

## VIADUCT & SILO MARINAS

### TERMS AND CONDITIONS

#### 1. Licence

1.1 Grant of Licence: Eke Panuku grants to the Customer a licence to use the Berth for the Term, subject to the terms and conditions of the Agreement ("**Licence**").

1.2 Acceptance of Licence: The Customer accepts the Licence on the terms and conditions of the Agreement.

#### 2. Agreement terms

2.1 Agreement terms: The full agreement and terms of the Licence are contained within:

2.1.1 the Berth Rental Agreement;

2.1.2 the Terms and Conditions;

2.1.3 the Silo and Viaduct Marinas Safety and Environment Rules; and

2.1.4 any other document published or administered by Eke Panuku or its duly authorised employee, contractor or agent for the purpose of managing the Marina,

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 2.1.4 (inclusive).

2.3 Variation: Eke Panuku 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 five (5) Working Days after the date of the notice.

2.4 Deemed Acceptance of Agreement: It is the Customer's responsibility to read and understand the Agreement. Failure to do so does not exempt the Customer from any liability to Eke Panuku. From the earlier of the date on which the Customer signs the Berth Rental Agreement, and the date on which the Customer accesses the Berth, the Customer will be deemed to have accepted and will be bound by the Agreement.

#### 3. Term

3.1 Term: Subject to clause 3.3, the Agreement shall start on the Commencement Date and remain in effect until the earlier of:

3.1.1 the Expiry Date;

3.1.2 the date the Agreement is terminated by either party giving thirty (30) days' notice to the other party pursuant to clause 18.1.1; or

3.1.3 the date the Agreement is otherwise terminated by Eke Panuku in accordance with clause 18,

the "**Term**".

3.2 Failure to Arrive: In the event that the Vessel fails to arrive at the Berth on the Commencement Date, the Customer acknowledges that Eke Panuku may terminate the Agreement on written notice to the Customer. Eke Panuku 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 3.2 will not prejudice Eke Panuku'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 Eke Panuku prior to termination.

3.3 Holding Over: Without prejudice to Eke Panuku's rights, if Eke Panuku permits the Customer to continue to occupy the Berth beyond the Expiry Date, the Agreement will be deemed to be extended and the fee shall be payable in advance in the manner stipulated by Eke Panuku to the Customer in writing ("**Holding Over Fee**"). The Holding Over Fee will be determined by Eke Panuku (and may be an amount greater than the Berthage Fee). Such occupancy may be terminated by either party on one (1) day's written notice to the other party, but will otherwise be on the same terms and conditions as set out in the Agreement.

#### 4. Berthage Fees

4.1 Berthage Fees: In consideration for the grant of the Licence by Eke Panuku, the Customer agrees to pay the Berthage Fees to Eke Panuku at all times during the Term in advance and in the manner stipulated by Eke Panuku to the Customer in writing, without any deduction or setoff. The Customer acknowledges that Eke Panuku may, in its sole and absolute discretion, propose new Berthage Fees 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, Eke Panuku may terminate the Agreement by written notice to the Customer, such termination to have effect from the expiry of the Review Notice. The Customer's failure to respond by 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.

4.2 Interest: Interest will be charged at the Default Rate for any amounts payable under this clause 4 that are unpaid ten (10) Working Days after the due date.

#### 5. Outgoings

5.1 Outgoings: In addition to the Berthage Fees, the Customer agrees to pay all Outgoings to Eke Panuku. 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 Agreement are the rates at the date that the Berth Rental Agreement is completed and are subject to change from time to time by Eke Panuku.

#### 6. Bond

6.1 Payment of Bond: The Customer shall pay the Bond to Eke Panuku on the date specified in the Berth Rental Agreement, or if no such date has been entered, on the Commencement Date. The method of payment of the Bond will be at Eke Panuku's sole discretion. The Bond will be held by Eke Panuku in its bond holding account. Any interest earned will be for the credit of Eke Panuku.

6.2 Increase or requirement for Bond: Eke Panuku reserves the right to require the payment of a Bond amount if no Bond has been stated in the Berth Rental Agreement or to otherwise increase the amount of the Bond and to require payment of that additional amount, at any time during the Term in its sole discretion.

6.3 Refund of Bond: As soon as is practicable after the Expiry Date or upon vacation of the Berth by the Customer (whichever is the later) Eke Panuku will refund the Bond, less any payments outstanding to Eke Panuku or any third party supplier of goods and services to the Customer (including without limitation for any fees owed including Berthage Fees, Container Fees, Outgoings, and/or the cost of, or incidental to, the repairing or fixing of any damage to any part of the Marina caused by the Customer or the Vessel (including to any other vessel, pontoon, ramp or other object)). The assessment of whether such repair work is required will be made solely by Eke Panuku.

6.4 Default Interest: Interest will be charged at the Default Rate for any amounts payable under this clause 6 that are unpaid ten (10) days after the due date.

## **7. Use of Berth**

7.1 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 Eke Panuku at its sole discretion has approved such a use in writing.

## **8. Maximum Dimensions of Vessel**

8.1 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.

## **9. Assignment and Change of Ownership and/or Change in Nominated Vessel.**

9.1 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 9.1, 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.

9.2 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 Eke Panuku's prior written consent (which may be withheld by Eke Panuku in its sole discretion). If consent is granted, it is subject to the following:

9.2.1 New Licence: the Customer procuring from the new owner an executed berth rental agreement for the Berth prior to the transfer of ownership (in the form used by Eke Panuku at that time) on such terms, conditions and rates as Eke Panuku may require in its sole discretion.

9.2.2 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.

9.3 Continued Liability: If, for whatever reason, the new Vessel owner does not execute the new berth rental agreement in accordance with this clause and the Vessel remains in the Berth, then without limiting Eke Panuku's rights, the Customer will continue as principal debtor liable to perform all the obligations and pay all amount 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 agreement.

9.4 Survival: This clause 9 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.

9.5 Changes in Nominated Vessel: The Customer shall ensure that it informs Eke Panuku in advance:

9.5.1 Material Changes: if any material changes are made to the Vessel; or

9.5.2 Mooring a New Vessel: if the Customer intends to moor a new vessel in the Berth. In such circumstances, the Customer shall provide Eke Panuku with written information regarding the new vessel (including name, type of vessel, dimensions, colour and whether it is equipped with holding tanks), and shall confirm to Eke Panuku that the dimensions of the new vessel do not exceed the Vessel dimensions specified in the Berth Rental Agreement. Provided these requirements are complied with, the new vessel shall become the "Vessel" for the purposes of the Agreement.

## 10. Duties of Customer

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

10.1.1 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 Eke Panuku in its sole discretion.

10.1.2 Animals: not permit any bird or animal to be kept on the Vessel or at the Marina without the prior written consent of Eke Panuku.

10.1.3 Swimming or Diving: ensure that the 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 Eke Panuku may stipulate from time to time.

10.1.4 Unlawful Activity: ensure that no unlawful activities are conducted, from or on, the Vessel.

10.1.5 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.

10.1.6 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 Eke Panuku.

10.1.7 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.

10.1.8 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 Eke Panuku.

10.1.9 Sailing and Mooring in Marina: not sail or moor within the Marina and will manoeuvre the Vessel within the Marina 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.

10.1.10 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 Eke Panuku.

10.1.11 Carparking: not park any vehicle in the Marina without Eke Panuku's express consent, which consent may be granted subject to conditions specified by Eke Panuku. If such consent is granted Eke Panuku may at any time and for any reason withdraw such consent by notice to the Customer. Eke Panuku may at all times tow unauthorised vehicles on the Marina (such towing and recovery costs to be at the vehicle owner's expense).

10.1.12 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).

10.1.13 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 Eke Panuku from time to time.

10.1.14 Proximity Cards: ensure that it takes reasonable care of any proximity card issued by Eke Panuku to the Customer for the purpose of accessing the Berth, and notify Eke Panuku if a proximity card issued to the Customer is lost or damaged.

10.1.15 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 Eke Panuku.

10.1.16 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 Eke Panuku'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 Eke Panuku and the Customer shall keep Eke Panuku indemnified against all claims arising therefrom.)

10.1.17 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.

10.1.18 Statutory Compliance: ensure that the Vessel and all persons associated with the Vessel (including but not limited to the Vessel's crew and the 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 properly authorised authority (including, for the avoidance of doubt, Auckland Council) (and including, without limitation, 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.

10.1.19 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.

10.1.20 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.

10.1.21 Pollution and Contamination: not pollute or permit the 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 Eke Panuku.

10.1.22 Health and Safety: for the purposes of the HAS be responsible for the health and safety of the 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 Eke Panuku from time to time and that any contractor that carries out work on the Vessel holds sufficient insurance to satisfy the insurance requirements of Eke Panuku. The Customer indemnifies and will keep indemnified Eke Panuku against all actions, suits, claims, debts, obligations and other liabilities arising out the activities of any contractor invited into the Marina by or on behalf of the Customer.

10.1.23 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 without limitation, 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 Eke Panuku upon demand.

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

10.1.25 Living on Board: ensure that neither the Customer nor any of the Invitees live anywhere in the Marina other than on the Vessel and then only with the prior written consent of Eke Panuku (which consent may be withheld at Eke Panuku's sole discretion, or may be granted subject to any conditions that Eke Panuku 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 10.1.8 (and as such is not permitted without the prior written consent of Eke Panuku). A breach of this clause 10.1.25 may constitute a default that is not capable of remedy for the purposes of clause 18.

## **11. Construction and Maintenance**

11.1 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 Eke Panuku (and provided that such consent may be withheld at Eke Panuku's sole discretion). Without limiting the terms and conditions on which Eke Panuku may grant consent under this clause, the Customer acknowledges that it will be a condition of any consent granted by Eke Panuku that the following conditions must be complied with:

11.1.1 Approval: The Customer will be required to obtain the approval of Eke Panuku for each type and stage of construction or maintenance works the Customer undertakes.

11.1.2 Spraying and Grinding: The Customer may not carry out any grinding or spray painting within the Marina whatsoever without the prior written consent of Eke Panuku.

11.1.3 Cessation of Work: Eke Panuku 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 Eke Panuku any compensation, loss or damages as a result of Eke Panuku exercising its right to require the Customer to cease its construction or maintenance work or by withdrawing its approval at any stage.

11.1.4 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, without limitation, 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).

11.1.5 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.

11.1.6 Berth Area: The Customer must ensure that the construction and maintenance works at no times 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).

11.1.7 Inspection: Eke Panuku will be entitled to inspect the construction and maintenance works at all reasonable times.

11.1.8 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.

11.1.9 Safety and Environmental Rules: The Customer and the Invitees must observe all rules and procedures relating to the use of the Berth for construction and maintenance purposes, including the Silo and Viaduct Marinas Safety and Environment Rules. Any breach of such a rule will be considered a default under the Agreement entitling Eke Panuku to terminate in accordance with the termination provisions of the Agreement and to otherwise exercise its rights under the Agreement.

## 12. Container use and Storage

12.1 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 Eke Panuku (which consent may be withheld at Eke Panuku's sole discretion). Without limiting the terms and conditions on which Eke Panuku may grant consent, the Customer acknowledges that it will be a condition of any consent granted by Eke Panuku that the following conditions must be complied with:

12.1.1 Container Licence: The Container will be placed in the position indicated by Eke Panuku. The licence to place the Container at the Marina will be for such a term as will be agreed upon at that time with Eke Panuku 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, Eke Panuku will be entitled to deal with the Container in accordance with the provisions of clause 12.1.4 (this is in addition to any other remedy available to Eke Panuku under clause 18).

12.1.2 Payment of Container Fees and Term: The Customer must pay the Container Fees in advance and otherwise in the manner stipulated by Eke Panuku.

12.1.3 Location of Container: If, for whatever reason, Eke Panuku requires the Container to be moved from its existing location (including without limitation 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. Eke Panuku 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.

12.1.4 Eke Panuku May Action: If the Customer fails to move the Container immediately as required by Eke Panuku, Eke Panuku may arrange for the Container to be moved at the Customer's risk and/or remove the Container and place it into storage with a reputable container storage company. If Eke Panuku moves the Container, Eke Panuku 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 Eke Panuku or the Customer) and the storing of the Container with a container storage company shall be payable by the Customer.

12.1.5 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.

12.1.6 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.

12.1.7 Inspection: Eke Panuku will at all reasonable times be entitled to inspect the interior of the Container and all goods and property stored in the Container.

12.1.8 Risk and Indemnity: The Container shall be stored entirely at the risk of the Customer and Eke Panuku 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 Eke Panuku against all actions, suits, claims, debts, obligations and other liabilities arising as a result of the Container being used, stored, moved or removed, including without limitation for any action, suit, claim, debt, obligation or other liability arising as a result of the type of property stored in the Container.

12.1.9 No Compensation: Eke Panuku 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 an external container storage company or for any damage to the Container or the contents of the Container during any such move or removal).

12.1.10 No Warranty: The Customer acknowledges that Eke Panuku gives no warranty that the Marina will be suitable or adequate for the storage of the Container.

12.1.11 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 an external container storage company 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 external container storage company).

12.1.12 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 Eke Panuku as its duly authorised agent) within or from the Marina. The Customer must, if requested by Eke Panuku provide Eke Panuku with a detailed certificate of currency for such policies.

### **13. Alternative Mooring**

13.1 Vacate Mooring: The Customer acknowledges that Eke Panuku may at any time require the Customer to vacate the Berth for such period or periods as stipulated by Eke Panuku 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 Eke Panuku will use all reasonable endeavours to provide an alternative mooring or berthage within the Marina for the use of the Customer and the Vessel during the relevant period. The Customer acknowledges that Eke Panuku may close all or any part of the Marina from time to time in its sole discretion. Eke Panuku shall not be liable to pay any compensation to the Customer in respect of any relocation or closure pursuant to this clause 13.1.

13.2 Removal of Vessel: Where Eke Panuku has used reasonable endeavours to contact the Customer regarding a requirement to vacate the Berth pursuant to clause 13.1, and Eke Panuku is unable to make contact with the Customer or the Customer otherwise fails to relocate the Vessel as required, Eke Panuku is entitled to remove the Vessel from the Berth. The Customer consents to Eke Panuku doing all things necessary to effect such removal at the Customer's risk. If any agent, employee or contractor of Eke Panuku 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. Eke Panuku may, at its discretion, charge the Customer for any costs that Eke Panuku incurs in removing a Vessel pursuant to this clause 13.2, and the Customer agrees to pay such charges.



13.3 Extreme Emergencies: Notwithstanding clauses 13.1 and 13.2, in extreme emergencies Eke Panuku 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.

## 14. Insurance

14.1 Customer to Insure: The Customer warrants that at all times during the Term it will effect and maintain:

14.1.1 Protection and Indemnity Insurance: public liability protection and indemnity insurance for an amount of not less than ten (\$10) million dollars (\$10,000,000.00) or such other amount as Eke Panuku shall require, to cover any third party loss caused by the Customer, the 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.

14.1.2 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 with the insurance company stated in the Berth Rental Agreement.

14.1.3 Other Insurance: appropriate insurance cover for any property (other than the Vessel) that the Customer (or any Invitee) brings into the Marina.

14.2 Proof of Insurance: The Customer will provide Eke Panuku with a detailed certificate of currency for each insurance policy effected pursuant to clause 14.1. 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 at the request of Eke Panuku. 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.

14.3 Contractor Insurance: The Customer must ensure and accepts responsibility to ensure that any contractor invited into the Marina by the Customer or any of the Invitees for the purpose of carrying out work on the Vessel in the Berth holds sufficient insurance to satisfy the insurance requirements of Eke Panuku.

## 15. Risk

15.1 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. Eke Panuku shall not, whether directly, indirectly or vicariously, nor shall any servant, agent or employee of Eke Panuku 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 Eke Panuku or not.

15.2 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 the Invitees or otherwise resulting from the use or storage of the Vessel.

15.3 Customer Acknowledgements: Without limiting the generality of the foregoing the Customer acknowledges and agrees that:

15.3.1 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, Eke Panuku 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 Eke Panuku 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 Eke Panuku for all risks and damages Eke Panuku 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 Eke Panuku (including its officers, agents and employees) or by anyone on Eke Panuku's behalf.

15.3.2 No Claim: during the Term there will be other activities whether or not associated with Eke Panuku 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 Eke Panuku and Eke Panuku 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.

15.4 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 Eke Panuku accepts no responsibility for the care or protection of the Vessel, any Container, or their contents.

## **16. Indemnity and Release**

16.1 Customer Indemnity: The Customer hereby indemnifies and will keep indemnified Eke Panuku against all losses, expenses, legal liability including any legal claims, damages, expenses, collection costs and other liabilities, including any costs incurred by Eke Panuku (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 Eke Panuku 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 the Invitees.

16.2 Third Party Loss: Eke Panuku 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 Eke Panuku 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 Eke Panuku, or its servants or agents or contractors or otherwise howsoever.

16.3 Eke Panuku 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 Eke Panuku 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.

## **17. Departure**

17.1 Customer's Notice: The Customer will give Eke Panuku not less than five (5) days' notice of its intention to depart the Berth and the Customer will ensure that all amounts due and owing under the Agreement by the Customer to Eke Panuku, howsoever arising, shall be paid prior to departing.

## **18. Termination and Consequences**

18.1 Termination:

18.1.1 Termination on Notice: Each of Eke Panuku and (subject to clause 18.7) the Customer may terminate the Agreement by giving thirty (30) days' notice to the other party.

18.1.2 Termination by Eke Panuku for Breach: If the Customer is at any time in breach of any of the terms, conditions, or provisions of the Agreement, Eke Panuku may at its sole and absolute discretion issue to the Customer a notice of default setting out the nature of the default and, if in Eke Panuku's opinion the default can be remedied, how it can be remedied ("**Default Notice**"). If the default as detailed in the Default Notice is not remedied within seven (7) days of the Customer's receipt of the Default Notice (or other time period specified in the notice), or is not capable of being remedied, then Eke Panuku may terminate the Agreement immediately by written notice to the Customer.

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

18.1.4 Termination by Eke Panuku upon Other Events: For the avoidance of doubt, and without prejudice to any other rights of termination Eke Panuku may have under the Agreement, Eke Panuku may terminate the Agreement immediately by written notice to the Customer subject to, and in accordance with, the provisions of clauses 3.2, 4.1, 10.1.25 and 11.1.9.

18.2 Effect of Termination: Upon termination of the Agreement (for whatever reason) or upon the expiry of the Term, the Customer will immediately pay all Berthage Fees, Holding Over Fees, Container Fees, Outgoings, the Penalty Fee (if applicable) and all other amounts owed by the Customer to Eke Panuku and shall immediately remove the Vessel and any Container (and all the goods and effects of the Customer) from the Marina.

18.3 Inaction upon Termination: If the Customer does not remove the Vessel and/or any Container (and all the goods and effects of the Customer) upon termination or expiry in accordance with clause 18.2 the Customer acknowledges that Eke Panuku may in its sole discretion:

18.3.1 Store the Vessel and Goods: 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;

18.3.2 Impound Vessel: lock and/or impound the Vessel and store it in such place (including on Marina hardstand) as it sees fit;

18.3.3 Containers: remove any Container in accordance with clause 12; and

18.3.4 Sell the Vessel: 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 Eke Panuku'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 Eke Panuku; and thirdly to the Customer. The Customer hereby irrevocably appoints Eke Panuku 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.

Nothing in this clause 18.3 restricts or otherwise affects the parties' rights under the Admiralty Act 1973 or otherwise at common law.

18.4 Acknowledgement on Term: The Customer further acknowledges and agrees:

18.4.1 Costs: that all costs, fees, charges and expenses (including legal costs and expenses on a solicitor and own client basis) incurred by Eke Panuku pursuant to clause 18.3, or otherwise in respect of such removal or incurred by Eke Panuku 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 Eke Panuku 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.

18.4.2 Indemnity: that it will indemnify Eke Panuku against all liability for costs, fees, charges and expenses incurred in respect of removal, impounding or storage pursuant to clause 18.3 or any matter arising there from and that

anything done by Eke Panuku pursuant to this clause shall be deemed to be done as agent for, and at the risk and cost of, the Customer.

18.5 Survival: Termination or expiry of the Agreement shall not affect clauses 3.2, 6.3, 9.4, 15.3, 16, 18.2, 18.3, 18.4, 18.5, and 22, 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.

18.6 Waiver: No delay or omission by a party to exercise any right shall constitute a waiver of that right. Any waiver of a right will 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.

18.7 Early Termination by Customer where Licence is on 'Ongoing' basis: In the event that the Customer:

18.7.1 Ongoing: has indicated its intention to licence the Berth for a period of no less than twelve (12) months by initialling the 'Ongoing' box under the section headed 'Rental Period' in the Berth Rental Agreement; and

18.7.2 Termination: terminates the Agreement pursuant to clause 18.1.1 prior to the expiry of the Initial Period,

the Customer shall incur and be bound to pay to Eke Panuku the Penalty Fee, no later than ten (10) Working Days after the date the Customer terminates the Agreement under the clause 18.1.1.

For the avoidance of doubt, the Customer has no obligation to pay the Penalty Fee to Eke Panuku in the event the Customer terminates the Agreement pursuant to clause 18.1.1 after the expiry of the Initial Period.

## **19. Scope of Licence**

19.1 No Lease: Nothing in the Agreement is intended to or will confer upon the Customer any right as tenant of Eke Panuku 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 Eke Panuku to the Customer will have any effect.

19.2 Customer's Rights: The Agreement relates only to the allocated waterspace 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 Eke Panuku may from time to time specify, during such hours as Eke Panuku may specify from time to time, for safety, security and the preservation of good order.

## **20. Notice and Appointment of Agent**

20.1 Contact Details and Appointment of Agent: The Customer will at all times advise Eke Panuku in writing of any change to the Customer's current address and contact phone numbers from that stated in the Berth Rental Agreement or alternatively the name, contact, phone number, email address, and address of any agent to whom the Customer has agreed to grant unlimited authority to act for the Customer in all matters concerned with, or arising out of, the Agreement and in the event of the appointment of an agent Eke Panuku will be entitled to deal with that agent in all respects as if the agent were the Customer and the Customer shall be bound accordingly. In the event that there is more than one Customer or the Customer is a company or trust, then all Customers shall appoint either one of their number or some other person to be their agent and in default of any such appointment the first named Customer shall be deemed to be the agent of all the Customers.

20.2 Service of Notice: Wherever in the Agreement:

20.2.1 Service on Customer: Eke Panuku is required to give notice to or communicate in any way with the Customer, such notice or communication shall for all purposes be deemed sufficiently made, given, served or communicated if

given in writing by Eke Panuku and either delivered personally to the Customer, affixed upon the Vessel, or posted or emailed to the Customer or the Customer's agent at the last address recorded with Eke Panuku (which unless otherwise notified in writing by the Customer to Eke Panuku will be the Customer's full contact address as set out on the Berth Rental Agreement, or as otherwise updated by the Customer from time to time in accordance with clause 20.1). Any notification shall be deemed to have been delivered and received: a) if delivered personally, when delivered; b) if affixed upon the Vessel, three (3) days after it is so affixed; c) if posted, four (4) days after it is posted; or d) if emailed, when recorded as being sent.

20.2.2 Service on Eke Panuku: Any notice or request or other communication with Eke Panuku is called for, the same must be made in writing to Eke Panuku's address set out in the Berth Rental Agreement (or any updated address notified by Eke Panuku from time to time) and if not so made in writing to this address will be deemed of no effect whatever.

## **21. Force Majeure**

21.1 Force Majeure: Eke Panuku 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 Eke Panuku, and the time for performance of that obligation shall be extended accordingly.

## **22. Privacy**

22.1 Information: The Customer authorises Eke Panuku 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 Eke Panuku for purposes associated with the Agreement. The Customer has the right to access personal information (within the meaning of the Privacy Act 1993) held by Eke Panuku and to request correction of any errors in that information.

22.2 Marketing: The Customer authorises Eke Panuku to send it newsletters and other promotional and marketing material from time to time.

22.3 Default or termination: The Customer authorises Eke Panuku, 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 Eke Panuku about the Customer.

## **23. Guarantee**

23.1 Guarantee: In consideration of Eke Panuku entering into the Agreement at the Guarantor's request, the Guarantor guarantees the payment of the Berthage Fees and the performance by the Customer of the covenants in the Agreement, and indemnifies Eke Panuku in respect of any monies owed, or other loss Eke Panuku might suffer should the Agreement be lawfully disclaimed or abandoned by any liquidator, receiver or other person.

23.2 Covenants: The Guarantor covenants with Eke Panuku that:

23.2.1 as between the Guarantor and Eke Panuku, the Guarantor may for all purposes be treated as the Customer and Eke Panuku shall be under no obligation to take proceedings against the Customer before taking proceedings against the Guarantor;

23.2.2 this guarantee and indemnity shall extend to any holding over by the Customer;

23.2.3 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

23.2.4 the Guarantor's obligations are not released, reduced, or affected by any change to the terms of the Agreement, whether or not such change is notified to the Guarantor.

## 24. Governing Law

24.1 New Zealand Law: The Agreement is subject to New Zealand law.

### Definitions and Interpretation

**Definitions:** In the Terms and Conditions unless the context otherwise requires:

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

**“Berth”** means the berth allocated to the Customer by Eke Panuku from time to time.

**“Berthage Fee(s)”** means the daily fee plus GST payable for the use of the Berth as set out as the Vessel Charge Rate in the Berth Rental Agreement.

**“Berth Rental Agreement”** means the document titled “Berth Rental Agreement” and which contains details regarding the Customer, Vessel, insurance, and other berth licence arrangements, and is signed by the Customer and Eke Panuku.

**“Bond”** means the amount of the bond payable by the Customer to Eke Panuku as set out in the Berth Rental Agreement.

**“Commencement Date”** means the Date of Arrival as stipulated in the Berth Rental Agreement.

**“Container”** has the meaning given to it at clause 12.1.

**“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 as the Container Charge Rate in the Berth Rental Agreement.

**“Customer”** means the person or entity named as such in the Berth Rental Agreement, being the Vessel owner, and includes the Customer’s executors, administrators, successors, permitted assigns and agents.

**“Default Notice”** has the meaning given to it at clause 18.1.

**“Default Rate”** means Eke Panuku's bank overdraft interest rate plus a further 4% per annum.

**“Expiry Date”** means the Date of Departure as specified in the Berth Rental Agreement.

**“Facilities”** has the meaning given to it at clause 15.3.1.

**“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 Agreement.

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

**“Holding Over Fee”** has the meaning given to it in clause 3.3.

**“Initial Period”** means the period commencing on the Commencement Date and ending on the date falling on the anniversary of the Commencement Date.

**“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 Viaduct Marina, which are managed by Eke Panuku.

**“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 Eke Panuku from time to time plus GST.

**“Eke Panuku”** means Eke Panuku Development Auckland Limited, its successors or its nominee and where the context so permits or requires includes its servants or agents.

**“Penalty Fee”** means the fee plus GST as set out as the Penalty Fee in the Berth Rental Agreement.

**“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 and Viaduct Marinas Safety and Environment Rules”** means the safety and environment rules for the Marina issued by Eke Panuku, and as updated by Eke Panuku, from time to time.

**“Term”** means the period set out in clause 3.

**“Terms and Conditions”** means these terms and conditions.

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

**“Working Day”** means any day of the week other than:

- (a) Saturday, Sunday, Good Friday, Easter Monday, Anzac Day, the Sovereign's Birthday, Labour Day, Waitangi Day and Auckland Anniversary Day; and
- (b) A day in the period commencing with 24 December in any year and ending 5 January in the following year.

For the avoidance of doubt, a Working Day shall be deemed to commence at 9:00am and terminate at 5:00pm.

**Interpretation:**

Words in the singular include the plural and vice versa.

Words of one gender include the other genders.

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.

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

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

Any obligation not to do anything includes an obligation not to suffer, permit or cause that thing to be done.

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.

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

