



Experts in Business

Proposed Tied Pubs (Code and Adjudicator) (Scotland) Bill

A consultation response for Neil Bibby MSP by FSB Scotland

Federation of Small Businesses Scotland
July 2017

Overview

The Federation of Small Businesses (FSB) welcomes the opportunity to respond to the Proposed Tied Pubs (Code and Adjudicator) (Scotland) Bill.

FSB is Scotland's leading business organisation. As experts in business, we offer our members a wide range of vital business services including advice, financial expertise, support and a powerful voice in government. Our mission is to help smaller businesses achieve their ambitions. These micro and small businesses comprise the majority of all enterprises in Scotland (98%), employ around one million people and contribute £68bn to the economy.

Creating and fostering a fair and competitive business environment is a key aim for FSB. It is our view that such an environment does not exist for tied tenants and legislative intervention is required to level the playing field between small businesses who lease tied pubs and large pub company owners (Pubcos).

FSB fully supports the proposals to introduce a statutory code, with a Market Rent Only option for tenants, to oversee the relationship between tied tenants and Pubcos. We see no reason why tied tenants in Scotland, who form a key part of an industry that contributes £1.6bn to the economy per year,¹ should not be afforded the same legal protections as those in England and Wales.

As one FSB member who runs a tied pub in Edinburgh put it: 'Everyone should have the opportunity to be free-of-tie'.

Fundamentally, we believe that these proposals would lead to a win-win situation for tied tenants and their customers. Tied tenants will be able to invest more in their businesses and take home higher personal incomes, while customers will benefit from lower prices and a wider range of products – including craft beers from microbreweries.

The case for change

In 2002, FSB asked the Office of Fair Trading (OFT) to assess whether tied tenants were paying too much for their beer and rent and whether the beer tie 'restricted choice and competition'.² Although the OFT did not conduct an investigation, our concerns led to what would be the first of four Select Committee inquiries into competition and transparency issues in the sector.

In 2011, the inquiries concluded with a landmark report on pub companies from the Business, Innovation and Skills Committee.³ The Committee noted that 'industry self-regulation [has] failed' and recommended that the UK Government introduce a statutory pubs code and an independent adjudicator. At the launch of the report, Adrian Bailey MP, chair of the committee, said:

*"On every occasion the industry has been found wanting... Pubs are businesses we are losing at an alarming rate. [Industry] has failed to put its own house in order... It is now time for the Government to act."*⁴

¹ "Economic Contribution", Scottish Beer and Pub Association.

² "Pubs Code Adjudicator: Annual Report and Accounts", Pubs Code Adjudicator, July 2017.

³ "Business, Innovation and Skills Committee – Tenth Report – Pub Companies", Business Innovation and Skills Committee, September 2011.

⁴ See: <https://www.parliament.uk/business/committees/committees-a-z/commons-select/business-innovation-and-skills/news/pub-companies-chairmans-comments/>

FSB believes that it is now time for the Scottish Government to act and respond to a comprehensive body of evidence expertly put together by four Select Committees – and the material prepared in support of this bill. Set against this context, the Scottish Government’s commissioned research on the pub sector, which found that no part of the sector was ‘unfairly disadvantaged’, seems insufficient grounds to rule out legislative action.⁵

Further, the creation of a voluntary code of practice for tied pubs in Scotland last year clashes with evidence from England and Wales. This evidence clearly states that self-regulation was ineffective in addressing the problems faced by tied tenants. FSB maintains that, although there are fewer tied pubs in Scotland, the tie between Pubcos and their tenants creates a market which is ‘characterised by asymmetric information, imbalance of bargaining power [and] behavioural biases’.⁶

If the UK Government considered it necessary to intervene on ‘the basis of fairness to rebalance outcomes’⁷ for tied tenants, then businesses should expect the same treatment in Scotland.

The small business angle

FSB provided a thorough evidence base for the UK Government to consider ahead of the introduction of the Small Business, Enterprise and Employment Act 2015.⁸ Although the bulk of the research was conducted in 2013, it is our view that this information should be carefully considered given its direct relevance to this proposed bill. As such, we will attach the research when submitting this response rather than reiterating its arguments.

Nonetheless, we do want to highlight the (unpublished) Scottish data from the research that was carried out with FSB publican members. While the sample sizes are small, the results are consistent with research published based on larger samples. For example:

- Around half of tied tenants in Scotland (48%) were paying higher rents than they would pay on the open market, with 19% paying about the same. Notably, there were no tenants paying lower levels of rent.
- A clear majority of tied tenants (77%) concluded that they would be financially better off if they were free-of-tie and paying fair rent levels. Though one in five (22%) were unsure, no tied tenants believed they would be worse off by breaking the tie.
- An overwhelming majority of tied tenants (85%) would become free-of-tie if they had the option, and if an independently assessed fair rent was available. In direct contrast, there were no FSB members who would not exercise this option. Around 15% were unsure of how they would proceed.

⁵ “Research on the Pub Sector in Scotland – Phase 1 Scoping Study”, Scottish Government and CGA Strategy, November 2016.

⁶ “Pub Companies and Tenants: Pubs Code and Adjudicator. Final Stage Impact Assessment”, UK Government, January 2015.

⁷ *Ibid.*

⁸ See: <http://www.legislation.gov.uk/ukpga/2015/26/contents/enacted>

- Over 90% would have more confidence in the future of their pub business if they were free-of-tie, compared to 6% who disagreed.
- Over three quarters (76%) of tied tenants believed that the Pubcos took too much of their profits, while 19% considered the profit split 'about the right amount'.

Underlying this proposed bill, and the legislation introduced by the coalition government, is the belief that tied tenants would be 'no worse off than free-of-tie tenants'. FSB research, expanded upon below, provides evidence for this assertion and also suggests that pubs would thrive by opting out of tied arrangements.

Figure 1

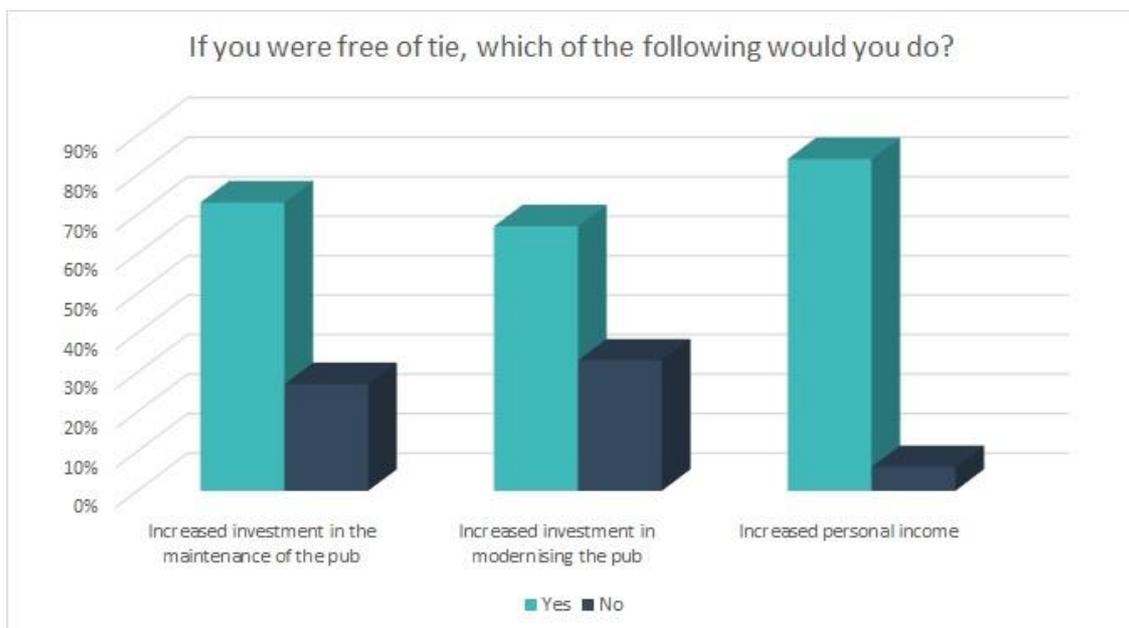


Figure 2

If you were free of tie, which of the following would you do?

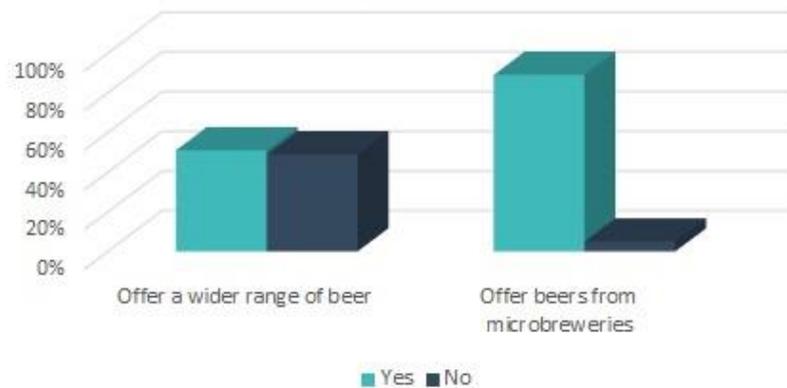
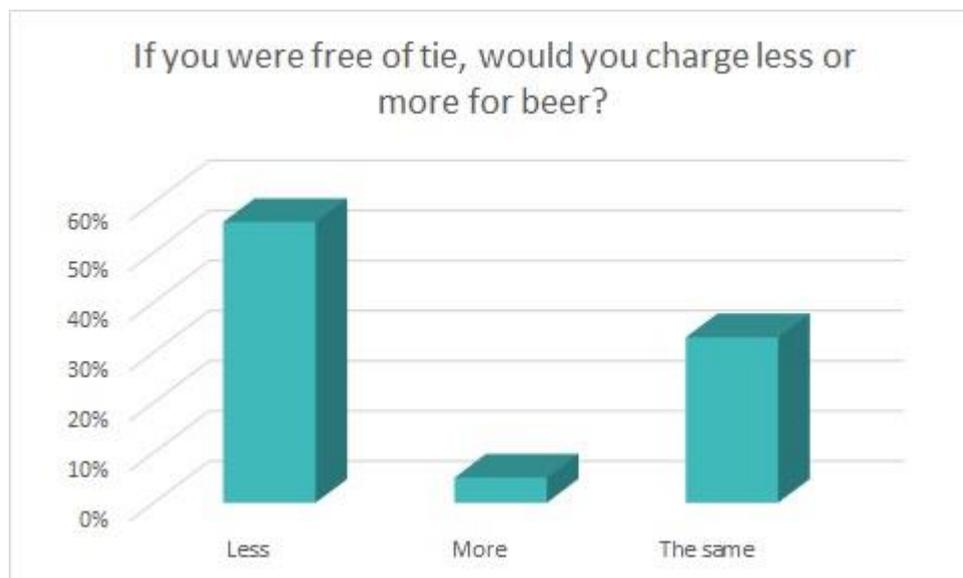


Figure 3

If you were free of tie, would you charge less or more for beer?



Small business interviews

To update our research and to get a deeper understanding of the tied pub sector, FSB carried out a number of telephone interviews with small business owners. These interviews highlight common issues facing tied tenants – commonalities that trump differences in geography, size, scale and Pubcos. Notably, it aligns with research commissioned by CAMRA on tied pub tenants in Scotland.⁹

First, as one tied tenant in Edinburgh said, ‘prices are a problem’. This was raised by all tenants whether they were tied to Punch Taverns, Belhaven/Greene King, Star Pubs & Bars/Heineken and Trust Inns. A shared belief was that, as a result of the tie, they were facing ‘higher beer charges’ and ‘a lot of add-ons for stock taking, accounts, deliveries and maintenance’:

⁹ “Scottish Tied Pub Licensee Survey: Methodology & Key Findings Overview”, CAMRA and CGA Strategy, September 2014.

"The difference in price is horrendous. Why do I have to pay more to sell their beer when I'm tied? Shouldn't it be cheaper than my competitors who are free-of-tie?"

Tied tenant, Inverness

"I see beer being sold cheaper at wholesale suppliers." **Tied tenant, East of Scotland**

Second, all tied tenants welcomed the creation of a statutory pubs code and an independent adjudicator in Scotland – even those who were happy with their tie. A tied tenant in Fife said it would be a 'good idea to oversee the Pubcos'.

And lastly, there were fears that rent levels would increase if they opted to become free-of-tie. This was a key point made by interviewees. Indeed, one FSB member remarked that he had been told by his Pubco that if he left his tie his rent would double.

Although these fears do not diminish FSB's support for establishing a Market Rent Only (MRO) option for tenants as part of a Scottish Pubs Code – giving tenants the opportunity to opt out of the contractual obligation to buy certain products from the owner is a key provision of the bill – the unequal relationship between Pubcos and their tenants have left some small business owners jaded. Certainly, there is work to do with tied tenants to convince them that the underpinning principles in the bill can lead to positive outcomes for their pubs.

Questions

Q. What do you think of the proposed contents of the Bill and the Code, and the scope of the Adjudicator's powers, as detailed on pages 17-18?

These measures strike a good balance between following the 2015 Act and enabling a flexible response to Scottish circumstances. FSB recommends that the Scottish Parliament's Non-Government Bills Unit liaise with counterparts in the House of Commons to learn how Scottish legislation could improve upon the 2015 Act. Similarly, the Pubs Code Adjudicator, Paul Newby, should be consulted to ascertain whether unforeseen legislative barriers hinder enforcement measures in England and Wales.

Q. In terms of who the Scottish Pubs Code, and Market Rent Only option, should apply to, which of the following best expresses your view?

Q. How do you think the associated costs of the proposal (predominantly the establishment and on-going running costs of a Scottish Pubs Code Adjudicator) should be funded?

There are questions within the consultation document which merit further examination, preferably by the Scottish Government and industry experts. Though FSB is pleased to contribute to general issues relating to the establishment of a statutory code and an independent adjudicator, we are not best placed to advise on technical and operational matters.

Notwithstanding this, there is one point we would like to make. How the office of a Scottish Pubs Code Adjudicator is set up and funded should reflect upon the experience of the Adjudicator in England and Wales. In its first year, the Adjudicator was overwhelmed by the number of enquiries (550) and the number of cases that have been accepted for arbitration (156).¹⁰ Unsurprisingly, this has led to complaints regarding the slow pace of settlements. Clearly, a potential Scottish Adjudicator will require the resources to do the job properly and swiftly. Thus, Scottish Government support and expertise will be essential.

Q. Which of the following best expresses your view of the Scottish Pubs Code Adjudicator being able to impose financial penalties for breaches of the Code?

FSB agrees with the views articulated in the consultation paper. A Scottish Pubs Code Adjudicator without the power to impose financial penalties for breaches of the code could not adequately protect tied tenants. Indeed, it is worth bearing in mind that it was, among other factors, the lack of sanctions that contributed to the failure of the voluntary code in England and Wales. We would echo the recommendation of the Business, Innovation and Skills Committee and call for a code and Adjudicator that is 'armed with a full suite of sanctions'¹¹ for serious breaches.

Further information

For further information please contact Barry McCulloch, Senior Policy Advisor at: barry.mcculloch@fsb.org.uk

¹⁰ See: <https://www.gov.uk/government/news/pubs-code-adjudicator-data-reveals-significant-activity-in-first-year-of-new-law>

¹¹ "Business, Innovation and Skills Committee – Tenth Report – Pub Companies", Business Innovation and Skills Committee, September 2011.



Experts in Business

The FSB is Scotland's largest direct-membership organisation. It campaigns for a better social, political and economic environment in which to work and do business. With a strong grassroots structure and dedicated Scottish staff to deal with Scottish institutions, media and politicians, the FSB makes its members' voices heard at the heart of the decision-making process. It is therefore recognised as one of Scotland's most influential business organisations. The FSB also provides a suite of services to help our members reduce the cost and risk of doing good business – from legal and tax protection to business banking.

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