

## **AUCKLAND CENTRAL & SILO MARINAS**

### **BERTH RENTAL TERMS AND CONDITIONS**

#### **1. LICENCE**

1.1 Grant of Licence: Auckland Council grants to the Customer, and the Customer accepts, a licence to use the Berth from the Arrival Date and for the remainder of the Term, subject to the terms and conditions of the Agreement ("Licence").

#### **2. AGREEMENT**

2.1 Agreement terms: The Agreement is comprised of:

- 2.1.1 The completed Berth Rental Form, signed by the Customer and Auckland Council; and
- 2.1.2 the Terms and Conditions,

together, the "Agreement".

2.2 Inconsistency: If there is any inconsistency between the provisions of the documents listed in clause 2.1, the documents shall have the order of priority (to the extent of any inconsistency) in descending order of precedence as set out in clauses 2.1.1 to 2.1.2 (inclusive).

2.3 Variation: Auckland Council may vary the Agreement (or any document comprising the Agreement) by written notice to the Customer, provided such variation is reasonably required to manage the Marina in a safe, effective, and commercially sustainable manner, and the same variation is applied to all berth occupiers within the Marina. Any variation will take effect ten (10) days after the date of the notice. Continued use of the Berth by the Customer following any variation under this clause 2.3 will constitute deemed acceptance by the Customer of the variation and the Customer will be bound by the said variation in conjunction with the Agreement.

#### **3. TERM**

3.1 Term: Subject to clause 3.2, the Agreement shall have effect from the Commencement Date and remain in effect until the earlier of the Expiry Date or the date on which the Agreement is terminated by either party in accordance with these Terms and Conditions ("Term"). For the avoidance of doubt, where the Berth Rental Form for an Auckland Central Marina Berth specifies that the term is 'Ongoing' and does not include an Expiry Date ("Ongoing"), the Agreement will continue indefinitely until terminated by either party.

3.2 Holding Over: Without prejudice to Auckland Council's rights, if Auckland Council permits the Customer to continue to occupy the Berth beyond the Expiry Date, the Agreement will be deemed to be extended on the same terms and conditions except that the Agreement may be terminated by either party at any time upon one (1) Working Day's notice to the other party. During any holding over period under this clause 3.2 Auckland Council may charge the Customer a fee in addition to or in place of the Berthage Fees, payable in advance in the manner stipulated by Auckland Council to the Customer in writing ("Holding Over Fee"). The Holding Over Fee will be determined by Auckland Council and may be an amount greater than the Berthage Fees.

#### **4. AUTHORITY AND APPOINTMENT OF AGENT**

4.1 Warranties: The Customer warrants and undertakes to Auckland Council, at the Commencement Date and continuously throughout the Term of the Agreement, that:

- 4.1.1 It has full power and legal capacity, and has obtained all authorisations and done all things necessary, in order to enter into the Agreement and to perform its obligations under the Agreement;
- 4.1.2 It has full legal title as the owner of the Vessel, and will provide evidence of such ownership that is satisfactory to Auckland Council promptly upon request;
- 4.1.3 It is not aware of anything which will, or is reasonably likely to, prohibit it from performing all of its obligations under this Agreement.

4.2 Agent: Where an agent signs the Agreement on behalf of the Customer, or the Customer appoints an agent to act on its behalf during the Term ("Agent"), the Customer warrants that:

- 4.2.1 The Agent has been expressly authorised in writing to act on behalf of the Customer in relation to the Agreement;
- 4.2.2 The Customer has agreed to grant unlimited authority to the agent to act for the Customer in all matters concerned with, or arising out of, the Agreement and Auckland Council will be entitled to deal with that agent in all respects as if the agent were the Customer (without further enquiry) and the Customer shall be bound accordingly; and
- 4.2.3 Without prejudice to clause 4.2.2, the Customer will, upon request by Auckland Council from time to time, promptly provide documents or evidence satisfactory to Auckland Council as to the identity of the Agent and/or that the Agent is duly and fully authorised in accordance with this clause 4.2.
- 4.3 The Customer may change its Agent by 10 Working Days' notice to Auckland Council at any time during the Term. For the avoidance of doubt this Agreement remains between Auckland Council and the Customer, and the Customer retains responsibility for its obligations and liabilities under the Agreement, notwithstanding the appointment of an Agent or any change in the Customer's Agent.

## **5. CONDITIONS**

- 5.1 The Customer is not entitled to begin using the Berth in accordance with their Licence unless and until the Customer has:
  - 5.1.1 fully completed all applicable sections of the Berth Rental Form to Auckland Council's satisfaction (which shall be evidenced by the Berth Rental Form being signed by both parties, and the guarantor if applicable);
  - 5.1.2 paid to Auckland Council, by their respective due dates, the following:
    - 5.1.2.1 the first invoiced instalment of the Berthage Fees;
    - 5.1.2.2 the Bond in accordance with clause 6, if required; and
    - 5.1.2.3 the Deposit in accordance with clause 7, if required;
  - 5.1.3 delivered to Auckland Council's reasonable satisfaction all information, evidence and documents required by Auckland Council under the Agreement, including evidence of Vessel ownership, evidence of an Agent's authority, an Electrical Warrant of Fitness and related documentation, and/or certificates of currency of insurance; and
  - 5.1.4 brought the Vessel to the Berth on the Arrival Date.
- 5.2 Failure to Meet Conditions: In the event that the Customer fails to meet any of the conditions under 5.1, Auckland Council may terminate the Agreement immediately by notice to the Customer. Auckland Council will use reasonable endeavours to mitigate any loss that it suffers as a result of such termination, however to avoid doubt the Customer acknowledges that termination of the Agreement under this clause 5.2 will not prejudice Auckland Council's rights to recover from the Customer any losses that it suffers as a result (including loss of Berthage Fees) or any other rights which have accrued to Auckland Council prior to termination.

## **6. BOND**

- 6.1 Payment of Bond: Where specified in the Berth Rental Form, the Customer shall pay the Bond to the nominated bank account of Auckland Council on the date specified in the Berth Rental Form, or if no such date has been entered, on the signing of the Berth Rental Form. The method of payment of the Bond will be at Auckland Council's sole discretion. Auckland Council will record and hold the amount of the Bond under a separate ledger, and will retain any interest earned on the amount of the Bond while held.
- 6.2 Increase or Requirement for Bond: Auckland Council reserves the right at any time during the Term by notice to the Customer to require the payment of a Bond, if no Bond has been stated in the Berth Rental Form, or to increase the amount of an existing Bond, and the Customer will pay the Bond or additional amount to Auckland Council's nominated bank account within 10 Working Days.
- 6.3 Use of Bond: Auckland Council may at its sole discretion use and apply some or all of the Bond as compensation for:
  - 6.3.1 the costs of, or incidental to, the repair or replacement of any damage to any part of the Marina or any other object or property caused by the Customer or the Vessel (including to any other vessel, pontoon, ramp or

other object);

- 6.3.2 any amounts owing by the Customer to Auckland Council upon expiry or termination of the Agreement (for any reason), including the Berthage Fees, Outgoings, Holding Over Fees and Container Fees; and
- 6.3.3 any costs or loss incurred by Auckland Council in connection with the Customer's failure to comply with the Customer's obligations under the Agreement.

6.4 Replacement of Bond: In the event that some or all of the Bond is applied by Auckland Council during the Term in accordance with clause 6.3, Auckland Council may require the Customer to pay the amount of the Bond expended (so as to restore the Bond held by Auckland Council to the full sum) upon ten (10) Working Days' notice.

6.5 Refund of Bond: As soon as practicable following the Customer's compliance with all of its obligations under clause 23.1, Auckland Council will refund the Bond, less any amounts applied or allocated for application under clause 6.3, to the Customer's nominated bank account.

## **7. DEPOSIT**

7.1 Payment of Deposit: Where specified in the Berth Rental Form, the Customer shall pay the Deposit to Auckland Council on the date specified in the Berth Rental Form, or if no such date has been entered, at least 14 days prior to the Arrival Date.

7.2 Use of Deposit: Subject to clause 7.3, Auckland Council will hold the Deposit to be applied in payment of the Customer's Berthage Fees for the final month of the Term (or for such other period corresponding to the amount of the Deposit).

7.3 Retention of Deposit:

- 7.3.1 If the Customer gives notice of termination under clause 21.1 at least 14 days prior to the Arrival Date, Auckland Council will refund the Deposit to the Customer less an administration fee of \$50.
- 7.3.2 The Deposit will be forfeited by the Customer and retained by Auckland Council if the Customer:
  - 7.3.2.1 gives notice of termination under clause 21.1 within 14 days (inclusive) of the Arrival Date;
  - 7.3.2.2 fails to meet any of the conditions stated in clause 5.1, including failing to arrive on the Arrival Date, and Auckland Council terminates the Agreement under clause 5.2; or
  - 7.3.2.3 otherwise breaches this Agreement on or prior to the Arrival Date and Auckland Council terminates this Agreement as a consequence.

## **8. BERTHAGE FEES**

8.1 Berthage Fees: In consideration for the grant of the Licence by Auckland Council, the Customer agrees to pay the Berthage Fees to Auckland Council at all times during the Term in advance and in the manner stipulated by Auckland Council to the Customer in writing, without any deduction or setoff.

8.2 Invoices: Auckland Council will invoice the Customer for the Berthage Fees on a monthly basis in advance, or otherwise as stipulated by Auckland Council in writing. The Customer may request that invoices be directed to its Agent, but will remain directly liable for all amounts invoiced. All invoices are due to be paid within 10 Working Days from the date of the invoice. The initial invoice will be issued, and must be paid by the Customer, prior to the Arrival Date.

8.3 Review of Fees: The Customer acknowledges that Auckland Council may, in its sole discretion, propose new Berthage Fees during the Term by giving the Customer not less than one (1) month's written notice ("**Review Notice**"), provided that any proposed increase to the Berthage Fees shall be reasonable. The Customer shall, within ten (10) Working Days of the date of the Review Notice ("**Response Date**"), advise whether or not it accepts the proposed new Berthage Fees. If the Customer does not agree with the proposed new Berthage Fees, then notwithstanding anything contained in the Agreement, Auckland Council may terminate the Agreement by written notice to the Customer, such termination to have effect from the expiry of the Review Notice. In the absence of a response by the Customer, the Customer's continued use of the Berth following the Response Date shall be deemed acceptance of the proposed new Berthage Fees. The new Berthage Fees shall apply from one (1) day after the expiry of the Review Notice.

8.4 Interest: Interest will be charged at the Default Rate for any amounts payable under this clause 8.4 that are unpaid ten (10) Working Days after the due date.

## **9. OUTGOINGS**

9.1 Outgoings: In addition to the Berthage Fees, the Customer agrees to pay all Outgoings to Auckland Council. Payment of Outgoings shall be due on the Expiry Date or seven (7) days after receipt of invoice (whichever is the earlier). To avoid doubt, the rates specified for Outgoings in the Berth Rental Form are the rates at the date that the Berth Rental Form is completed and are subject to change from time to time by Auckland Council.

## **10. USE OF BERTH**

10.1 Right to Berth: Subject to clause 5.1, the Customer's Licence to use the Berth begins from 12:00 PM on the Arrival Date and continues throughout the remainder of the Term.

10.2 No Specific Berth: The Customer is not entitled to any specific berth within the relevant Marina and the Berth allocated to the Customer may be changed from time to time on notice by Auckland Council. Auckland Council will use reasonable endeavours to maintain the continuity of the Berth for the Customer. Subject to clause 10.7, Auckland Council will not licence the Berth to any other person while it is licensed to the Customer.

10.3 Use of Berth: The Customer shall only use the Berth for pleasure boating purposes and not for any commercial or other use or purpose unless Auckland Council at its sole discretion has approved such a use in writing.

10.4 Auckland Council Policies: In using the Berth and exercising the Licence, the Customer shall at all times comply with the applicable requirements of the Auckland Council Policies.

10.5 Customer's Rights: The Agreement relates only to the allocated water space of the Berth (and when applicable allocation of space for a Container). In common with others, the Customer has the right to tie up to the Berth structures including all seawalls, piers, jetties, walkways, pontoons, piles, fingers, gangways, ramps and all other structures and has the right of access in, and the use of, the common waterways and pathways of the Marina, subject to the bylaws relating to the Marina and such regulations and rules as Auckland Council may from time to time specify, during such hours as Auckland Council may specify from time to time, for safety, security and the preservation of good order.

10.6 No Lease: Nothing in the Agreement is intended to or will confer upon the Customer any right as tenant of Auckland Council or of the Berth or of space any Container may occupy or create the relationship of a landlord and tenant or confer any property interest whatsoever between the parties. The Agreement shall be conclusive evidence that the relationship between the parties is that of licensor and licensee and the rights of the Customer as such licensee are fully set forth in the Agreement and no representations or warranties contrary to or inconsistent with the Agreement given by any servant or agent of Auckland Council to the Customer will have any effect.

10.7 Re-Licensing: Auckland Council and the Customer may agree to an arrangement whereby Auckland Council may offer a short-term licence of the Berth to other vessels during periods of the Customer's planned absence from the Berth. Such arrangement will be recorded in writing, and will in any event be subject to the following conditions:

- 10.7.1 While such an arrangement is in place, the Customer must provide Auckland Council with no less than five Working Days' notice of any intended arrival or departure of the Vessel from the Berth;
- 10.7.2 Provided clause 10.7.1 is complied with, Auckland Council will ensure that the Customer's use and enjoyment of the Berth is not impeded by any other person to whom the Berth is re-licensed;
- 10.7.3 Auckland Council will in its sole discretion determine whether to re-lodge the Berth, which persons or vessels it may be re-licensed to, and the terms on which it is re-licensed;
- 10.7.4 Auckland Council will apply a fair proportion of the amount earned from the re-licensing of the Berth to reduce the Customer's Berthage Fees during the relevant period; and
- 10.7.5 Either party may terminate an arrangement under this clause 10.7 immediately upon five Working Days' notice to the other party.

## **11. MAXIMUM DIMENSIONS OF VESSEL**

11.1 Maximum Dimensions of Vessel: The Customer shall at no time allow any part of the Vessel using the Berth (including spars, bowsprits, anchors, davits and tenders or any other thing affixed to the Vessel) to exceed the published or nominal dimensions of the Berth. For the avoidance of doubt, the published or nominal dimensions are less than the physical dimension of the Berth and indicate the maximum dimensions of an occupying vessel.

## **12. ASSIGNMENT AND CHANGE OF OWNERSHIP AND/OR CHANGE IN NOMINATED VESSEL.**

12.1 Transfer & Assignment: Subject to the change of ownership provisions set out in this clause, the Customer will have no right to assign, transfer, sub-let, authorise any other person to use the Berth, or otherwise part with the right to occupy the Berth conferred by the Agreement. For the purposes of this clause 12.1, where the Customer is a limited liability company a change in more than 50% of the shareholding(s) of the Customer from the shareholding(s) in place at the Commencement Date shall be deemed an assignment.

12.2 Change in Vessel Ownership: If at any stage during the Term or during any holding over period, the Customer wishes to sell or transfer the ownership of the Vessel and the subsequent new owner wishes to re-licence the Berth, the Customer must first obtain Auckland Council's prior written consent (which may be withheld by Auckland Council in its sole discretion). If consent is granted, it is subject to the following:

- 12.2.1 New Licence: the Customer procuring from the new owner an executed Berth Rental Form for the Berth prior to the transfer of ownership (in the form used by Auckland Council at that time) on such terms, conditions and rates as Auckland Council may require in its sole discretion; and
- 12.2.2 Fees Outstanding: the Customer paying all Berthage Fees, Holding Over Fees and other amounts owed (including Outgoings) and completing its obligations under the Agreement up to the date of the change of ownership; and
- 12.2.3 Bond: prior to the transfer, Auckland Council procuring from the new owner a bond equivalent to the current bond held on behalf of the Customer.

12.3 Continued Liability: If, for whatever reason, the new Vessel owner does not execute the new Berth Rental Form in accordance with this clause and the Vessel remains in the Berth, then without limiting Auckland Council's rights, the Customer will continue as principal debtor liable to perform all the obligations and pay all amounts owed under the Agreement as if the Vessel was still owned by the Customer. This obligation will continue until the new Vessel owner executes the new Berth Rental Form.

12.4 Survival: This clause 12 will survive, and the obligations and covenants given by the Customer will continue to apply, notwithstanding the re-licensing of the Berth to a new licensee who is owner of the Vessel.

12.5 Changes in Nominated Vessel:

- 12.5.1 Material Changes: Where the Customer proposes to make any material changes to the Vessel during the Term, the Customer must first notify Auckland Council in writing and provide any information requested by Auckland Council about the proposed changes.
- 12.5.2 Mooring a New Vessel: Where the Customer wishes to moor a new vessel in the Berth, the Customer must first provide Auckland Council with written information regarding the new vessel, including the name, type of vessel, dimensions, colour, whether it is equipped with holding tanks and any other information requested by Auckland Council and then, at Auckland Council's discretion, either:
  - a. confirm to Auckland Council that the new vessel will meet all the requirements of this Agreement (including as to ownership, insurance and certification), and obtain Auckland Council's prior written consent to the change of vessel, in which case the new vessel shall become the "Vessel" for the purposes of the Agreement with a corresponding adjustment to the Berthage Fees; or
  - b. enter into a new Berth Rental Agreement in respect of the new vessel.

## **13. DUTIES OF CUSTOMER**

13.1 Customer's Duties: The Customer acknowledges and agrees that at all times during the Term it will:

- 13.1.1 Damage or Nuisance: keep the Vessel on the Berth in such order, condition and state of repair as to prevent it from becoming a nuisance or causing annoyance or damage to any other person or property, and will steer, manage and control the Vessel so as not to damage or cause to be damaged any part of the Marina or any other vessel, person or property. Without limiting the foregoing, the Customer also agrees to keep the Vessel in good, serviceable and seaworthy condition and repair. Whether or not the Vessel complies with the requirements of this clause will be determined by Auckland Council in its sole discretion.

- 13.1.2 Animals: not permit any bird or animal to be kept on the Vessel or at the Marina without the prior written consent of Auckland Council.
- 13.1.3 Swimming or Diving: ensure that Invitees shall not engage in any swimming, diving or underwater activities within the Marina, provided that this shall not prohibit under water maintenance of the Vessel subject to any reasonable directions as Auckland Council may stipulate from time to time.
- 13.1.4 Unlawful Activity: ensure that no unlawful activities are conducted, from or on, the Vessel.
- 13.1.5 Secured Rigging: ensure that all halyards, lines, ropes, rigging and sheets on the Vessel are secured so that they shall not create any noise or nuisance.
- 13.1.6 Noise and Hosting of Parties: not carry on any activity including the hosting of parties on board the Vessel or allow the use of any television, radio, musical apparatus or any other form of sound reproduction, to the extent that such activity creates, or is likely to create, a nuisance to any other person or property, and will immediately cease any such activity upon request by Auckland Council.
- 13.1.7 Loading and Unloading: ensure that the loading and unloading of passengers, goods and other supplies to and from the Vessel are undertaken in a safe and orderly manner and without damage, annoyance, nuisance or disturbance to any person or property.
- 13.1.8 Commercial Activities: not permit the Vessel to be used for any commercial activities (including, but not limited to, permitting the Vessel to be used as a venue for the supply of food and beverage for reward) while the Vessel is situated at the Berth or in the Marina, without the prior written consent of Auckland Council.
- 13.1.9 Sailing and Mooring in Marina: not sail or moor within the Marina and will manoeuvre the Vessel within the Marina in a safe and responsible manner so as to avoid creating a danger, impediment, obstacle or inconvenience to any other users of the Marina or in a manner which obstructs the public right of navigation through the Marina.
- 13.1.10 Storage of Gear on Walkways: not permit or allow any property, gear or equipment under the control or direction of the Customer to be stored on or around the Marina including its walkways, fingers or foreshore thereof without the prior written consent of Auckland Council.
- 13.1.11 Carparking: not park any vehicle in the Marina without Auckland Council's express consent, which consent may be granted subject to conditions specified by Auckland Council. If such consent is granted Auckland Council may at any time and for any reason withdraw such consent by notice to the Customer. Auckland Council may at all times tow unauthorised vehicles on the Marina (such towing and recovery costs to be at the vehicle owner's expense).
- 13.1.12 Security: be solely responsible for the security and safe keeping of its property in the Marina (including the Vessel and its contents and any Container and its contents).
- 13.1.13 Gates and Security Devices: ensure that all gates and other amenity security devices giving access to the Marina (including the Marina walkways and fingers) are securely locked or fastened in accordance with all directions given by Auckland Council from time to time.
- 13.1.14 Proximity Cards: ensure that it takes reasonable care of any proximity card issued by Auckland Council to the Customer for the purpose of accessing the Berth, and notify Auckland Council if a proximity card issued to the Customer is lost or damaged.
- 13.1.15 Alterations and Modifications to the Berth: not make any alterations or modifications or affix any object to the Berth without the prior written consent of Auckland Council.
- 13.1.16 Mooring Lines: ensure that all mooring lines are of a high quality and such standard appropriate for the sea conditions and size of the Vessel and are maintained to Auckland Council's satisfaction. (For the avoidance of doubt, should the mooring lines prove to be inadequate by design or lack of maintenance, no liability shall attach to Auckland Council and the Customer shall keep Auckland Council indemnified against all claims arising therefrom.)
- 13.1.17 Mooring of Other Craft: not allow or permit at any time vessels other than the Vessel to be moored in the Berth and shall not allow any part of the Vessel, including any tender or the like whether fixed on board or moored adjacent to the Vessel to extend beyond the dimensions of the Berth, which shall be delimited at the outer end by the length overall for the Vessel when properly berthed at the Berth.

13.1.18 Statutory Compliance: ensure that the Vessel and all persons associated with the Vessel (including but not limited to the Vessel's crew, any Invitees and any person delivering, loading or unloading any Container) comply with all New Zealand statutes and regulations and all local regulations, rules and by-laws imposed by any duly authorised authority (including, for the avoidance of doubt, Auckland Council) (and including, but not limited to, the Auckland City Consolidated Bylaw 1998 Part 8 – Wharves, the Health and Safety at Work Act 2015 ("HAS"), the Resource Management Act 1991, the Marine Protection Rules of New Zealand and Maritime Rules enacted pursuant to the Maritime Transport Act 1994 and the International Regulations for Preventing Collisions at Sea 1972) and any other provisions passed in substitution for, or in succession to, the above or Acts, Rules and Regulations relating to the use of the Marina and its vicinity.

13.1.19 Minors: ensure that any children under the age of 13 and for whom the Customer or its Invitees are responsible, are accompanied by a person over the age of 18.

13.1.20 Hazardous Substances: ensure that no person or vessel shall enter the vicinity of the Marina with any hazardous substances as defined under the Hazardous Substances and New Organisms Act 1996.

13.1.21 Pollution and Contamination: not pollute or permit pollution by the Vessel of the area in the vicinity of the Marina or discharge into the Marina vicinity any poisonous, noxious, dangerous or offensive substance or thing. Without prejudice to the generality of the preceding sentence, the Customer shall not allow the discharge of any sewage or the emptying of any latrines into the Marina vicinity or otherwise dispose of any garbage, oil, fuel, bilge water, or other material whatsoever on or in the Marina vicinity except into appropriate containers or other receptacles provided by Auckland Council.

13.1.22 Health and Safety: for the purposes of the HAS be responsible for the health and safety of any Invitees when the same are using, visiting or occupying the Marina, and when undertaking any works on the Vessel and/or in the Marina (including when delivering, loading or unloading a Container). Without limiting the foregoing, the Customer acknowledges that it is responsible for ensuring that any contractor invited into the Marina by or on behalf of the Customer has completed any necessary contractor access forms and other induction requirements, as specified by Auckland Council from time to time and that any contractor that carries out work on the Vessel holds sufficient insurance to satisfy the insurance requirements of Auckland Council. The Customer indemnifies and will keep indemnified Auckland Council against all actions, suits, claims, debts, obligations and other liabilities arising out of the activities of any Invitees invited into the Marina by or on behalf of the Customer.

13.1.23 Site Specific Plan: keep and maintain a comprehensive site-specific health and safety plan for its use of the Berth and surrounding Marina areas (including sections covering how it deals with employee safety and training, public safety, contractors and sub-contracts, accidents and incident recording and investigations, hazard identification and control, hazardous materials (including chemicals and solvents), plant and equipment, emergency evacuation procedures). The Customer must produce the plan to Auckland Council upon demand.

13.1.24 Auckland Council Rules, Regulations and Directions: comply with any rules, regulations or directions issued by Auckland Council including any rules relating to the management, navigation, safety, cleanliness or harmonious use of the Marina, as notified by Auckland Council to the Customer from time to time.

13.1.25 Living on Board: ensure that neither the Customer nor any Invitees live anywhere in the Marina other than on the Vessel and then only with the prior written consent of Auckland Council (which consent may be withheld at Auckland Council's sole discretion, or may be granted subject to any conditions that Auckland Council considers appropriate in relation to living on board arrangements). For clarification, staying overnight for more than one (1) night a week shall constitute living on-board. The Customer acknowledges that subletting the Berth and/or Vessel or permitting third parties to stay on board for reward is considered to be a commercial activity for the purposes of clause 13.1.8 (and as such is not permitted without the prior written consent of Auckland Council). A breach of this clause 13.1.25 may constitute a default that is not capable of remedy for the purposes of clause 22.2.

13.1.26 Electrical Warrant of Fitness (EWOF): if the Vessel requires a connection to mains power at the Berth, at all times have a valid EWOF issued for their Vessel. Prior to connecting to any power supply, the Customer shall provide a copy of its EWOF to Auckland Council. The Customer warrants that the EWOF is valid and will ensure a new EWOF is obtained and provided to Auckland Council prior to the EWOF's expiry. If at any time during Term, the Customer's EWOF expires, clause 22 shall apply.

- 13.1.27 Test Tags: ensure that all leads used during the Term, shall be tested and tagged in accordance with ASNZS:3760 prior to being connected and then retested at intervals not exceeding 12 months (if applicable). The tag must be clearly legible and attached to the end of the lead where it is connected to the marina shore power supply. A photo of the tag must be supplied to Auckland Council prior to the Arrival Date, or the Customer must organise an inspection of the power cable on Arrival, as required by Auckland Council.
- 13.1.28 Hard wired electrical connection (Silo Marina Customers ONLY): ensure any electrical connection that is hard wired between the Customer's vessel and the mains power is carried out by a registered New Zealand electrician in a proper workmanlike manner. The Customer warrants to provide written evidence to Auckland Council such as an electrician's certification and/or sign off confirming the hard wire connection has been carried out in accordance with this clause. A breach of this clause may result in this agreement being terminated by Auckland Council in accordance with clause 22 of this Agreement.
- 13.1.29 Fuel Bunkering: Without limitation to its other obligations under this Agreement, the Customer must give Auckland Council at least 24 hours prior notice before any proposed fuel bunkering or related activity at the Marina.

#### **14. CONSTRUCTION AND MAINTENANCE**

- 14.1 Construction and Maintenance: The Customer acknowledges that it will not carry out any construction or maintenance works (other than minor cosmetic maintenance and provided that such work does not create a danger, impediment, obstacle or nuisance to the other customers or users of the Marina) in respect of the Vessel within the Marina without the express written consent of Auckland Council (and provided that such consent may be withheld at Auckland Council's sole discretion). Without limiting the terms and conditions on which Auckland Council may grant consent under this clause, the Customer acknowledges that it will be a condition of any consent granted by Auckland Council that the following conditions must be complied with:
  - 14.1.1 Approval: The Customer will be required to obtain the approval of Auckland Council for each type and stage of construction or maintenance works the Customer undertakes.
  - 14.1.2 Spraying and Grinding: The Customer may not carry out any grinding or spray painting within the Marina whatsoever without the prior written consent of Auckland Council.
  - 14.1.3 Cessation of Work: Auckland Council may in its sole discretion require the Customer to immediately cease any and all construction or maintenance works at any time. The Customer agrees that it will not be entitled to claim from Auckland Council any compensation, loss or damages as a result of Auckland Council exercising its right to require the Customer to cease its construction or maintenance work or by withdrawing its approval at any stage.
  - 14.1.4 Skill and Care: The Customer will be required to carry out and complete the maintenance and construction works with proper skill and care and in accordance with all New Zealand statutes and regulations and all local regulations, rules and by-laws (including the Auckland City Consolidated Bylaw 1998 Part 8 – Wharves) imposed by any properly authorised authority (including, for the avoidance of doubt, Auckland Council acting in its regulatory capacity).
  - 14.1.5 Works Undertaken: The Customer warrants that the construction and maintenance works will follow sound and accepted boat building engineering and electrical practices and will at all times ensure that all works are undertaken with the supervision of competent and properly qualified boat builders, electricians, designers and/or engineers.
  - 14.1.6 Berth Area: The Customer must ensure that the construction and maintenance works at no time interrupt, interfere with or limit the quiet enjoyment of other Marina users, that noise is kept to a minimum so as not to cause a nuisance, and that the works do not extend beyond the dimensions of the Berth (which shall be delimited at the outer end by the length overall for the Vessel when properly berthed at the Berth).
  - 14.1.7 Inspection: Auckland Council will be entitled to inspect the construction and maintenance works at all reasonable times.
  - 14.1.8 Health and Safety: The Customer must ensure that it and all contractors and subcontractors involved in the construction and maintenance works have adequate health and safety policies and procedures for the type of construction and maintenance works being undertaken and that its contractors and subcontractors are adequately instructed on the Customer's own health and safety policy and procedures.

14.1.9 **Safety and Environmental Rules:** The Customer and the Invitees must observe the Auckland Council Policies and all other rules, policies and procedures relating to the use of the Berth for construction and maintenance purposes,. For the avoidance of doubt, any breach of such a rule, policy or procedure is a breach of this Agreement entitling Auckland Council to give notice under clause 22.2 and to otherwise exercise its applicable rights under the Agreement.

## **15. CONTAINER USE AND STORAGE**

15.1 **No Containers Permitted:** The Customer acknowledges that it shall not store, deposit or bring any cargo container or other similar storage unit (“**Container(s)**”) onto any part of the Marina at any time without the prior written consent of Auckland Council (which consent may be withheld at Auckland Council's sole discretion). Without limiting the terms and conditions on which Auckland Council may grant consent, the Customer acknowledges that it will be a condition of any consent granted by Auckland Council that the following conditions must be complied with:

15.1.1 **Container Licence:** The Container will be placed in the position indicated by Auckland Council. The licence to place the Container at the Marina will be for such a term as will be agreed upon at that time with Auckland Council and thereafter upon a daily basis terminable by either party on one (1) day's prior written notice. Should the Customer not remove the Container upon termination of the Container licence term, Auckland Council will be entitled to deal with the Container in accordance with the provisions of clause 15.1.4 (without prejudice to any other right or remedy available to Auckland Council under the Agreement or at law).

15.1.2 **Payment of Container Fees and Term:** The Customer must pay the Container Fees in advance and otherwise in the manner stipulated by Auckland Council.

15.1.3 **Location of Container:** If, for whatever reason, Auckland Council requires the Container to be moved from its existing location (including for the staging of public events or for emergencies), the Customer must immediately arrange for the Container to be moved at the Customer's cost. Auckland Council reserves the right to close all or any part of the Marina at any time without notice, which may result in a loss of access to the Container.

15.1.4 **Auckland Council May Action:** If the Customer fails to move the Container immediately as required by Auckland Council, Auckland Council may arrange for the Container to be moved at the Customer's risk and/or remove the Container and place it into storage off-Marina with a reputable container storage company determined by Auckland Council. If Auckland Council moves the Container, Auckland Council does so as the duly authorised agent of the Customer. The Customer agrees that all costs associated with moving or removing the Container (whether undertaken by Auckland Council or the Customer) and the storing of the Container with a reputable container storage company shall be payable by the Customer.

15.1.5 **Loading and Unloading:** The Customer shall ensure that the loading and unloading of goods and property to and from the Container are undertaken in a safe and orderly manner and without damage, annoyance, nuisance or disturbance to any person or property.

15.1.6 **State of Repair and Inspection:** The Customer must ensure that the Container is kept securely locked and sealed and in a clean and tidy state of repair at all times. The Customer must not under any circumstances store any goods in the Container that are hazardous, illegal, stolen, flammable, explosive, environmentally harmful, perishable, or which may attract vermin, cause a nuisance or put the Marina or any person or thing in such area, at risk.

15.1.7 **Inspection:** Auckland Council will at all reasonable times be entitled to inspect the interior of the Container and all goods and property stored in the Container.

15.1.8 **Risk and Indemnity:** The Container shall be stored entirely at the risk of the Customer and Auckland Council takes no responsibility for break-ins or theft of property that may be stored in the Container or of the Container itself. The Customer hereby indemnifies and will keep indemnified Auckland Council against all actions, suits, claims, debts, obligations and other liabilities arising as a result of the Container being used, stored, moved or removed, including for any action, suit, claim, debt, obligation or other liability arising as a result of the type of property stored in the Container.

15.1.9 **No Compensation:** Auckland Council shall not be liable for any damages or to pay any compensation to the Customer for any closure of the Marina or for any moving or removal of the Container (including for the storage of the Container with a container storage company in accordance with clause 15.1.4 or for any damage to the Container or the contents of the Container during any such move or removal).

- 15.1.10 No Warranty: The Customer acknowledges that Auckland Council gives no warranty that the Marina will be suitable or adequate for the storage of the Container.
- 15.1.11 Damage: The Customer will be responsible for all damage to persons using the Marina and to docks, structures, pilings or property in the Marina and/or vessels and persons using the Marina arising from any act or omission, neglect or default by the Customer or the Invitees relating to the use, storage, moving or removal of the Container (including for the storage of the Container with a container storage company in accordance with clause 15.1.4 or for any damage to the Container or the contents of the Container during any such move or removal or for any damage caused whilst in storage with the container storage company).
- 15.1.12 Insurance: Without limiting the Customer's other insurance obligations set out in the Agreement, the Container (if owned by the Customer) and all property in the Container must be fully insured by the Customer, and the Customer must effect and maintain public liability insurance to cover all loss resulting from the use, storage and moving/removal of the Container (including moving or removal by Auckland Council as its duly authorised agent) within or from the Marina. The Customer must, if requested by Auckland Council provide Auckland Council with a detailed certificate of currency for such policies.

## **16. ALTERNATIVE MOORING**

- 16.1 Vacate Mooring: The Customer acknowledges that Auckland Council may at any time require the Customer to vacate the Berth for such period or periods as stipulated by Auckland Council in its sole discretion as may be necessary to allow repairs or maintenance to be carried out, to facilitate the staging of public events within the Marina, or for any other reason in connection with the operation of the Marina (including in any emergency or for the purposes of Port Operations) provided that Auckland Council will use all reasonable endeavours to provide an alternative mooring or berthing within the Marina for the use of the Customer and the Vessel during the relevant period. The Customer acknowledges that Auckland Council may close all or any part of the Marina from time to time in its sole discretion. Auckland Council shall not be liable to pay any compensation to the Customer in respect of any relocation or closure pursuant to this clause 16.1.
- 16.2 Removal of Vessel: Where Auckland Council has used reasonable endeavours to contact the Customer regarding a requirement to vacate the Berth pursuant to clause 16.1, and Auckland Council is unable to make contact with the Customer or the Customer otherwise fails to relocate the Vessel as required, Auckland Council is entitled to remove the Vessel from the Berth. The Customer consents to Auckland Council doing all things necessary to effect such removal at the Customer's risk. If any agent, employee or contractor of Auckland Council moves the Vessel in accordance with this clause, such individual shall for the purposes of this clause be deemed to be acting as the duly authorised agent of the Customer and shall not be liable in negligence or otherwise for any damage to or loss or theft of the Vessel or property which occurs as a result of moving the Vessel and shall be indemnified by the Customer against such liability. Auckland Council may, at its discretion, charge the Customer for any costs that Auckland Council incurs in removing a Vessel pursuant to this clause 16.2, and the Customer agrees to pay such charges.
- 16.3 Extreme Emergencies: Notwithstanding clauses 16.1 and 16.2, in extreme emergencies Auckland Council reserves the right to take whatever steps it considers are required, in its sole and absolute discretion, to promote the integrity and safety of the Marina.

## **17. INSURANCE**

- 17.1 Customer to Insure: The Customer warrants that at all times during the Term it will effect and maintain insurance on appropriate terms, and with one or more reputable insurer(s) reasonably acceptable to Auckland Council, of the following kinds:
  - 17.1.1 Protection and Indemnity Insurance: public liability protection and indemnity insurance for an amount of not less than ten million dollars (\$10,000,000.00) or such greater amount as Auckland Council shall require, to cover any third party loss caused by the Customer, its Invitees or the Vessel including death and/or bodily injury to persons and loss or damage to property of others arising out of the use of the Vessel and/or use and occupation of the Marina;
  - 17.1.2 Marine Hull Insurance: marine hull insurance in respect of the Vessel, to cover any loss or damage to the Vessel, including loss or damage by fire, storm, tempest, typhoon, Act of God and all other usual maritime risks including hull and machinery, explosion, removal of wreck cover, and that it will maintain such insurance for an amount that is satisfactory to Auckland Council, acting reasonably; and

- 17.1.3 Other Insurance: appropriate insurance cover for any property (other than the Vessel) that the Customer (or any Invitee) brings into the Marina, as required by Auckland Council.
- 17.2 Proof of Insurance: The Customer will provide Auckland Council with a detailed certificate of currency for each insurance policy effected pursuant to clause 17.1. Such certificates of currency must be provided on execution of the Agreement, each time that a policy is renewed or amended in any way, and promptly (and in any event within 5 Working Days) upon the request of Auckland Council from time to time. Any certificate of currency provided by the Customer pursuant to this clause must contain, at a minimum, details of the insured entity, period of insurance, type of insurance, name of the insurer, a policy number, and confirmation of the amount of insurance. Failure by the Customer to comply with this clause 17.2 at any time will entitle Auckland Council to immediately terminate the Agreement by notice to the Customer.
- 17.3 Contractor Insurance: The Customer must ensure and accepts responsibility to ensure that any Invitee invited or permitted into the Marina by the Customer for the purpose of carrying out work on the Vessel in the Berth holds sufficient insurance to satisfy the insurance requirements of Auckland Council.

## **18. RISK**

- 18.1 Mooring at Customer's Risk: Any Vessel moored at the Berth at any time will be moored entirely at the risk of the Customer and at all times while on or adjacent to the Marina shall remain at the risk of the Customer. Auckland Council shall not, whether directly, indirectly or vicariously, nor shall any servant, agent or employee of Auckland Council be liable in negligence or otherwise for any damage to or theft or loss of the Vessel or any tackle, goods, gear, machinery or other property thereon whilst at the Berth or in or around the Marina no matter how or from what cause such loss or damage may arise or occur including (but without limiting the generality of the foregoing) loss or damage caused or contributed to by the use or removal of the Vessel by any person not authorised by the Customer to so use or remove it whether such use or removal shall be permitted by Auckland Council or not.
- 18.2 Damage: The Customer agrees that it will be responsible for all damage to persons using the Marina and to docks, structures, pilings or property in the Marina and/or vessels and persons using the Marina arising from any act or omission, neglect or default by the Customer or its Invitees or otherwise resulting from the use or storage of the Vessel.
- 18.3 Customer Acknowledgements: Without limiting the generality of the foregoing, the Customer acknowledges and agrees that:
  - 18.3.1 At Own Risk: it is required to take all reasonable care in its activities within the Marina and understands that there are hazards within the Marina that are inherent in a marina environment and cannot be eliminated. To the fullest extent permitted by law, Auckland Council makes no warranty whatsoever as to the condition of the shipways and Marina and their buildings, piers, walkways, pontoons, gangways, cranes, hoists, ramps, mooring gear and other facilities provided for berthing, storage, and mooring in connection with the Marina and the Berth ("**Facilities**") and the Customer agrees that it will use the Facilities solely at its own risk. The Customer acknowledges that Auckland Council gives no warranty that the Marina will be suitable or adequate for the mooring of the Vessel at, or the departure of the Vessel from, the Berth, due to the wave and swell action and disturbance resulting from the exposed nature of the Marina or created by passing navigation. To the fullest extent permitted by law, the Customer further acknowledges that it will indemnify Auckland Council for all risks and damages Auckland Council may suffer in relation to any claim or demand of any kind from all liability, which may arise in respect of such risks. The Customer agrees that it has either examined the Marina and Berth or waives its right to do so and relies on its own judgment in accepting the use of the same and acknowledges it does not rely on statements or representations made by Auckland Council (including its officers, agents and employees) or by anyone on Auckland Council's behalf.
  - 18.3.2 No Claim: during the Term there will be other activities whether or not associated with Auckland Council occurring in and around the Marina including, but not limited to, the moving of boats, onshore entertainment and partying and the Customer shall have no claim against Auckland Council and Auckland Council shall have no liability in relation to the same notwithstanding that the activities may interfere with the Customer's use, occupation and quiet enjoyment of the Berth.
- 18.4 No bailment: The terms and conditions of the Agreement are not in any way intended by either party to create a bailment, and the Customer understands that Auckland Council accepts no responsibility for the care or protection of the Vessel, any Container, or their contents.

## **19. INDEMNITY AND RELEASE**

19.1 Customer Indemnity: The Customer hereby indemnifies and will keep indemnified Auckland Council against all losses, expenses, legal liability including any legal claims, damages, expenses, collection costs and other liabilities, including any costs incurred by Auckland Council (whether direct, indirect or consequential), on a solicitor and own client basis, in enforcing the Agreement or otherwise arising out of the Agreement or of any act or omission of the Customer or his servants, agents, employees, invitees or licensees. Additionally, the Customer agrees to compensate, recompense, pay, indemnify and hold indemnified Auckland Council and third parties against loss or damage to the Berth or Marina or any of the Facilities or any vessels moored or remaining therein or to any other person or property which is caused by or results from the acts or omissions of the Customer or its Invitees.

19.2 Third Party Loss: Auckland Council shall not be liable and accepts no responsibility for consequential loss, loss or damage to boats, craft, third party property or persons using the same within the confines of, or near to the Marina and Auckland Council shall not be liable to the Customer or any person for any loss or damage incurred or suffered within the Marina however the same occurs and whether or not such happening is attributable to the acts, defaults or negligence of Auckland Council, or its servants or agents or contractors or otherwise howsoever.

## **20. AUCKLAND COUNCIL AS REGULATORY AUTHORITY:**

20.1 Auckland Council as Regulatory Authority: Nothing in the Agreement will limit or affect the powers, duties and obligations of Auckland Council as a regulatory authority under the Resource Management Act 1991, the Building Act 2004, or any other relevant statute, regulation or bylaw. The Customer will not be entitled to claim from Auckland Council (being a council-controlled organisation of Auckland Council) any compensation, loss or damages where, as a result of Auckland Council having lawfully exercised its statutory duties, the Marina or Berth are affected in any way.

## **21. TERMINATION BY CUSTOMER**

21.1 Cancellation before Arrival: The Customer may terminate this Agreement for convenience immediately by notice to Auckland Council at any time prior to the Arrival Date. Cancellation under this clause may result in the forfeiture of some or all of the Deposit pursuant to clause 7.3.

21.2 Cancellation during Licence: The Customer may terminate this Agreement for convenience at any time following the Arrival Date by giving notice to Auckland Council of no less than:

- 21.2.1 10 days, in the case of a Silo Berth or a Short-Term Auckland Central Marina Berth; or
- 21.2.2 30 days, in the case of a Long-Term Auckland Central Marina Berth.

21.3 Cancellation of Ongoing Arrangement: Where this Agreement relates to a Long-Term Auckland Central Marina Berth that is specified as Ongoing, and the Customer exercises the right to terminate under clause 21.1 within 12 months of the Arrival Date, the Customer will be liable to Auckland Council immediately upon termination for the Early Termination Fee. The Customer acknowledges the importance of Auckland Council's ability to plan and accommodate arrangements for the long-term use of its Auckland Central Marina Berths and agrees that the Early Termination Fee is not a penalty but a pre-estimate of the cost to Auckland Council of the Customer prematurely terminating the Agreement. Auckland Council's right under this clause 21.3 is without prejudice to any other right or remedy available to Auckland Council under this Agreement or at law.

## **22. TERMINATION BY AUCKLAND COUNCIL**

22.1 Termination for Convenience: Auckland Council may terminate this Agreement for convenience at any time by giving notice to the Customer of no less than:

- 22.1.1 7 days, in the case of an Auckland Central Marina Berth; or
- 22.1.2 14 days, in the case of a Silo Berth.

22.2 Termination for Breach: If the Customer is at any time in breach of this Agreement, Auckland Council may issue to the Customer a notice of default setting out the nature of the default and, if in Auckland Council's opinion the default can be remedied, how it can be remedied ("Default Notice"). Auckland Council may terminate the Agreement immediately by written notice to the Customer if:

- 22.2.1 the default is not remedied to Auckland Council's reasonable satisfaction within seven (7) days of delivery of the Default Notice (or such other time period specified in the Default Notice);

- 22.2.2 the default is, in Auckland Council's opinion, not capable of being remedied; or
- 22.2.3 the Customer has breached the Agreement three (3) or more times in any twelve (12) month period, irrespective of whether those breaches have each been subject to a Default Notice.

22.3 Auckland Council's Rights Affected: If Auckland Council's entitlement to manage, use, occupy and/or licence the use of the Marina is terminated for any reason, Auckland Council may terminate the Agreement immediately by written notice to the Customer.

22.4 Other Rights of Termination: Notwithstanding clause 22.3, but without prejudice to any other rights of termination Auckland Council may have under the Agreement, Auckland Council may terminate the Agreement immediately by written notice to the Customer in accordance with the provisions of:

- 22.4.1 clause 5.2 (relating to pre-conditions);
- 22.4.2 clause 8.3 (relating to review of the Berthage Fees);
- 22.4.3 clause 13.1.28 and/or clause 24 (relating to electrical requirements and/or power supply); or
- 22.4.4 clause 17.2 (relating to the Customer's currency of insurance).

### **23. CONSEQUENCES OF TERMINATION**

23.1 Effect of Termination: Upon termination of the Agreement (for whatever reason) or upon the expiry of the Term, the Customer will immediately:

- 23.1.1 pay all Berthage Fees, Holding Over Fees, Container Fees, Outgoings, the Penalty Fee (if applicable) and all other amounts payable by the Customer to Auckland Council under this Agreement as a debt due and owing; and
- 23.1.2 remove the Vessel, any Container and all other goods and effects of the Customer from the Marina.

23.2 Removal, storage and sale: If the Customer does not remove the Vessel, any Container or other goods and effects upon termination or expiry in accordance with clause 23.1, Auckland Council may in its sole discretion exercise any or all of the following rights without further notice to the Customer:

- 23.2.1 Store the Vessel and Goods: Auckland Council may enter onto and remove the Vessel and/or goods to any place it so wishes and if required, to contract for their safekeeping and for the payment of storage and insurance fees as agent for the Customer;
- 23.2.2 Impound Vessel: Auckland Council may lock and/or impound the Vessel and store it in such place (including on Marina hardstand) as it sees fit;
- 23.2.3 Containers: Auckland Council may remove any Container in accordance with clause 15; and
- 23.2.4 Sell the Vessel: Auckland Council may offer the Vessel (and all of the goods and effects of the Customer) for sale by public auction or private contract and apply such of the proceeds of any resulting sale: first in satisfaction of Auckland Council's expenses incurred in the removal and or storage including administrative expenses, legal costs (on a solicitor and own client basis) and the cost of providing custodians; secondly in or towards satisfaction of any debts or liabilities owed by the Customer to Auckland Council; and thirdly to the Customer. The Customer hereby irrevocably appoints Auckland Council to be the attorney of the Customer to execute all documents and to do all things as are necessary to give effect to such sale,

provided that nothing in this clause 23.2 restricts or otherwise affects the parties' rights under the Admiralty Act 1973 or otherwise at common law.

23.3 Acknowledgement of Term: The Customer further acknowledges and agrees:

- 23.3.1 Costs: that all costs, fees, charges and expenses (including legal costs and expenses on a solicitor and own client basis) incurred by Auckland Council pursuant to clause 23.2, or otherwise in respect of such removal or incurred by Auckland Council in relation to the Customer's breach of any term, condition, or provision of the Agreement (including the breach of any rule or regulation made pursuant to the Agreement or any bylaw under which the Marina operates) will be payable by the Customer immediately upon demand and that Auckland Council will not be required to release the Vessel, or any goods or Containers until such time as all costs and fees have been paid in full; and

23.3.2 Indemnity: that it will indemnify Auckland Council against all liability for costs, fees, charges and expenses incurred in respect of removal, impounding, storage or sale pursuant to clause 23.2 or any matter arising there from and that anything done by Auckland Council pursuant to this clause shall be deemed to be done as agent for, and at the risk and cost of, the Customer.

23.4 Survival: Termination or expiry of the Agreement shall not affect clauses 5.2, 6.3, 6.5, 7.3, 12, 13.1.22, 15, 18, 19, 21.3, 23, 24, 25, 27.2, 28 and 29, and any other clauses intended by their nature to survive termination or expiry, will remain in effect. To avoid doubt, the parties acknowledge that termination or expiry of the Agreement does not affect any rights of a party that have accrued prior to termination or expiry.

## **24. DISCONNECTION OF POWER SUPPLY**

24.1 Inspection: Auckland Council may at any time upon 24 hours' notice to the Customer carry out an inspection and review of the Vessel's electrical systems, including any system on board the Vessel and any connection between the Vessel and the Marina.

24.2 Notice to disconnect mains power: Auckland Council in its complete discretion as a regulated power supplier under this Agreement may, if it considers the Customer to be in breach of any requirement relating to the supply of power (whether or not any inspection under clause 24.1 has been carried out), give notice to the Customer setting out the nature of the breach ("**Disconnection Notice**"). If the breach as detailed in the Disconnection Notice is not remedied to Auckland Council's satisfaction within seven (7) days from the date of the Disconnection Notice (or other time period specified in the notice) ("**Disconnection Period**") or is in Auckland Council's opinion not capable of being remedied, then Auckland Council may immediately disconnect the power supply to the vessel without further notice to the Customer.

24.3 Risk of loss due to disconnection of power: In the event that the mains power is disconnected to the Vessel by Auckland Council after serving a Disconnection Notice, the Customer releases Auckland Council from any liability and indemnifies Auckland Council in respect of any and all loss or damage to the Vessel or the Customer's property whether direct or consequential resulting from the disconnection of power. Auckland Council shall not be liable in negligence or otherwise for any damage resulting to the Customer's equipment (including but not limited to power sources or batteries) in the event that the power to the vessel is terminated as a result of a breach of the Agreement by the Customer or in accordance with this clause 24.

## **25. NOTICES**

25.1 Service on Customer: Where Auckland Council is required to give notice to or communicate in any way with the Customer, Agent or Guarantor, such notice or communication shall for all purposes be deemed sufficiently made, given, served or communicated if given in writing and either:

- 25.1.1 affixed upon the Vessel; or
- 25.1.2 delivered personally or by courier to the Customer or the Customer's Agent, at the Customer's Address; or
- 25.1.3 emailed to the Customer or the Customer's Agent, at the Customer's Email Address,

and any notification under this clause 25.1 shall be deemed to have been delivered and received: a) if affixed upon the Vessel, three (3) days after it is so affixed; b) if delivered personally or by courier, when delivered; or c) if emailed, at the time the email enters the recipient's information system and is not returned undelivered or as an error.

25.2 Service on Auckland Council: Where the Customer is required to give any notice or request or other communication to Auckland Council under this Agreement, the same must be made in writing and either:

- 25.2.1 delivered personally or by courier to Auckland Council's address for service being Level 1, 220 Quay Street, Auckland, New Zealand, or any updated address notified by Auckland Council from time to time; or
- 25.2.2 emailed to Auckland Council at the Marina email address stated on Berth Rental Form or as otherwise notified to the Customer,

and any notification under this clause 25.2 shall be deemed to have been delivered and received: a) if delivered personally or by courier, when delivered; or b) if emailed, at the time the email enters the recipient's information system and is not returned undelivered or as an error.

## **26. FORCE MAJEURE**

26.1 Force Majeure: Auckland Council shall not be deemed to be in breach of the Agreement or otherwise be liable to the Customer, by reason of any delay in performance, or non-performance, of any of its obligations under the Agreement to the extent that any such delay or non-performance is due to any event outside the reasonable control of Auckland Council, and the time for performance of that obligation shall be extended accordingly.

## **27. PRIVACY**

27.1 Information: The Customer authorises Auckland Council to obtain and collect any relevant information about the Customer from any persons (including credit reference agencies) and to use this information and any information about the Customer already held by Auckland Council for purposes associated with the Agreement. The Customer has the right to access personal information (within the meaning of the Privacy Act 2020) held by Auckland Council and to request correction of any errors in that information.

27.2 Default or termination: The Customer authorises Auckland Council, upon default under the Agreement by the Customer or on termination of the Agreement, to disclose to the membership of the Marina Operators Association of NZ Inc any personal information held by Auckland Council about the Customer.

## **28. MARKETING**

28.1 Marketing: The Customer authorises Auckland Council to send it newsletters and other promotional and marketing material from time to time.

28.2 Promotional materials: Auckland Council may, with the consent of the Customer, create images, video and other media depicting the Vessel at the Marina and may retain, use and publish these in Auckland Council's informational, marketing and promotional materials.

## **29. GUARANTEE**

29.1 Guarantor may be Required: Where Auckland Council requires a guarantor under this Agreement, as indicated on the Berth Rental Form, this Agreement is conditional on the Customer procuring that the Guarantor also sign the Berth Rental Form and provide the guarantee and indemnity under this clause 29.

29.2 Guarantee: In consideration of Auckland Council entering into the Agreement at the Guarantor's request, the Guarantor guarantees the payment of the Berthage Fees and all other amounts payable by the Customer under this Agreement, guarantees the performance by the Customer of the covenants in the Agreement, and agrees upon demand to indemnify and hold harmless Auckland Council in respect of any monies owed or other loss Auckland Council might suffer upon default of the Customer or should the Agreement be lawfully disclaimed or abandoned by any liquidator, receiver or other person.

29.3 Covenants: The Guarantor irrevocably covenants with Auckland Council that:

- 29.3.1 as between the Guarantor and Auckland Council, the Guarantor may for all purposes be treated as the Customer and Auckland Council shall be under no obligation to take proceedings against the Customer before taking proceedings against the Guarantor;
- 29.3.2 this guarantee and indemnity shall extend to any holding over by the Customer;
- 29.3.3 this guarantee and indemnity is for the benefit of and may be enforced by any person entitled for the time being to receive the Berthage Fees and any other monies due under the Agreement; and
- 29.3.4 the Guarantor's obligations are not released, reduced, or affected by any change to the terms of the Agreement, or settlement, waiver or agreement with the Customer, whether or not such change, settlement, waiver or other agreement is notified to the Guarantor.

## **30. MISCELLANEOUS**

30.1 Amendments: Subject to clause 2.3, no amendment or variation to this Agreement will be effective unless it is in writing and signed by Auckland Council and the Customer.

30.2 Waiver: No delay or omission by a party to exercise any right under this Agreement shall constitute a waiver of that right. Any waiver of a right will be signed and in writing, and shall not constitute a waiver of any subsequent or continuing right. No single or partial exercise of a right shall restrict the further exercise of that or any other right.

30.3 Severability: If any of the Agreement's terms are or become void or unenforceable, then those terms will be severed

from the Agreement and replaced with terms that validly and enforceably accomplish (to the extent possible) those terms' objectives, and in that case the rest of the Agreement will remain valid and enforceable.

- 30.4 Entire agreement: This Agreement constitutes the entire agreement of the parties and supersedes all prior agreements and representations (whether oral or written) given by or made between the parties, relating to the matters dealt with in this Agreement.
- 30.5 New Zealand Law: The Agreement is subject to New Zealand law and the parties irrevocably submit to the non-exclusive jurisdiction of the New Zealand courts in any proceedings relating to the Agreement.
- 30.6 Counterparts: This Agreement may be executed in counterparts, including facsimile or scanned PDF counterparts, which, when executed, will constitute and be read as one document. Each party consents to the use of electronic signatures as a means of legally effective execution, and consents to receiving a counterpart of this Agreement in electronic or digital form.

### **31. DEFINITIONS AND INTERPRETATION**

- 31.1 **Definitions:** In these Terms and Conditions, unless the context otherwise requires:

**"Agent"** means a named agent appointed by the Customer in accordance with clause 4.2.

**"Agreement"** has the meaning given to it at clause 2.1.

**"Berth"** means the berth allocated to the Customer by Auckland Council from time to time.

**"Berthage Fees"** means the applicable daily fee (plus GST), payable for the Licence of the Berth from the Arrival Date until the end of the Term, as set out in the Berth Rental Form (or as amended in accordance with clause 8.3).

**"Berth Rental Form"** means the document titled "Berth Rental Form" and which contains details regarding the Customer, Vessel, insurance, and other berth licence arrangements, and is signed by the Customer (or the Agent on the Customer's behalf) and Auckland Council.

**"Bond"** means the bond payable by the Customer to Auckland Council as set out in the Berth Rental Form or as otherwise required by Auckland Council in accordance with clause 6.2.

**"Commencement Date"** means the date on which the Berth Rental Form is signed by the Customer (or Agent for the Customer) and Auckland Council.

**"Container"** has the meaning given to it at clause 15.1.

**"Container Fee(s)"** means the daily fee plus GST payable in respect of the storage of each cargo container on the Marina as set out in the Berth Rental Form.

**"Customer"** means the person or entity named as such in the Berth Rental Form, being the Vessel owner, and includes the Customer's executors, administrators, successors, permitted assigns and agents.

**"Customer's Address"** means the Customer's physical address as detailed on the Berth Rental Form or as updated by the Customer from time to time by notice.

**"Customer's Email Address"** means the Customer's email address as detailed on the Berth Rental Form or as updated by the Customer from time to time by notice.

**"Default Notice"** has the meaning given to it at clause 22.2.

**"Default Rate"** means Auckland Council's bank overdraft interest rate plus a further 4% per annum.

**"Deposit"** means the deposit payable by the Customer to Auckland Council of the amount set out in the Berth Rental Form or, where no amount is specified, of an amount equal to the Berthage Fees for a period of thirty (30) days.

**"Disconnection Notice" and "Disconnection Period"** have the meanings given to those terms at clause 24.1.

**"Early Termination Fee"** means a fee equal to the difference between the applicable Berthage Fees for a Short-Term Auckland Central Marina Berth and a Long-Term Auckland Central Marina Berth, in respect of the Vessel, for the period running from the Arrival Date to the date of termination.

**"Auckland Council Policies"** means any Auckland Council rules, bylaws or policy document published or administered by or on behalf of Auckland Council for the purpose of managing the Marina, as updated from time to time, and includes the

Marinas User Guide.

**"Expiry Date"** means the Date of Departure as specified in the Berth Rental Form.

**"Facilities"** has the meaning given to it at clause 18.3.1.

**"GST"** means goods and services tax levied pursuant to the Good and Services Tax Act 1985 or any alternative tax levied in substitution of that tax.

**"Guarantor"** means, if applicable, the person named as guarantor in the Berth Rental Form.

**"HAS"** means the Health and Safety at Work Act 2015.

**"Holding Over Fee"** has the meaning given to it in clause 3.2.

**"Invitees"** means any of the Customer's agents, servants, contractors, subcontractors, employees, licensees, guests, passengers or other invitees.

**"Licence"** has the meaning given to it at clause 1.1.

**"Marina"** means the wharves, berthage and associated access ways within the Silo Marina and Auckland Central Marina, which are managed by Auckland Council.

**"Ongoing"** has the meaning given to it at clause 3.1.

**"Outgoings"** means the cost of all services supplied to, or used by the Customer in the Marina (including but not limited to power, water, sewerage, rubbish collection and any pump out services which may be supplied) during the Term at the rate(s) specified by Auckland Council from time to time plus GST.

**"Auckland Council"** means Auckland Council Development Auckland Limited, its successors or its nominee and where the context so permits or requires includes its servants or agents.

**"Port Operations"** means all customary commercial and leisure activities, uses and developments carried on in an international seaport at any time during the Term in accordance with prevailing practices and trends for the time being, whether involving the use of light or heavy machinery, equipment, vehicles, vessels or otherwise.

**"Silo Berth"** means a Berth at the Silo Marina, which may be Short-Term or Long-Term, as respectively indicated in the Berth Rental Form.

**"Term"** means the period set out in clause 3.1.

**"Terms and Conditions"** means these Berth Rental Terms and Conditions, as updated by Auckland Council from time to time in accordance with clause 2.3.

**"Vessel"** means the vessel (including any tackle, goods, gear, machinery, fittings or other property thereof) named and described in the Berth Rental Form.

**"Auckland Central Marina Berth"** means a Berth at Auckland Central Marina, which may be Short-Term or Long-Term, as respectively indicated in the Berth Rental Form.

**"Working Day"** means any day of the week in New Zealand other than a Saturday, Sunday, or public holiday (as defined in the Holidays Act 2003) in Auckland; or a day in the period commencing with 24 December in any year and ending 5 January in the following year. A Working Day shall be deemed to commence at 9:00am and to end at 5:00pm (New Zealand local time).

31.2 **Interpretation:** In these Terms and Conditions, unless the context indicates otherwise:

31.2.1 Words in the singular include the plural and vice versa. Words of one gender include the other genders.

31.2.2 References to persons include references to individuals, companies, corporations, partnerships, firms, joint ventures, associations, trusts, organisations, governmental or other regulatory bodies or authorities or other entities in each case whether or not having separate legal personality.

31.2.3 References to any statutory provision include any statutory provision which amends or replaces it, and any subordinate legislation made under it.

31.2.4 References to clauses are references to clauses in the Terms and Conditions.

31.2.5 All references to dollars are references to New Zealand dollars unless provided otherwise.

- 31.2.6 Any obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done.
- 31.2.7 The term "including" means including without limitation.
- 31.2.8 Section, clause and other headings are for ease of reference only and do not form any part of the context or affect the Agreement's interpretation.