

PROPOSED MERGER OF GLIMA AND NHMBA

1 Summary

1.1 It is proposed that GLIMA and NHMBA, which are currently both unincorporated associations, should merge to form a company limited by guarantee, and that the new company should have registered charity status.

1.2 This note sets out the advantages and disadvantages of using a company and the requirements and procedure for registration as a charity.

2 Company limited by guarantee

2.1 The usual form of company for a charity is a company limited by guarantee. A company limited by guarantee is different from a normal commercial company limited by shares. The members of a company limited by guarantee do not own shares in the company, but rather each holds a membership certificate, having given a guarantee to contribute to the assets of the company if it is wound up whilst he or she is a member (or within one year of ceasing to be a member). The amount of the guarantee is generally nominal (often £1) so there is no real liability for the members.

2.2 Separate legal personality

2.2.1 A company has its own legal personality. This means that it is a separate legal entity from its members and directors. This is an advantage over the current position of both GLIMA and NHMBA as unincorporated associations.

2.2.2 A company is able to enter into contracts in its own name and, importantly, the company, rather than its members or directors, will be liable for any breach of contract or tort (for example under occupier's liability legislation).

2.2.3 The net result of the separate legal personality of a company limited by guarantee and the nominal amount of the guarantees typically given by its members is that, if a third party claim is made against the company and that claim exceeds the assets of the company, the members and directors will not be personally liable for the shortfall. (By contrast, with the current structures, there is potential – at least in principle – for such personal liability).

2.2.4 However, the position in relation to third party claims should be contrasted with the position in relation to claims for breach of charity law. Any such

claim would be brought by the Charity Commission against the directors of the proposed company, and would not be limited by reference to the assets of the company.

2.3 *Company's constitution*

A company is governed by both company law and its own constitution. A company's constitution is made up of two elements: the Memorandum of Association (which is essentially a "snap-shot" of part of the company's constitution at the point of registration, containing a statement that the subscribers wish to form a company and have agreed to become members) and the Articles of Association (containing the powers and objects of the company together with the rules governing the running of the company).

2.4 *Structure of management and control*

2.4.1 A company has a two tier structure of management and control made up of the directors and the members. We would envisage that all the current members of GLIMA and NHMBA would become members of the new company. GLIMA and NHMBA would then need to select representatives from their number, for example the current members of the executive committees, to become directors of the company.

2.4.2 This two tier structure makes for a very democratic organisation. Broadly speaking, the directors take all significant day to day decisions in relation to the activities of the company. However, in order to implement certain decisions (for example, to amend the company's constitutional documents) the directors must seek the approval of the members. The members, acting by majority, are able to appoint and remove directors. In exercising their rights as members, they must act in the best interests of the company.

2.5 *Accounts*

2.5.1 There is a certain amount of bureaucracy involved in using a company. In particular, some form of annual accounts will need to be submitted to Companies House (the UK companies registry). The company is likely to qualify as a "small company" and, if so, it will not be required to submit audited accounts. It may either submit full (but unaudited) accounts or an abbreviated balance sheet and notes.

2.5.2 The first set of accounts filed by the company can cover a period of anything up to 18 months. The accounts for that period must be filed within 21 months of the date of incorporation of the company. In subsequent years, the accounts must be prepared for a 12 month period and the deadline for filing the accounts will be 9 months from the financial year end of the company (this date can be decided when the company is incorporated).

2.5.3 Charity Commission requirements in relation to the accounts should be borne in mind when they are prepared, if there is a need to submit accounts to the Charity Commission as well as to Companies House (see paragraph 4.4.2.2 below, regarding the “Statement of Recommended Practice” or “SORP”).

2.5.4 GLIMA and NHMBA must consider whether any of their current officers have the skills and experience needed for the preparation of accounts and making the necessary filings or whether, as is likely, the company will need to engage an accountant.

2.6 *Next Steps*

Assuming that GLIMA and NHMBA wish to proceed with this, we will prepare the Memorandum and Articles of Association together with all the necessary forms for incorporation of the proposed company, and submit these to Companies House.

3 **A possible alternative – Charitable Incorporate Organisation (CIO)**

3.1 It may be worth noting that, at some point in 2010, a new charitable entity should become available, called the Charitable Incorporated Organisation or CIO. This has been in the pipeline for about four years now. The idea behind CIOs is that they should offer the benefits of a company in terms of protection from third party claims, but be as easy to administer as trusts and unincorporated associations. If this is of interest, please let us know.

3.2 However, if there is any urgency to the merger of GLIMA and NHMBA we would recommend that a company limited by guarantee is used, as there is uncertainty about how soon the implementing legislation for CIOs will be passed and the introduction of the CIO form has been much delayed already.

4 **Other considerations**

4.1 *Name*

4.1.1 GLIMA and NHMBA will need to agree on a name for the new company. There are few restrictions here, but it will be important to check that any proposed name has not already been taken by an existing UK company or charity. We will carry out these checks once the name has been agreed upon.

4.1.2 Non-charitable companies are generally required to have “limited” after their name, but charitable companies are excepted from this rule.

4.2 *Objects*

4.2.1 The objects of a charity (i.e. its purposes, as stated in its constitution) must be exclusively charitable according to the law of England and Wales. The meaning of ‘charitable’ is defined in statute and case law. We will assist in ensuring that the objects of the company are exclusively charitable.

4.2.2 The current objects of GLIMA and NHMBA are quite similar. We propose to combine the objects of the two organisations in order to produce objects for the new company and adapt these objects, to the extent necessary, to ensure that they are exclusively charitable according to the law of England and Wales. We will try to keep such changes to a minimum to preserve continuity with the existing organisations.

4.3 *Applying for registration as a charity*

4.3.1 Following incorporation of the company, we can apply to the Charity Commission (the government body that regulates charities) to obtain registered charity status.

4.3.2 Exclusively charitable purposes

In order to apply for registered charity status, the company would need to have exclusively charitable purposes (as discussed above), and its constitutional documents would need to be drafted so as to prevent it from being converted into a non-charitable entity, and to prevent the members and directors from benefiting from the company’s funds, for example in the form of remuneration for acting as a director (except in very limited circumstances).

4.3.3 Annual income of £5,000

4.3.3.1 In addition, we would need to show the Charity Commission that, in its first financial year, the charity would receive

income of at least £5,000 (or had already received such income).

4.3.3.2 NHMBA's Arts Council grant can, in principle, be included in this figure. We would recommend that NHMBA approaches the Arts Council for a letter confirming that once NHMBA and GLIMA have merged to form a company, the remaining instalments of the grant will be paid to the company, absent any breach of the conditions attached to the grant (and making clear the amount that should be received by the end of the company's first financial year). We would expect the Charity Commission to accept such a letter as evidence that the £5,000 funding requirement will be met, assuming of course that the remaining instalments of the grant will add up to £5,000 or more.

4.4 *Charitable status – pros and cons*

There are both advantages and disadvantages of charitable status.

4.4.1 Advantages

4.4.1.1 Registered charitable status may give the company greater credibility, and third parties (such as foundations, companies and individuals) may be encouraged by this status when considering making grants or donations.

4.4.1.2 There are also certain tax advantages of being a charity. Subject to a few exceptions, a charity is exempt from tax on income and capital gains.

4.4.1.3 Equally importantly, Gift Aid should be available on donations made by individuals. Very broadly, Gift Aid is available on any cash donation made by a UK taxpayer to a charity provided the individual has made a Gift Aid declaration (and certain anti-avoidance rules aren't infringed). Under the Gift Aid scheme a charity is entitled to reclaim (from HM Revenue & Customs) the basic rate of tax that an individual has paid on the gift, which currently equates to 28p for every £1 donated. Higher rate taxpayers are able to reclaim the difference between the basic rate

(reclaimed by the charity) and the higher rate of tax on their donation (worth 25p for every £1 given away).

4.4.1.4 “Corporate gift aid” is available for UK companies on cash donations made to UK charities. The effect of corporate gift aid is that the gift will reduce the taxable profits of the company, and therefore (in principle) the company’s corporation tax bill.

4.4.1.5 Other tax reliefs for donations to charities, for example donations of listed shares, are available as well, and these can be discussed with you if this might be relevant.

4.4.1.6 A charity which rents office space for its charitable purposes will qualify for an 80% reduction in business rates and in some cases the local authority will waive the 20% balance.

4.4.2 Disadvantages

4.4.2.1 In addition to the filings detailed above that must be made to Companies House, a charity, depending on its annual income, must make certain filings to the Charity Commission. Charities with an annual income exceeding £10,000 must submit an annual return to the Charity Commission.

4.4.2.2 If a charity’s income exceeds £25,000 it must submit accounts to the Charity Commission and produce a Trustees Annual Report (including information on how the charity’s activities have benefitted the public in the relevant financial year). There is overlap between the Companies House and Charity Commission requirements in relation to accounts so, generally, the same accounts can (if required) be sent to both bodies. However, any accounts prepared for submission to the Charity Commission generally need to be prepared in accordance with a document known as “SORP” (or the “Statement of Recommended Practice”), and an accountant should be chosen who is familiar with the requirements.

4.4.2.3 Anyone proposing to set up a charity, whether a company or a trust or unincorporated association, needs to be aware of the duties that apply to “charity trustees”. “Charity trustees” are the persons with strategic control of a charity - for example the directors of a charitable company limited by guarantee. In principle these duties are onerous, and the consequences of breaching them are serious; although with common sense, due care and (where appropriate) advice, any charity trustee can stay out of trouble.

4.4.2.4 We are attaching a note which summarises the duties of charity trustees. This should be read carefully to make sure that the officers of GLIMA and NHMBA are comfortable about entering a regulated regime involving some official scrutiny, which creates scope for personal liability if charity law is breached.

4.5 *VAT*

4.5.1 We understand that NHMBA is currently registered for VAT and has done so in order to recover the VAT it incurs in buying in services (input VAT). As a result, NHMBA charges VAT on the ticket price it charges for entry to a concert/show it produces each year.

4.5.2 If the entity used for the merger of NHBMA and GLIMA is a company, it should be possible to register it for VAT either voluntarily or compulsorily. Registration for VAT is compulsory where a company will make more than £68,000 of taxable supplies in the next 12 months. Either way, there will be a certain amount of VAT compliance to deal with as a result of the merger.

4.5.3 GLIMA is not registered for VAT, but its activities will be subject to the VAT rules once they are effectively carried on by the new entity that is VAT registered.

4.5.4 It is possible that the merger of the two organisations will cause payments received by them (annual subscriptions, for example) to become subject to VAT where they were not before. However, this will not be the case in every situation and we will need to find out more about what members of the

organisations receive in exchange for their subscription fee in order to determine what the VAT position on these would be in the future.