

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**.[64]

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.[65]

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 to this clause tabled by the Opposition, by Sheryll Murray and by Andrew Griffiths.

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."[66] First, he proposed that the clause should stipulate that the Code would require large pubcos to "list on their websites the full package

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63 PBC 28 October 2014 c311, c313
64 PBC 28 October 2014 c318, PBC 30 October 2014 c386
65 PBC 28 October 2014 c305
66 PBC 28 October 2014 c319

of benefits [for any tenancy agreement] and their estimated monetary value."[67] 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."[68]

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)**.[69] 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.[70]

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.[71]

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."[72] Second, it was unnecessary to specify the scope of regulations to be made under **clause 38** in the way Mr Perkins had suggested:

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67 PBC 28 October 2014 c330
68 PBC 28 October 2014 c331
69 PBC 28 October 2014 c319
70 PBC 28 October 2014 c333
71 PBC 28 October 2014 c338
72 PBC 30 October 2014 c343-4

> **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.[73]

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:

> 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.[74]

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."[75]

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."[76] 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.[77]

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 …

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73 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).

74 PBC 28 October 2014 c348

75 PBC 28 October 2014 c351

76 PBC 28 October 2014 c354

77 PBC 28 October 2014 c370. In the event the Committee voted against each of these amendments: PBC 30 October 2014 c384, c386, c388.

> 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 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.[78]

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."[79]

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.[80]

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

78 PBC 28 October 2014 cc357-9
79 PBC 28 October 2014 c367
80 PBC 30 October 2014 cc369-70

> who is suffering—if the tie is not operating correctly for them or if they suffer abuse—needs to be dealt with fairly."[81]

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."[82] 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."[83]

The Minister supported the principle of shifting certain conditions from the Core Code to the Enchanced Code, reiterating what she had set out in a letter to the 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.[84]

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."[85]

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81 PBC 30 October 2014 c371
82 PBC 30 October 2014 cc373-4
83 PBC 30 October 2014 c374
84 PBC 30 October 2014 cc376-8
85 PBC 30 October 2014 c378

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.[86]

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.[87]

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.[88]

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**).

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86 PBC 30 October 2014 c378
87 PBC 30 October 2014 c379
88 PBC 30 October 2014 c383-4

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.

3.5 Childcare and schools (Part 5)

An amendment to **clause 64** was moved by the Opposition, which intended to "exempt schools from having to register with Ofsted before taking two-year-olds". Mr Perkins explained that it was a "probing amendment to question the appropriateness of school care for two-year-olds. We seek to ensure that the care provided by schools is age appropriate".[89] The Minister said that "there are already good and sufficient checks and balances in place. They will continue and the amendment is therefore not necessary".[90] Following the debate on the amendment, Mr Perkins said "we are satisfied that the Minister has put those points on the record. We will continue to review the extent to which there is any negative impact in any way on standards".[91] The amendment was withdrawn.

The Committee also considered an amendment to **clause 66** (although it was not moved); the intention of the amendment was to "give the chief inspector of schools [i.e. Ofsted] a general duty to advise the Secretary of State on the quality and appropriateness of facilities and premises used by early years providers, including schools".[92] The Minister responded by saying that the provisions proposed by the amendment were "already very much covered by the law".[93]

3.6 Education evaluation: sharing information on learning outcomes (Part 6)

Clauses 67 to 69 were discussed by the Committee; the Minister gave assurances about the confidentiality and protection of the information that would be shared.[94] No amendments were tabled and all the clauses were ordered to stand part of the Bill.[95]

3.7 Companies: transparency (Part 7)

A theme within the Bill is to improve the transparency of company dealings, ownership and control. As part of this, Schedule 3 would amend the *Companies Act 2006* by requiring companies to maintain a "Register of people with significant control over the company, and to make the register available to the public". The Opposition welcomed the fact that this would be the first Register of its type in the world and its amendments were designed to ensure that the register met its objectives:

> ensuring that the data are as accurate as possible; that the data are relevant and kept up to date in a timely manner; that the sanctions for not complying are of sufficient

89 PBC Deb 30 October 2014 cc391 and 392
90 PBC Deb 30 October 2014 c395
91 PBC Deb 30 October 2014 c399
92 PBC Deb 30 October 2014 c393
93 PBC Deb 30 October 2014 c397
94 PBC, 30 October 2014 c401
95 PBC, 30 October 2014 c400-403

> magnitude to warrant effective compliance; and that where exemptions are allowed by the Bill, they are done so only in clear and exceptional circumstances[96]

Opposition amendments first tried to limit the scope of exemptions to the general requirement by requiring that first there should be equivalent transparency by some other measure. They proposed that some reasons for exemption (personal safety or national security) should be in the Bill. The Opposition also wanted provisions determining the details of the requirements to be approved by the affirmative resolution procedure.

The Minister, Jo Swinson, responded by setting out the reasoning behind the exemption regime:

> We have carefully considered the effect of the new requirement on business, which is why companies that are already subject to stringent ownership disclosure requirements—such as those listed on the main market of the London stock exchange—will not be required to have a PSC register. Furthermore, where a company is owned by another company that is already keeping a PSC register or is exempt from the requirements, the company need only provide details of that other company on its PSC register. That will avoid unnecessary duplication without affecting the overall integrity and utility of the register.
>
> We have also considered the impact on individuals, which is why we have provided for a protection regime in secondary legislation that will allow individuals who are at serious risk of harm to apply to have their details withheld from the public register. We published a discussion paper on the issue earlier in the week, and we will be preparing regulations following analysis of the responses. If Members have particular views or concerns about how such individuals should be protected and how the regime should work, I encourage them to respond to the consultation.
>
> The PSC register is a complex reform, and much of the detail will have to come in secondary legislation. It is right that that is where the detail is, as it will allow us to make changes more easily in the light of experience and changing circumstances. It will also ensure that we can seek the views of stakeholders. We will be embarking on that process over the coming months—indeed, it has already started with the discussion paper that we published this week.[97]

She said the Opposition's amendments were unnecessary as the regulations would give the Secretary of State full power to consider applications for exemption from the Register. The proposal that there would be a duty on the face of the Bill to keep the information up to date she thought unnecessary too but recognised the importance of its currency and promised:

> We anticipate that there will be a need to review whether that power needs to be exercised when the formal review of the PSC register takes place within three years of implementation. That will be an opportunity to see how it is working and whether there is a need to change the time scales. We therefore have the power to do that without resorting to primary legislation. There is also a duty on the company and anyone giving information to the company to ensure that the PSC information is accurate, which is enforced by the criminal offences that apply to anyone failing to provide that information.[98]

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96 PBC, 30 October 2014 c406
97 PBC, 30 October 2014 c410
98 PBC, 30 October 2014 c413

The amendments were withdrawn. A series of minor and technical Government amendments were moved and agreed to.

Clauses 71 – 73: Review of PSC Register

The obverse of the transparency coin is a loss of privacy. Robert Jenrick asked a number of questions about "the right of law-abiding people, in particular families and family businesses, to protect the privacy of their assets and so on".[99] He asked about the scale of the problem the clauses attempted to tackle; what was the burden on 'law abiding' companies; and what consultations had been carried out with other countries?

The Minister replied that a full privacy impact assessment and an assessment in light of the *Human Rights Act 1998* had been carried out. She said that organised crime in the UK generated some £13 billion, of which £10.5 billion was laundered.[100] She went on to talk about the other points raised:

> On the questions of practicality, whether it will work and whether it is an undue burden, the impact assessment points to the cost to business being some £97 million, but that is split across 3 million companies. If we think about the total number affected, the cost is not disproportionate when we will get the advantage of transparency and trust in business, so that the UK has a sound reputation as a trusted place to do business. My hon. Friend highlights the importance of the international element. The UK acting on its own would not be sufficient to address the problem. He talks about the risk of being first, but I would also talk about the advantage of being first and showing global leadership, which will affect the UK's reputation. Of course it is vital that the international community takes this seriously, which is why we have not just been pushing ahead with this in the UK; we have also been showing international leadership through organisations such as the G7 and the G20 and trying to ensure that other countries follow our lead.[101]

The clauses were agreed to.

Schedule 4: Abolition of bearer share warrants

This was agreed to with a number of technical amendments and transitional provisions to permit the transfer of warrants to another form.

Clause 76: Directors to be natural persons

The clause was amended by the Government to allow the approval of non-natural persons to be subject to a regulator's approval.

Clause 79: Definition of shadow directors.

Government amendments were agreed to.

3.8 Company filing requirements (Part 8)

Clause 80: Duty to deliver confirmation statement instead of annual return

The clause was amended by the Government to close a loophole by linking the duty to make a return with the 12 month review cycle.[102] Ana amendment to replace the fines for non-compliance with custodial sentences was withdrawn.

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99 PBC, 30 October 2014 c420
100 PBC, 30 October 2014 c423
101 PBC, 30 October 2014 c423
102 PBC, 30 October 2014 c430

Clauses 81-91 were agreed to with little or no debate.

3.9 Directors' disqualification etc. (Part 9)

The Committee briefly considered Part 9 of the Bill during its 13th Sitting.

Part 9 comprises a series of measures designed to strengthen the director disqualification regime and to increase the likelihood of directors who act improperly being held to account. Specifically, the provisions of Part 9 would increase the matters that a court must have regard to within director disqualification proceedings to ensure that more focus is placed on factors such as the amount of harm that a director's conduct has caused and their track record in managing companies. Under Part 9 it would be possible to bring proceedings to bar a director when they have been convicted of a company-related offence abroad, such as fraud. Part 9 would also enhance the investigation process as part of a more intelligence-led approach which would include improvements to how director misconduct is reported. Finally, it would be possible under Part 9 for compensation to be awarded against disqualified directors in certain circumstances, to help victims of misconduct when creditors have not been adequately compensated through the insolvency process.

The Opposition had no issues with Part 9 and welcomed a strengthening of the current regime.[103] However, Iain Wright asked to what extent the Government thought that Part 9 would increase the number of directors disqualified each year and whether additional resources would be given to enforcement and compliance in order to make sure that the new regime would be as effective as possible.[104]

In response, the Minister, Jo Swinson, said that it would be difficult to put a number on the expected change to director disqualifications; by definition it depends on behaviour. It was the Government's hope that an enhanced regime would deter unscrupulous behaviour and misconduct by directors.[105] On the question of resources, the Minister said that there had been an organisational challenge for the Insolvency Service to manage a reduction in its offices and numbers of staff to correspond with a falling case load. As a result of improved efficiency, resources were available.[106] She confirmed that the Government would make sure that the Insolvency Service continued to be adequately resourced.[107]

Toby Perkins said that many people in the profession were concerned that under the current regime the burden of proof was too high, deterring Insolvency Practitioners from pursuing a director's disqualification. He asked if the Minister anticipated that the changes introduced by Part 9 of the Bill would lead to an increase in disqualifications.[108] The Minister said that since Part 9 would change the criteria for disqualification, making it easier to disqualify a director, it was anticipated that there would be an increase. The intention of Government was to ensure that the regime was one that everyone could have confidence in.[109]

Only one amendment was tabled in respect of Part 9. This was Government amendment 33 to Schedule 8, which was both minor and technical; it was made without division. This amendment sought to correct a cross-reference to ensure that none of the provisions setting out the new ground for disqualifying a person for instructing an unfit director would apply to industrial and provident societies in Northern Ireland, to correspond with consequential

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103 PBC 4 November 2014 c438
104 PBC 4 November 2014 cc438-439
105 PBC 4 November 2014 c438
106 PBC 4 November 2014 c439
107 *Ibid*
108 PBC 4 November 2014 c439
109 PBC 4 November 2014 c439

amendments being made to that effect in Great Britain. Otherwise, Part 9 in its entirety (including Schedules) was agreed without amendment

3.10 Insolvency reforms (Part 10)

Part 10, **clauses 105 to 124**, introduces a suite of measures to amend various parts of the current insolvency framework. The measures are technical, designed to improve the efficient working of all insolvency procedures. In addition, **clauses 125** to **134** seek to improve the regulation of Insolvency practitioners (IPs) so they deliver their services properly and at a fair and reasonable cost. The stated aim is to strengthen the existing insolvency regulatory framework in order to ensure that any misconduct is effectively sanctioned.

The Committee considered Part 10 of the Bill over two sittings.[110] Amendments were tabled by both the Government and the Opposition, with a number of clauses being debated at length. In total, there were seven divisions, six of which were on Opposition amendments which were all defeated. One Opposition amendment was made without division – although there were indications of Government objection.[111]

Clause 105: Power for administrator to bring claim for fraudulent or wrongful trading

Clause 105 would allow administrators the same right as liquidators to bring wrongful and fraudulent trading actions. The aim being to allow more actions to be taken where justified and save the cost of having to first put the company into liquidation. A probing amendment was tabled by the Opposition in respect of clause 105 on the basis that it had reservations about how the clause would work in practice.[112]

Speaking to this amendment, Toby Perkins agreed that administration was an important tool not just for IPs but for a business that is struggling. However, it was a short-term insolvency procedure, used in specific circumstances.[113] The Opposition was not convinced that extending the wrongful and fraudulent trading provisions to administration would work as long as the provision for automatic termination of administrations within one year remains. It could take a couple of years to bring a wrongful trading claim. Toby Perkins argued that this discrepancy in timings could create incentives for delinquent directors to adopt obstructive, delaying tactics to hold up proceedings and therefore get away with wrongdoing.[114] It could also be a disincentive for businesses to go into administration.[115]

In response, the Minister said that the 12 months' time limit on the duration of administration would not necessarily reduce the effectiveness of the right proposed under clause 105.[116] She argued that if the legal action could not be concluded by the time the administration was otherwise complete, the administrator could use the new right to assign an officeholder's claim, proposed by clause 106, to pass the claim over to the liquidator or any other party well placed to pursue it. Often, the former administrator becomes the liquidator, so it might well be the same professional person in control of the claim if it is assigned.[117]

The Minister said that if the administrator thought that it would be inappropriate to assign the legal action outside of administration, then the time limit on administration was not a fixed

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110 The thirteenth and fourteenth sittings of the Public Bill Committee, both held on 4 November 2014
111 PBC 4 November 2014 c462
112 Amendment 217 in clause 105
113 PBC 4 November 2014 c441
114 *Ibid*
115 *Ibid*
116 PBC 4 November 2014 c443
117 *Ibid*

end point. She argued that in addition to clause 115 of the Bill, which would extend the period by which creditors can consent to an extension of administration by up to an additional year, there was still recourse to the court.

The Opposition withdrew the amendment but asked the Minister to consider how Clause 105 would work in practice and keep an open mind about what disincentives may be created.[118]

Clause 106: Power for liquidator or administrator to assign causes of action

Clause 106 of the Bill provoked a great deal of debate in Committee and was only agreed to on division.

In a nutshell, clause 106 would amend the *Insolvency Act 1986* (IA 1986) to allow a liquidator or administrator (the officeholder) to assign to a third party certain causes of action that arise in Great Britain when a company goes into liquidation or administration. The clause would allow the officeholder to assign not only the right of action itself but also the proceeds of such an action. In practice this would enable an officeholder to assign the civil recovery claim to an individual creditor, group of creditors, a former director or any third party. Unsecured creditors would benefit from the proceeds of sale. Subject to the terms of the assignment, the purchaser could take all the risk and bear all the cost of pursuing the prospective claim, but would stand to gain fully from potential benefits arising from the action.

The Insolvency Service anticipates that a market in these assigned civil actions would develop, and increase the prospect of actions being taken against directors more frequently where there has been misconduct.[119] This would occur if IPs prefer the certainty of having up front funds or do not want to take the risk of pursuing funds or fighting a case that might involve litigation and uncertain costs that could be difficult to recover. It is hoped that once directors realise that the threat of action is more likely, long-term changes to behaviour (i.e. less detrimental conduct) could potentially result.[120]

Toby Perkins stated that the Opposition had significant concerns about **clause 106**. Whilst it welcomed the intention to recover more money for unsecured creditors, it argued that there were other, unintended consequences arising from clause 106. In particular, competitive advantages may be given to people who abuse the process.[121]

Toby Perkins argued that there was a fundamental difference between company actions (which could already be assigned) and officeholder actions.[122] A company action is brought by the company as a claimant and includes, for example, recovery of a commercial debt or a claim on the director's loan account. The IP will collect information on behalf of the company and, where appropriate, can assign the claim. In contrast, officeholder actions are claims conferred by statute on the insolvency officeholder and arise as a consequence of the insolvency. Toby Perkins gave the examples of wrongful trading, preferences and undervalued transactions; actions taken when the director has not operated in the best interests of the business or if they have been trading wrongfully or whilst insolvent.[123] He highlighted the fact that an insolvency officeholder has extensive powers of investigation as

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118 PBC 4 November 2014 c444

119 "Enabling Liquidators and Administrators to assign to third parties certain rights of action that only they can bring under the Insolvency Act 1986 and to extend the right to bring fraudulent and wrongful trading actions to an administrator", Impact Assessment IA No: BIS INSS007, 16 April 2014, [online] (accessed 11 November 2014)

120 *Ibid*

121 PBC 4 November 2014 c445

122 *Ibid*

123 PBC 4 November 2014 cc445-6

well as control of all company records, including confidential and sensitive material, and is under a statutory duty to use that information only in the interests of the administration or liquidation.[124] He said that crucially, an officeholder's investigatory powers and their powers to bring actions are closely bound-up. That was the crux of the Opposition's concerns. Toby Perkins argued that by assigning such actions to third parties, the ethics, duties and obligations on qualified professional IPs are separated from the incentive and right to pursue a complaint.[125]

On the assumption that there could be no suggestion of the officeholder's powers being delegated to the assignee, Toby Perkins said that it was difficult to see how the proposal in clause 106 could be implemented.[126] He asked the Minister to explain how clause 106 would work in practice and what representations she had received about the likelihood that the confidentiality expected of an officeholder would be passed on to the assignee? [127]

In response, the Minister said that it would be inconsistent to treat company actions and officeholder claims differently.[128] In some cases, IPs may be unable to take action, perhaps due to a lack of funding for the litigation or because of the costs involved in prolonging the insolvency procedure. She argued that clause 106 would give more flexibility by giving the IP the additional option of assigning an officeholder action instead of taking the action themselves.[129]

On the issue of confidentiality, the Minister said that IPs would still be bound by statutory limitations on disclosing information and the assignee would not have access to the statutory powers that exist to the IP. It was a particularly privileged position conferred on IPs, so that they could fulfil their statutory duties. She confirmed that it would not be right or appropriate to transfer those powers, or indeed, any information received under those powers.[130] In making any assignment, the Minister said that the IP would need to consider carefully whether there were any legal restrictions – such as those in the *Data Protection Act 1998* – on the information that they could pass on. It would be for the prospective purchaser to establish in the negotiation whether or not they could access sufficient information to bring the action and therefore whether it would be sensible for them to take on the assignment.[131]

As noted above, clause 106 was agreed to on division.

Clause 109: Exercise of powers by trustee: removal of need for sanction

Clause 109 of the Bill removes the requirement for trustees in bankruptcy to seek permission (of either the court or a creditors' committee, or where there is none, the Secretary of State) before exercising certain powers given to them in insolvency legislation, including permission to issue legal proceedings in the bankrupt's name and to continue trading the bankrupt's business. Amendment 218, tabled by the Opposition, sought to make an exception for cases where the trustee wished to appoint the bankrupt to assist in dealing with certain tasks.
Responding to the amendment, the Minister said that trustees have a statutory duty to act in the interests of creditors and should not undertake actions (including employing the bankrupt) that are likely to have a negative impact on the bankrupt's estate and therefore reduce the money available for creditors. Any failure in this duty would be addressed through

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124 *Ibid*
125 PBC 4 November 2014 c446
126 PBC 4 November 2014 c446
127 PBC 4 November 2014 c447
128 PBC 4 November 2014 c448
129 *Ibid*
130 *Ibid*
131 *Ibid*

the regulatory system. She argued that the current requirement to seek a sanction from the creditors' committee therefore served no worthwhile purpose and just added unnecessary cost.[132]

This amendment was pressed to a vote but was defeated and the clause was added to the Bill.[133]

Clauses 110 and 11: Abolition of requirement to hold creditors' meetings

Clauses 110 and **111** of the Bill were considered together. **Clause 110** would remove face-to-face meetings as the default method of getting decisions from creditors and contributories in corporate insolvency proceedings, but, crucially, it allows them to require the insolvency officeholder to call a face-to-face meeting but only if a set amount of the creditors or contributories agree with the request. The level will be set by the Insolvency Rules but the Government's current thinking was that the amount should be 10 per cent of the creditors or contributories by value.[134] Instead, of physical meetings, IPs would hold virtual meetings through other means, such as phones or over the internet, or whatever they judge to be effective.

Clause 111 sets out a process of deemed consent, where officeholders would be able to write to creditors or contributories with a proposal, and provided that objections were received from less than a prescribed proportion of creditors or contributories, the proposal would be deemed to be approved. In the event that more than the prescribed proportion object to the proposal, the officeholder would be required to use an alternative decision making process.

There was a series of Government amendments to **clause 110**, all of which were agreed without division.[135] In addition, the Opposition tabled amendment 219 to clause 110 and amendment 220 to clause 111. Amendment 219 would allow a meeting to be called by just one creditor, whatever the value of their claim. Amendment 220 sought to change the way in which deemed consent was used in personal insolvency proceedings.

Speaking on both amendments 219 and 220, Toby Perkins said that it was Opposition's view that the Government had got the balance wrong. Whilst arguing that the official Opposition strongly supported the principle of adapting the insolvency regime to modern technology, it had concerns that predicted savings were too optimistic and that clauses 110 and 111 would both lead to further creditor disengagement.[136] He argued the importance of holding physical meetings on the basis that they create creditor engagement and often lead the IP to additional resources held by the debtor.[137] The Opposition was also dubious about the claim that holding meetings in a virtual, online space would be cheaper for creditors and IPs alike.[138]
The thrust of the Opposition's amendments were about ensuring that creditors are properly engaged.[139]

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132 PBC 4 November 2014 cc457-8
133 Ayes 6, Noes 10
134 PBC 4 November 2014 c460
135 Government amendments 165 to 173 to clause 110
136 PBC 4 November 2014 cc451-2
137 PBC 4 November 2014 cc453-4
138 PBC 4 November 2014 c456
139 *Ibid*

Quoting from a recent report by Elaine Kempson,[140] the Minister said that generally only 4 per cent of creditors engage with meetings. She argued that if a creditors' meeting was not welcomed, well attended or well-used, it just added expense to the insolvency process.[141]

Commenting specifically on the Opposition's amendment 219, which would allow a meeting to be called by just one creditor (whatever the value of their claim), the Minister argued that it would give a lot of power to one individual creditor, who could have very little economic interest in an insolvency case but would nevertheless be able to cause unnecessary cost to all other creditors and needlessly take up the IP's time. The amendment would set the bar too low.[142] She argued that it was important that a proactive effort was made to engage creditors, this might be through virtual meetings, emails, correspondence or telephone calls. The creditor engagement might involve everyone being there at the same time, or individual discussions being held. It would depend on the individual circumstances. Where there was a real appetite among creditors to have a meeting, they could ask to do so.[143]

The Minister said that the effect of Opposition amendment 220, as drafted, would be that deemed consent could not be used where the office holder had identified that a face-to-face meeting would incur no additional cost saving – that is to say, when such a meeting would be at a cost to the estate – but since face-to face meetings would in almost all circumstances come at a cost to the estate, the amendment would remove the opportunity to use deemed consent in nearly all cases. According to the Minister, that would be absolutely contrary to the aim of the cause.[144]

Amendments 219 and 220 were both pressed to a vote. Unexpectedly, amendment 219 was made without division – although there were indications of Government objection.[145] Amendment 220 was defeated on division.[146]

Clause 117: Administration: sales to connected persons

Clause 117 of the Bill gives the Secretary of State a power to introduce regulations to address problems in relation to sales to 'connected persons' in pre-packaged administration (prepacks). A 'pre-pack' refers to an arrangement under which the sale of all or part of a company's business or assets is negotiated with a purchaser prior to the appointment of an administrator and the administrator effects the sale immediately on, or shortly after his appointment. The purchaser may be new to the company or a competitor but it is also possible that the purchaser may be the existing management or other 'connected persons'.

A 'connected person' situation is where a person or the company purchasing the business has a relationship with the insolvent company. This includes directors, shadow directors or their associates. 'Associate' encompasses, amongst other connections, where the person buying the company is the spouse, civil partner, relation of, or in business partnership with those acting as directors of the insolvent company.[147]

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[140] Insolvency Service, '*Review of Insolvency practitioner fees'*, by Elaine Kempson, July 2013
[141] PBC 4 November 2014 c459
[142] PBC 4 November 2014 cc458-459
[143] PBC 4 November 2014 c459
[144] PBC 4 November 2014 c460
[145] PBC 4 November 2014 c462
[146] Ayes 6, Noes 10
[147] Clause 117 also captures where common individuals exercise 'control' over both companies. The existing legislative definition of 'control' of a company includes those persons who are not directors but whom the directors are accustomed to acting in accordance with their instructions.

Following an inquiry by the BIS Select Committee and the Graham Review into prepacks[148] the Government intends to create a reserve power under clause 117(10) for the Secretary of State to make regulations prohibiting or imposing conditions on sales, disposals or, hiring out of the assets or business of the company in administration to 'connected parties' unless there has been third party scrutiny of the proposed sale. This power expires at the end of the period of 5 years beginning with the day on which the provision comes into force unless it is exercised during that period.

The Opposition tabled two amendments in clause 117. Amendment 221 would restrict the scope of the clause 117 to pre-pack sales only, and not all sales in administration. Amendment 222 would remove the reserve power given to the Secretary of State to prohibit all sales in administration to a 'connected party'.

Speaking to both amendments, Toby Perkin said that **clause 117** provides the Government with the reserve power to prohibit not only pre-pack administration sales to connected parties (if certain criteria are not met), but potentially all connected party sales in administration.[149] He argued that such wide drafting may have unintended consequences, and the Minister may have to look again at the clause on Report. In particular, he drew attention to a warning given by R3 (the insolvency practitioners' trade body) that a business could end up going into liquidation instead of administration as a result of clause 117. This would lead to job losses and the UK's business rescue culture being undermined. [150]

In taking a reserve power, Toby Perkins also thought that the Government's approach was odd. He argued that to create a reserve power that the Secretary of State would only use if there was evidence of future wrongdoing was dangerous; despite Government assurances, he argued that any future government could simply decide to enact the power.[151]

In response, the Minister said that the Government had been deliberate in its drafting of clause 117. She argued that in tabling amendment 221 the Opposition sought to restrict the scope of the clause to pre-pack sales only, and not all sales in administration. This could lead to a situation in which unscrupulous individuals might delay a sale specifically to avoid the regulations, which is why the Government had adopted the current wording of clause 117.

In respect of the reserve power, the Minister confirmed that it was the Government's intention to review the market before introducing any related regulation, which would enable it to see whether the problems that were identified by the Graham Review had been addressed, and to assess whether the six voluntary reforms recommended in that Review had been effective.[152] She said that a power to prohibit sales in administration to connected parties was a necessary tool. [153]

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148 BIS Committee, '*The Insolvency Service'* (sixth Report of Session 2012-13), HC 675, 6 February 2013, Ev 67; "*Graham Review into Pre-pack Administration – Report to The Rt. Hon Vince Cable MP*", Teresa Graham CBE, June 2014; *Pre-pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration – Final Report to the Graham Review*", April 2014; and: BIS press notice, "*Willott announces plans to clean up 'pre-pack' insolvency deals"*, 16 June 2014

149 PBC 4 November 2014 c459

150 PBC 4 November 2014 cc466-7

151 PBC 4 November 2014 c467

152 BIS Committee, '*The Insolvency Service'* (sixth Report of Session 2012-13), HC 675, 6 February 2013, Ev 67; "*Graham Review into Pre-pack Administration – Report to The Rt. Hon Vince Cable MP*", Teresa Graham CBE, June 2014; *Pre-pack Empirical Research: Characteristic and Outcome Analysis of Pre-Pack Administration – Final Report to the Graham Review*", April 2014; and: BIS press notice, "*Willott announces plans to clean up 'pre-pack' insolvency deals"*, 16 June 2014

153 PBC 4 November 2014 c469

Toby Perkins decided to press to a vote amendments 221 and 221 in clause 117. However, both amendments were defeated.[154]

Clause 120: Creditors not required to prove small debt: individual insolvency

The aim of **clause 120** is to streamline the process of distributing funds from an insolvent estate. It gives the Secretary of State the power to make rules dealing with the treatment of small debts in individual insolvencies. At the moment, it does not matter how much or how little a creditor is owed by a bankrupt; the creditor has to submit a claim to an IP or official receiver, who then has to scrutinise it to ensure that the debt is properly recorded. It is the Government's view that for small debts, the administrative burden is disproportionate to the amounts involved, increasing costs and resulting in smaller dividends.

Under clause 120, creditors would not be required to prove small debts in respect of an individual insolvency (bankruptcy) where the debt owed was below a prescribed amount. Where the officeholder is unclear on the amount owed, or has other doubts regarding the claim, they may still require a claim form and/or documentary evidence from the creditor.

There was general agreement in Committee that there was clearly an amount below which it would not make sense to have a bureaucratic process or spend a lot of time assessing a claim, given that less money would be returned to the creditor then was spent processing the claim. In tabling amendment 224, the aim of the Opposition was to set the prescribed amount at £100.

The Minister was concerned that £100 was too low. She argued that few debts in insolvency tend to be less than £100, so any savings from reducing bureaucracy would be extremely limited, meaning that creditors would lose out. The Minister felt that a more appropriate threshold was £1,000. She stressed that it was not just about the amount of debt but the likely rate of return.[155]

Toby Perkins argued thought that a £1,000 was a high threshold in respect of individual insolvency, since many individual bankruptcies were for relatively small amounts. He argued that Parliament had to be careful not to make legislation that would incentivise fraudulent behaviour.[156] Whilst there is a power for IPs to demand evidence, he said that Opposition Members were still worried about the message that clause 120 might send if no evidence were required of some outstanding debts, and what the impact might be.[157]

Amendment 224 was pressed to a vote but was defeated. [158]

Schedule 9: Trustee in bankruptcy

Schedule 9 contains changes to the IA 1986 that are required for **clause 121** to operate effectively. Currently, the IA 1986 provides that when the court makes a bankruptcy order the official receiver (the 'OR') is appointed receiver and manager of the bankrupt's estate, with limited powers to act.[159] In many cases it is the OR who is subsequently appointed as the trustee in bankruptcy, who then has full powers to deal with all the assets. **Clause 121**

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[154] Amendment 221 to clause 117: Ayes 4, Noes 10; amendment 222 to clause 117 Ayes 4, Noes 10

[155] PBC 4 November 2014 c480

[156] PBC 4 November 2014 c481

[157] *Ibid*

[158] Amendment 224 in clause 120, ayes 6, Noes 9

[159] The OR's duties are limited to protecting the estate and dealing with any urgent realisations of assets that are required pending the appointment of a trustee

would change the process so that the OR would be appointed trustee on the making of the bankruptcy order, unless the Court ordered otherwise. However, clause 121 would not remove the option for an IP to be appointed trustee in place of the OR or the ability of the creditors to request that this occurs.

In tabling amendment 225 to Schedule 9, it was the Opposition's view that the changes set out in the Schedule went too far in removing responsibilities from the OR and rights from creditors.[160] Toby Perkins asked how the Government would ensure that its reforms, designed to reduce the cost of the insolvency process, do not dumb down the industry, return less money to the creditors and weaken the current successful insolvency regime.[161]

In response, Minister argued that there were no particular benefits in delaying the appointment of a trustee; it served only to delay the realisation of assets.[162] She said clause 121 was designed to cut red tape at the start of the bankruptcy process, whether the OR remains the trustee or an IP is later appointed.[163]

Opposition amendment 225 was pressed to a vote but was defeated.[164]

3.11 Employment (Part 11)

The employment aspects of the Bill were considered during the Committee's 14th to 16th sittings.

Clause 135: Protected disclosures: reporting requirements

While the Opposition supported the clause, which would require regulators receiving whistleblowing disclosures to report annually on how these are dealt with, they described it as "incredibly limited" in scope.[165] Ian Murray tabled an amendment that sought to extend whistleblowing protections to job applicants.[166] Whistleblowing law currently protects "workers" from being subjected to detriment if they make public interest disclosures; some, including the charity Public Concern at Work, have argued that this leaves job applicants (who do not fall within the definition of "worker") at risk of being blacklisted due to previous whistleblowing activity, with no effective statutory protection.

The Minister, Jo Swinson, responded to Mr Murray's concerns by noting existing protections under the *Data Protection Act 1998*.[167] Although the Minister said she recognised the importance of the debate about blacklisting, she questioned whether the amendment was appropriate for a clause about the narrower issue of the role of regulators.[168]

The amendment was defeated on division and the clause ordered to stand part.[169]

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160 PBC 4 November 2014 c482
161 PBC 4 November 2014 c457
162 PBC 4 November 2014 c460
163 *Ibid*
164 Ayes 6, Noes 9
165 PBC 4 November 2014 c488
166 Ibid., c486
167 Ibid., c492
168 Ibid.
169 Ibid., c494

Clause 136: Financial penalty for failure to pay sums ordered by employment tribunal

The Opposition tabled a number of amendments to clause 136:

- The clause would penalise failure to pay financial awards ordered by employment tribunals, but would not penalise failure to pay a costs or preparation time order - amendment 231 sought to bring these within the scope of the penalty.
- Amendment 232 sought to institute a system whereby the Secretary of State could publicly 'name and shame' employers for failing to pay tribunal awards, reflecting the Government's current naming and shaming scheme targeted at employers that breach national minimum wage law.
- The fines created by the clause would be paid to the State. Amendment 233 sought to ensure that, if a financial penalty is imposed on a non-paying employer, any penalty amount paid by the employer would be paid first to employee in respect of the unpaid award, prior to being allocated to any sum on the penalty notice.[170]

Speaking for the Opposition, Ian Murray described amendment 233 as "probably our most important amendment in this section" and explained its intended effect:

> It would ensure that, out of any payments made by an employer, the relevant sum of the compensatory award for the employee is taken out first, before the penalty fine is paid. We should reflect on that: people have entered the employment tribunal system and been awarded a payment which they have not received. They go through a system in which a penalty may be levied on the employer for not paying the award, but the employer could quite easily say, "Well, that's fantastic. I'll pay the penalty, but I'll continue to not pay the award," and the penalty would be paid in the first instance.[171]

In response, the Minister said that non-payment of awards results in repeated penalties, which incentivises employers to pay awards first:

> the Government recognise that the introduction of a penalty should not reduce the likelihood of individuals getting their award, and priority should be given to the claimant, so that the state would not benefit from their not receiving payment. I understand those arguments, which is why clause 136 already incentivises the employer to pay the employee before paying the penalty to the state.
>
> When the warning notice is issued, the employer will have 28 days in which to pay the award and avoid the penalty completely. The provision is designed to encourage employers to do that, and is a pretty clear incentive. An employer who paid only the late payment penalty and not the award could of course be subject to the multiple penalties, and it would rapidly not be worthwhile for them to continue in that vein.[172]

Mr Murray also asked about the creditor status of tribunal awards vis-à-vis the new penalties; i.e. whether a penalty would take precedence over a tribunal award in an insolvency scenario. The Minister undertook to respond to the question in writing.[173]

The Committee divided on amendments 232 and 233; both were defeated.

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170 Ibid., c434
171 Ibid., c498
172 Ibid., c504
173 Ibid., c503

The Government tabled an amendment, agreed to without division, to change the venue for appeals against financial penalties. The Bill had previously provided that the venue would be the county court or (in Scotland) sheriff court; the amendment changed this to the employment tribunal, in keeping with the procedure for appealing against National Minimum Wage penalties.[174]

Clause 136 as amended was ordered to stand part. **Clause 137** was agreed without debate.

Clause 138: Amount of financial penalty for underpayment of national minimum wage

Clause 138 would amend National Minimum Wage (NMW) law so that an employer can be fined per underpaid worker, up to a present maximum of £20,000 each. The Opposition supported the clause, although tabled several amendments and proposed a new clause. These would have: increased the penalty maximum to £50,000; empowered the Secretary of State to devolve to local authorities responsibility for NMW enforcement; and enabled NMW enforcement officers to include holiday pay in their calculations of arrears.[175]

After a wide-ranging debate, the Opposition withdrew the amendment to increase the maximum and the proposed new clause regarding holiday pay, although pressed to a vote the amendment on local authority enforcement. Mr Murray set out his case for this:

> Amendment 240 proposes more effective enforcement by giving local authorities new powers to enforce the national minimum wage through working alongside their colleagues in HMRC. My hon. Friend the Member for Hartlepool raised that issue earlier. HMRC does a great job in enforcing what it can, but there is limited scope in the funding and numbers available to it. Local authorities are on the ground visiting businesses all the time, perhaps through environmental health officers or health and safety visits. In some industries they visit licensed premises such as restaurants on a more regular basis. Local authorities are already on the ground visiting those high-risk businesses where there is more likely to be infringement of the national minimum wage.
>
> Local authorities know their own patches very well. In terms of local geography and the make-up of local businesses, they might receive complaints about other issues that allow them to have more eyes and ears on the ground and effectively look at whether businesses are paying the national minimum wage.[176]

The Minister said that HMRC was better placed to carry out enforcement activity:

> … HMRC has expertise in this area and a strong track record, so it can deal with the enforcement issue. Since 1999, HMRC has identified more than £54 million in arrears for over 229,000 workers during more than 65,000 investigations. It investigates every complaint made to the pay and work rights helpline. I remind the Committee, as I always take the opportunity to, that the number is 0800 917 2368. HMRC also does risk-based enforcement, looking at particular sectors where there is a risk. It is a central enforcement body with a consistent approach across the whole of the United Kingdom, a high-quality service and a brand that everyone recognises.[177]

The amendment was defeated on division and the clause ordered to stand part.

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174 Ibid., cc508-510
175 PBC 6 November 2014 c515
176 Ibid., c522
177 Ibid., c533

Clause 139: Exclusivity terms unenforceable in zero hours contracts

Clause 139 attracted substantial debate in light of ongoing concerns about the use of zero-hours contracts. The Opposition tabled amendments that broadly reflected their established commitments should a Labour government be elected in 2015.[178] These included:

- Amendment 237 would have required the Secretary of State to make regulations setting out, among other things, remedies available to workers on zero-hours contracts with exclusivity clauses.
- Amendment 242 would have obliged employers to offer fixed-hours contracts to workers that have worked regular hours over a six-month period.
- Amendment 244 proposed a requirement for employers to compensate workers in the event of short-notice shift cancellation.
- Amendment 229 would have empowered the Secretary of State to make regulations requiring employers to provide basic information about terms and conditions to zero-hours workers.[179]

Ian Murray said that amendment 237 would address the absence of legal remedy in relation to the prohibition of exclusivity clauses (the Bill would render such clauses legally unenforceable, although does not propose a legal remedy to workers subjected to detriment as a result of breaching exclusivity clauses). Mr Murray set out the Opposition's reasoning behind the amendment:

> We are asking the Secretary of State to come back with regulations to allow us to see how things will be enforced. They might state the length of the qualifying period, which is two years at the moment, so someone would have to be on an illegal exclusive zero-hours contract for more than two years. Will the early conciliation process at ACAS be included, which is a legal requirement now? Will any fee be payable to enter an employment tribunal to enforce those rights? Will an imposition of penalties on the employer be among the remedies available? At the moment, the legislation does not include any of those matters. Sarah Veale of the TUC said:
>
> "It is actually quite extraordinary to have a breach of employment rights proposed in a Bill without any kind of penalty".—[*Official Report, Small Business, Enterprise and Employment Public Bill Committee*, 14 October 2014; c. 71, Q162.][180]

Amendment 242 was a probing amendment about regular work on zero-hours contracts. Mr Murray cited evidence from the Chartered Institute of Personnel Development indicating 83% of zero-hours workers have been engaged for more than six months, while 65% have been for two or more years. He argued that zero-hours arrangements are inappropriate for extended use, as their "whole point … was to deal with short-term need and fluctuations in seasonal employment or because of emergencies".[181]

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[178] See *Zero-hours contracts*, Commons Library Standard Note, SN06553, 7 October 2014
[179] PBC 6 November 2014 cc534-535
[180] Ibid., c542
[181] Ibid., cc542-544

On the issue of short-notice shift cancellation, Mr Murray said workers should be compensated for this, as shift offers may lead to travel and childcare costs. He cited support for the proposal from both the Chartered Institute of Personnel Development and CBI.[182]

In response to the Opposition amendment regarding legal remedy, the Minister said this was already contemplated in the Bill, which would create a regulation-making power that could provide for the imposition of financial penalties. The Government recently consulted on potential avoidance of the prohibition of exclusivity clauses and routes of redress; the consultation closed on 3 November 2014.[183] The Minister said "If those responses suggest it is necessary, we will consider redress as part of our response".[184]

On regular zero-hours work, the Minister said a mechanism already exists whereby a zero-hours worker classified as employees, with sufficient continuous employment, may make a flexible working request to change his hours, times or location of work. The employer would then have to consider the request and could only refuse it on certain statutorily defined grounds.[185]

As to the Opposition amendment about compensation for short-notice shift cancellation, the Minister said the Government intends to address the issue by way of codes of practice:

> We should also recognise that there could be unintended consequences. We do not want employers to avoid planning shifts too far in advance in case they have to cancel them, and instead to invite people into work at short notice. That would also be pretty disruptive for individuals, who may have to arrange child care or make other changes in their life. That could mean that they were less able to take advantage of the work that was offered. We must ensure that we do not have such unintended consequences, but I recognise that there is a genuine issue, which is why the legislation we are bringing through is only part of the Government's response to the issues raised by zero-hours contracts.
>
> As the hon. Member for Edinburgh South said, business organisations such as the CBI and the CIPD have also recognised that there are issues with how these contracts are sometimes used. That is why we want to introduce sector-specific codes of practice on what the responsible use of zero-hours contracts looks like. I am sure that we will work closely with a range of representative bodies, including employee representatives, to provide guidance that can be more bespoke, specific and tailored to individual sectors.[186]

In response to amendment 229 regarding terms and conditions, the Minister said a requirement to outline contractual terms would be considered as part of the previously announced Department of Business, Innovation and Skills review of employment status.[187]

The Committee divided on amendments 237 (enforcement) and 244 (compensation) both of which were defeated by six votes to nine.

Government amendment 30, agreed to without division, was a technical amendment with important legal consequences. The Minister said that, if an employment tribunal is called to

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182 PBC 6 November 2014 c548
183 BIS, *Zero hours employment contracts: exclusivity clause ban avoidance*, August 2014
184 PBC 6 November 2014 c551
185 Ibid., c552; see *Flexible Working*, Commons Library Standard Note, SN1086, 3 June 2014
186 PBC 6 November 2014 c553
187 Ibid.; 'Employment review launched to improve clarity and status of British workforce', Gov.uk [accessed 11 November 2014]

assess whether a contract is one for services or an employment contract conferring employee status, the inclusion of an exclusivity clause could indicate it was the latter.[188] The amendment provides that the prohibition of exclusivity is disregarded "for the purposes of determining any question whether a contract is a contract of employment or other worker's contract". This means that if a contract includes an exclusivity clause, the clause may be relied on in court as evidence that the contract is one of employment, notwithstanding the fact the clause is unenforceable.

Clause 139 as amended was ordered to stand part.

Clauses 140-142: Public sector exit payments

Clauses 140-142 would create a regulation-making power, whereby the Treasury may require certain public sector workers to repay specified exit payments if employed again in the public sector within a prescribed period. The Minister indicated that the Government intends for this to extend to privatised public services.[189]

Clauses 140-142 were agreed without amendment.

[188] PBC 6 November 2014 c554; the existence of an exclusivity clause could help evidence mutuality of obligation, which is a feature of employment contracts: see the discussion in *Zero-hours contracts*, Commons Library Standard Note, SN6553, 7 October 2014

[189] PBC 6 November 2014 c558