

## **A COMPARISON OF THE CURRENT MEMORANDUM AND ARTICLES OF ASSOCIATION WITH THE TIER 1 ARTICLES PROPOSED BY SOME MEMBERS AND THE NATIONAL COUNCIL RECOMMENDED ARTICLES**

### **BACKGROUND**

The BMC is the national representative body for climbers in England and Wales and the national governing body for competition climbing. In 1993 it converted from an association to a limited company when the current M&A were adopted. Although there have been some amendments on specific points since then, the Articles remain substantially similar. In the interval there has been a fundamental reform of company law resulting in the Companies Act 2006 (“the Act”) and the introduction of improved standards of governance not reflected in the current M&A.

Although they served the BMC well for 2 decades, the current Articles have given rise to difficulty in recent years due to confusion over the respective roles of National Council and the Executive Committee. Central to this is the deliberate ambiguity in Article 15.1 (“the Ambiguity”) which provides **“The policies of the BMC shall be decided by National Council .... And shall oversee the work of the Executive Committee and the CEO”**. Company law provides that the board of directors is responsible for management and strategy, answerable only to the members in general meeting. Article 13.1 provides that members of Executive Committee are the directors and by extension Executive Committee is the Board.

Matters came to a head during 2016 and in February 2017 National Council determined to set up an Organisational Review Group (ORG) which was appointed in April with Ray Wigglesworth as independent chair. In the interval a Motion of No Confidence (“MoNC”) was submitted and as soon as that was published Sport England suspended grant funding which supports a range of BMC activities. These events coincided with an increased focus by government on governance of organisations that received public funding and the introduction of a new Code of Conduct (“the Code”) in October 2016. Although the MoNC was defeated at the 2017 AGM the suspension remained and this has added urgency to the review.

ORG embarked upon the largest member consultation ever undertaken by BMC and produced a draft report in October 2017 with 51 recommendations. A further consultation followed and an amended report was published in early March 2018 incorporating a number of significant changes. National Council determined to implement those recommendations that were concerned with governance by presenting new Articles to the 2018 AGM, whilst deferring other recommendations to enable more extensive consultation with Members.

National Council created an Implementation Group (IG) to liaise with independent solicitors on the preparation of new draft articles and with Sport England to ensure that its concerns about governance were addressed. Early proposals were regarded by Sport England as non-compliant with the Code, but

it has since become more understanding of the role of a representative body and has accepted key provisions in the new draft articles which limit the power of the Board of Directors and empower the Members.

Although the Board is given unlimited power to manage BMC (subject to the rights of Members through a General Meeting) and National Council will no longer have the role of overseeing the Board and setting policy, this is offset by providing National Council with the power to call a General Meeting of Members and Reserved Matters. Moreover National Council will still have the role of holding the Board to account on behalf of the Members.

The concept of Reserved Matters was introduced by the Act and had it been available in 1993, would have been the preferred method of empowering the Members. They are contained in Appendix 1 to the Articles and comprise a list of things considered to be most important to Members. There are 2 parts, the first being things which the Board cannot do without the consent of National Council or the Members in General Meeting and the second being things which the Board cannot determine without consulting National Council.

Before the National Council Recommended Articles were published a number of interested and concerned Members published their own draft Articles and submitted a resolution to adopt them at the AGM. They are referred to herein as the Tier 1 Articles which relates to the 3 levels (or tiers) of governance in the Code. Sport England criteria appear to suggest that the BMC would need to comply only with the lowest, Tier 1 category. However in discussions with Sport England involving the President, the CEO, the IG chair and independent solicitors they have made clear that all national bodies are required to comply with the highest, Tier 3, category. National Council consider it appropriate that the BMC aspires to best governance practice.

In setting out the story to date reference to the National Council Recommended Articles has focused on governance and compliance with company law, but they are not about that exclusively. They address the composition of the Board (proposing changes to that of the current Executive Committee), transparency and Member participation. The National Council Recommended Articles implement ORG recommendations 26-29 inclusive, 33, 34, 36 and 39. In addition electronic proxy voting is introduced for the 2018 AGM.

#### TIER 1 ARTICLES (AGM Proposal B in the website article)

These are based on the format and content of the current BMC Articles with limited changes designed to overcome the Ambiguity and ensure the BMC remains Member-centric. The proposers state that **“The role of National Council is to determine the high level policy direction that is best suited to British Mountaineers: and that “the role of Directors and staff is to implement it”**. It is said that this resolves ambiguity and will be compliant with the Act and the Code, but there are differing views about that and Sport England have not indicated that they are considered satisfactory.

It is acknowledged by the proposers that **“The BMC would only be eligible to bid for further Sport England grant funding under limited Tier 1 criteria.** It is also acknowledged that Sport England require national bodies to **“be Tier 3 compliant to receive further funding”** but they note that the current trend is that the level of grant funding is diminishing and that the higher cost of Tier 3 compliance and the high level of officer time spent servicing Sport England might mean it is not worth the effort.

The changes from the current BMC Articles are highlighted in the Tier 1 Articles. The Memorandum of Association are retained without alteration. The main changes to the Articles are listed below by reference to the numbering therein preceded by **C** for current Articles or **T** for proposed Tier 1 Articles.

T1.1 The definition of **Regulations** is limited to National Council and Area Meetings. National Council can no longer regulate Executive Committee or other committees. National Council is defined to be **“the consultative body on behalf of the Members”**. A definition of “The Board” is substituted for that of “Executive Committee”. A new definition of “Director” is included.

T15.1 National Council will now determine **“broad strategy”** rather than **‘policies’** and will **‘consult with the Board’** rather than **“oversee the work of the Executive Committee”**. It remains responsible for representing the interests of Members.

C20.3 and 20.4 relate to exercise of powers by Councillors and are omitted.

C22.1 The Finance Committee is no longer required to report to National Council.

C24.4 and 24.5 relating to reports to National Council by the Treasurer and CEO are omitted.

T25 New provisions relating to the creation of committees by the Board and delegation of business to those committees or individual directors. They include Finance Committee, Nominations Committee and Specialist Committees.

C36 Relates to committees formed by National Council and is omitted.

T40 National Council is entitled to delegate any of its activities to the Board.

C40 Relates to Specialist Committees formed by National Council and is omitted.

These changes all relate to governance and are intended to establish the primacy of the Board, but T15.1 may be interpreted differently. This necessarily involves National Council relinquishing powers it currently exercises but the Tier 1 Articles do not propose any alternative form of Member protection. Accordingly there is doubt about whether they achieve the intended aims of legal compliance and remaining a **“Member-led organisation”**.

## NATIONAL COUNCIL RECOMMENDED ARTICLES (AGM Proposal A in the website article)

These are also based upon the content of the current M&A, but the format is different with longer paragraphs sub-divided in an attempt to make them more readable and accessible. The Memorandum no longer exists as such but its content is transposed into the Articles as provided by the Act. There are no changes to what existed but new provisions have been added. In particular there is a new object at Article 4.1.10 to encourage and promote traditions and values. The current Memorandum are contained in Articles 2-6 inclusive, 8 and 34.

There are significant changes to the Articles that remove the Ambiguity, are compliant with the Act and the Code, meet Tier 3 criteria and Sport England have confirmed them to be satisfactory. They ensure that Members retain significant influence over management and better define the roles of the Board (currently the Executive Committee) and National Council. The main changes are listed below by reference to the numbering therein preceded by **C** for current Articles and **NC** for National Council Recommended Articles.

NC4.1.10 New object as mentioned above.

NC5 Additional provisions regarding reserves and investments at paras 7, 9 and 10, insurance at para 14, communications at para 18, research at para 20, training at para 22 and regulations at para 24: but all only in furtherance of the Objects.

NC6 Better defines and restricts what payments can be made to Members, officers and employees than the existing provisions in paragraph 4 of the Memorandum.

NC7 New provisions aimed at avoiding or managing conflicts of interest: that is where a Director or Councillor has a personal interest that may conflict with that of the BMC.

NC9 There is no substantive change to provisions about membership categories, applications and subscriptions in C4-8 inclusive, but the wording has been amended on some points of detail to address anomalies.

NC10 Provisions related to termination of membership incorporate minor changes for clarity and new provisions in paras 1 and 8 regarding resignation and reputational damage.

NC11 Provisions about General Meetings are identical to C49 and 50 save that reference to an **Extraordinary General Meeting** is removed because they no longer exist under the Act. Changes to the number of Members who can call a General Meeting were considered, but not included.

NC12 New provisions in para 2 enable National Council to call a General Meeting. Paras 16-18 and 20 are new and clarify procedure for the conduct of a poll.

NC14 Paras 3-12 inclusive contain more detailed provisions about proxy voting and a change to reflect the law that the person appointed does not need to be a Member. Para 13 is new and enables the BMC to introduce electronic voting.

NC15 New provisions enabling Members to pass resolutions in writing which is a legal requirement, albeit probably unworkable in the context of the BMC.

NC16 The role of National Council is redefined. It can challenge the Board and hold it to account, but cannot direct or regulate it. A Memorandum of Understanding between National Council and the Board will determine what is communicated between the two bodies, how and when that is done, to ensure full understanding and agreement. All Councillors must be Members, 5 being Officers elected at a General Meeting, 20 being elected from the 10 Areas and up to 5 co-opted, with the President acting as chair.

NC17 More detailed definition of the role of National Council including the provision for Reserved Matters at para 1.5. See also the list in Appendix 1.

NC18.2 Each Elected Officer shall be appointed for a 3 year term with a maximum of 2 consecutive terms.

NC19.2 Together with Appendix 2 provides for a period of transition from the current Executive Committee to the new Board.

NC19.3 The full Board will comprise 12 individuals including the President (elected at a General Meeting), 3 Councillors (appointed by National Council but subject to the approval of the Members at the next General Meeting of the Members), the CEO, the Chair (nominated by the Board but approved by the Members at a General Meeting), 3 persons nominated by Stakeholders (defined to include Members and 3<sup>rd</sup> parties – but approved by the Members at a General Meeting) and 3 Independent Directors (defined to include Members and 3<sup>rd</sup> parties – but approved by the Members at a General Meeting). Accordingly 11 out of 12 Directors are elected or ratified by the Members in General Meeting, with a minimum of 7 of them and possibly all 12 being Members. The CEO is appointed by the Board.

NC20 Directors are to be elected/ratified for a 3 year term with a maximum of 2 consecutive terms or, in the case of ex-officio directors, until they cease to hold office.

NC21 New provisions define the powers and duties of the Directors subject to the Reserved Matters and Special Resolutions of the Members in General Meeting.

NC22 New provisions relating to the termination of a Director's appointment.

NC23 New provisions relating to the proceedings of Directors include a requirement for a quorum of 5 which must include 1 nominated by National Council and 1 Independent Director. It also provides that the Board will create a Finance Committee, a Nominations Committee and Specialist Committees to replace those already existing, all subject to the approval of National Council. All committees must include at least 1 Director. Subject to confidentiality requirements, minutes of meetings are to be made available to National Council and others upon request and to be published on the website.

NC26 Provides that a Patron can be removed following consultation with National Council in the event of the Patron causing reputational damage.

NC28 The role of Area Meetings is better defined. The Chair and Secretary are elected annually but cannot serve for more than 5 consecutive years. Councillors are elected annually by the Areas and can serve for a maximum of 6 consecutive years.

NC29 As required by company law, annual accounts are adopted/approved by the Board and presented to National Council and the Members in General Meeting.

NC31 Provides for electronic service of notices and excludes service by 2<sup>nd</sup> class post.

NC33 The indemnity provisions cover Directors and Officers, not other employees.

## CONCLUSIONS

1. The current M&A are out-dated and no longer fit for purpose.
2. The Tier 1 Articles are an improvement in terms of legal compliance and some aspects of governance, but transfer powers from National Council to the Board without providing alternative Member protection and are not considered satisfactory by Sport England.
3. The National Council Recommended Articles provide more in terms of legal compliance and governance and they also provide alternative Member protection and influence and are considered satisfactory by Sport England.
4. The risk of abuse of power is addressed by new provisions at NC6 and 7.
5. Governance and legal compliance are respectively improved and ensured by new provisions at NC 16,17 and 21-23 inclusive.
6. Membership empowerment is provided by NC 12.2, 17 and 19.3.
7. Membership engagement is facilitated by NC 14, 17 and 19.3.
8. A balance is struck between management continuity and turnover by NC 18.2, 20 and 28.
9. Membership control is ensured by a minimum of 7 directors being Members and possibly all of them.

10. They are based on extensive consultation undertaken by ORG and are supported by ORG.
11. They are recommended by National Council with the support of the Executive Committee and BMC staff as providing an appropriate governance model to ensure stable and accountable delivery of the work that Members want the BMC to do.
12. They ensure that BMC remains the single umbrella body for Mountaineering in England & Wales and can continue to assist funded Partners.

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