

SCHEDULE B – BERTHING AND MOORING AGREEMENT TERMS AND CONDITIONS

- A. The Marina is the operator of a Marina business at the premises: Newcastle Harbour, Hannell St, Wickham, NSW, 2293
- B. The Boat Owner is the owner or duly authorised agent, of the vessel, including equipment, machinery, sails, tackle and boats identified in Item 2 of Schedule A.
- C. At the request of the Boat Owner the Marina has agreed to let the Mooring/Berth/Rack identified in Item 3 of Schedule A from the date identified in Item 5.

1. IT IS NOW AGREED AS FOLLOWS:

The Marina shall let the mooring or berth on hire specified in Item 5 of Schedule A ("the Berth") to the Boat Owner and the Boat Owner shall hire the Berth from the Marina on the Terms and Conditions of this Agreement herein contained, provided always that the Boat Owner's use of the Berth shall not be exclusive.

2. DEPOSIT HIRE AND OTHER MONEY

- 2.1 Upon the execution of this Agreement and prior to the commencement date the Boat Owner shall deposit with the Marina the hire fees detailed in item 4 of Schedule A and shall produce evidence to confirm ownership of the vessel.
- 2.2 The Boat Owner shall pay to the Marina prior to the commencement date a quarterly/hiring fee ("the Hire") together with any other fees as set out in Item 4, computed from the commencement date and payable in advance as particularised in Item 5 of Schedule A.
- 2.3 The Marina may at any time increase the Hire. The amount of such increase shall be at the Marina's discretion provided that such increase does not take effect until the end of the period in which the increase has been notified to the Boat Owner.
- 2.4 The Boat Owner shall pay to the Marina utility usage fees in arrears based on usage of electricity, water and other utilities (Utility usage fees are not applicable for a casual berths unless otherwise noted.)
- 2.5 All money payable by the Boat Owner under this Agreement shall be paid at the Marina's office detailed in Item 1 of Schedule A, or as otherwise directed in writing by the Marina and shall be paid free and clear of any deductions whatsoever.
- 2.6 The Boat Owner shall pay to the Marina interest at the rate of one and a half percent per month compounded monthly on:
 - (a) All money due but unpaid by the Boat Owner from the due date for payment to the date of payment to the Marina.
 - (b) All monies paid by the Marina in or in connection with the exercise and enforcement of its rights under this Agreement from the date of such payment by the Marina to the date of payment to the Marina.
- 2.7 The Boat Owner's obligation to pay the Hire and all other money payable at the times and in a manner herein provided and the Marina's rights in and to such Hire and other monies shall be absolute and unconditional and shall not be affected by any defect in the Berth, or the condition, operation or fitness for the use of the Berth. Such obligation continues until this Agreement is terminated pursuant to its terms.
- 2.8 The Hire and any monies outstanding and owing by the Boat Owner to the Marina shall be for all purposes prima facie such is set out in writing by the Marina.

3. COMMENCEMENT DATE AND HOLDING OVER PERIOD

- 3.1 The Commencement Date is set out in Item 5 of Schedule A.
- 3.2 At the expiration of the current hire period, the hire term shall be monthly and the Hire shall be monthly in advance. Excludes casual berthing.
- 3.3 Unless either party notifies the other in writing of its intention to the contrary one month before the expiry date of the current month, this Agreement will automatically renew for a further month and the Boat Owner must pay a further hire fee as set out in Item 4 (or such amount as has been notified to him by the Marina) one month before the expiration of the current hire period.
- 3.4 Notwithstanding Clause 3.3, the Marina is under no obligation to renew this Agreement.

4. OPERATION MAINTENANCE AND STORAGE OF THE VESSEL AND EQUIPMENT

- 4.1 The Boat Owner at his own expense shall keep and maintain the vessel and its equipment including but not limited to the ropes and lines on or attached to the vessel in good working order and condition.
- 4.2 The Boat Owner shall operate, maintain and store the vessel and its equipment with due care and diligence.
- 4.3 The Boat Owner undertakes:
 - (a) To comply with all relevant laws, regulations, rules and by-laws governing or relating to the registration, operation or licensing of the vessel and its equipment or in any manner relating to the vessel and its equipment or the use thereof and to obtain and maintain in full force and effect all necessary licenses, permits, certificates and registrations relating to the vessel and its equipment or use and to pay promptly all requisite fees and charges upon demand and produce to the Marina receipts for the payment thereof.
 - (b) To reimburse the Marina on demand for all money which the Marina has paid to make good any failure by the Boat Owner to comply with any obligation under this Agreement or any other obligation incurred by the Boat Owner in respect of the Vessel and its equipment and all other costs and expenses, including, but without limitation, legal costs and expenses that the Marina may incur in the enforcement or protection or attempted enforcement or protection of the Marina's rights hereunder.
 - (c) Not to cause or not to allow any of his servants, agents, invitees or guests to cause any disturbance in or around the Marina area in such a way to prevent the Marina, Boat Owner or invitees the use and enjoyment of the facilities provided by the Marina. In the event of such disturbance the Marina in its absolute discretion (which the Boat Owner hereby acknowledges) may terminate this Agreement forthwith by written notice setting out the date and the time the Boat Owner is required to vacate the Berth.
 - (d) Not to conduct or permit any refuelling of the vessel whilst the vessel is berthed or stored at the Marina other than in designated refuelling areas.
- 4.4 The Boat Owner warrants that the vessel has the dimensions and displacement set out in Item 3 of Schedule A. The Boat Owner shall be liable for any damage or additional expense arising out of the failure of the vessel to have the said dimensions and displacement.
- 4.5 The Boat Owner agrees not to employ or engage contractors to work on the vessel at the marina location unless said contractors are licensed and approved by the Marina.
- 4.6 The Boat Owner will not bring fuel or other hazardous materials onto the marina premises, or any property owned or operated by the Marina.

5. LIENS AND ENCUMBRANCES

- 5.1 The Boat Owner shall not, without the Marina's consent, attempt to assign, mortgage, pledge, sell, charge, encumber, sub-let, part with possession of or grant any lien, licence or any encumbrance over or dispose of or deal with or permit or suffer to exist any lien or other encumbrance over the Vessel or any part thereof or any rights of the Boat Owner to the Vessel or any part thereof or any rights of the Boat Owner under this Agreement and shall keep the Vessel and its equipment free of any distress, execution or other legal process. The Boat Owner warrants to the Marina that the vessel is unencumbered, and shall produce, if so demanded by the Marina, evidence to support that warrant.
- 5.2 The Boat Owner shall notify any potential workers upon the Vessel and its equipment of the existence of the restriction on the creation of liens or any similar interest whether already pledged or otherwise in the Vessel and its equipment and shall notify any person repairing the Vessel or any part thereof of the restrictions contained in clause 5.1.

6. RISK AND INSURANCE

- 6.1 The Boat Owner assumes all risk and liability for and in respect of the use of the facilities of the Marina and the use of his Vessel and equipment including but not limited to ropes, lines and tackle and for all loss, damage, injury or death caused to persons or property howsoever arising from the use of the facilities, the Vessel and its equipment. Notwithstanding whether or not the Boat Owner has effected insurance with respect thereof, the Boat Owner will indemnify and release the Marina against and from any claims or demands resulting from loss of or damage to the facilities, other property or persons howsoever caused.
- 6.2 The Boat Owner shall insure and keep the Vessel and its equipment insured with an insurer of recognised standing acceptable to the Marina in the name of the Marina and the Boat Owner for the respective rights and interest against such risks as the Marina may nominate or in the absence of such nomination, against any loss, damage, injury or death occasioned by the use of the facilities and/or the use of the Vessel and its equipment howsoever caused. The Boat Owner shall deliver the policy of such insurance to the Marina and shall promptly pay all premiums and stamp duty which are necessary for effectively keeping such insurance in force. The Boat Owner shall on demand produce to the Marina a certificate of currency of the insurance. If the Boat Owner fails to keep the insurance current, or if any insurance becomes void or invalid, the Marina may without prejudice to its other rights and remedies hereunder, but is not obliged to, pay the premiums for such insurance and if so paid by the Marina the same shall be immediately recoverable by the Marina from the Boat Owner.
- 6.3 The Boat Owner will not do any act or thing which might invalidate or prejudice any such insurance or the Marina's interest therein.
- 6.4 The Boat Owner shall advise the Marina forthwith in writing of any event which leads or might lead to a claim for compensation or payment under any insurance policy and shall comply with all instructions of the Marina in connection with its claim.

7. RELIANCES AND WARRANTIES

- 7.1 The Boat Owner acknowledges by entering into this Agreement that:
- (a) the Boat Owner has not relied in any way on the Marina's skill and judgment;
 - (b) the Boat Owner has satisfied himself as to the condition and suitability of Berth for the Boat Owner's purpose;
 - (c) the Boat Owner has examined and satisfied himself as to the condition and suitability, including but not limited to the slipway, building, piers, walks, pontoons, gangways, cranes, hoists, ramps and mooring gear at the Marina and that he will use such as provided for berthing, storage, mooring and parking spaces solely at his own risks; and
 - (d) the Marina may, at its sole discretion, board and move the Vessel and/or its equipment, at the Boat Owner's risk and expense as required by emergencies or other operation requirements.
- 7.2 All conditions and warranties express or implied, whether arising by statute or otherwise, as to the condition, suitability, quality, fitness or safety of the Berth or other facilities or services provided by the Marina are hereby negated and excluded to the full extent permitted by law. The Boat Owner acknowledges that the Marina has not given any such warranty or condition provided that the goods and services supplied by the Marina are not subject to any implied warranty under the *Trade Practices Act 1974* as amended to the extent that the said Act is applicable to the Agreement and prevents any exclusion and modification of any such warranty.
- 7.3 The Boat Owner acknowledges that whether or not these Terms and Conditions are signed, the Boat Owner of the Vessel will be deemed to have jointly and severally accepted them upon the earliest of oral acceptance of these Terms and Conditions, signing of these Terms and Conditions by the Boat Owner of the Vessel or berthing the Vessel at the Marina.
- 7.4 The Boat Owner is responsible for all rubbish associated with the Vessel and expressly agrees to pay for the cost of the removal of same. Rubbish includes, but is not limited to bilge, engine and other oils, discarded equipment, barnacles, marine growth, paint scraping, etc.

8. DEFAULT AND TERMINATION

- 8.1 Each of the following events is an Event of Default:
- (a) The Hire or any part thereof or other money payable under this Agreement remains unpaid for a period of five (5) days or more after its due date of payment; or
 - (b) The Boat Owner fails to observe, fulfil or perform any obligations, liability or other provision of this Agreement on its part and such failure continues for a period of seven (7) days or more after notice in writing by the Marina has been given requiring remedy of same; or
 - (c) The Marina ascertains that any warranty, representation or statement made by the Boat Owner under or in connection with this Agreement has been false in any material respect; or
 - (d) Any insurance policy in respect of the Vessel is cancelled or not renewed; or
 - (e) The Boat Owner commits or suffers to be committed any act of bankruptcy or, if a body corporate, a resolution is passed for its winding up, or a meeting is convened for the purpose of passing a resolution under Section 254N of the *Corporations Act 2001* (as amended) or an order is made by any Court for its winding up, dissolution, or an official manager or receiver and manager is appointed in respect of the whole or any of its assets or an inspector is appointed to investigate its affairs; or
 - (f) Execution or distress is levied against the Boat Owner or any of its assets; or
 - (g) The Boat Owner enters or proposes to enter into any arrangement, reconstruction or composition with any of its creditors; or
 - (h) The Boat Owner, if a body corporate, ceases or threatens to cease carrying on its business, or is unable to pay its debts as they fall due or suspends payment generally; or
 - (i) The Boat Owner, if a body corporate, disposes or assigns of or parts with all or a substantial part of its undertaking or assets or attempts to do so; or
 - (j) The Boat Owner, if an individual, is declared mentally ill, is convicted of a criminal offence, or dies; or
 - (k) There is a material adverse change in the business or financial condition of the Boat Owner which could adversely affect the ability of the Boat Owner to meet its obligations under this Agreement.
- 8.2 At any time upon or after the occurrence of an Event of Default:
- (a) The Marina may take possession of the Vessel at the risk of the Boat Owner with or without any notice to the Boat Owner; or
 - (b) The Marina may, by notice in writing to the Boat Owner, terminate this Agreement.
 - (c) If 8.2(a) or 8.2(b) are enforced, then the Marina may deduct from the security deposit any monies then due and payable under this Agreement together with interest thereon as provided by Clause 2.6.
- 8.3 If the Marina takes possession of the Vessel and/or its equipment pursuant to Clause 8.2(a) the Marina may retain such possession until:
- (a) The Marina is satisfied that the Event of Default giving rise to such taking of possession by the Marina has been remedied or in the Marina's opinion such Event of Default does not or would not prejudicially affect the Marina's rights under this Agreement; and
 - (b) There is no other Event of Default which has occurred and is continuing and has not been waived or remedied.
- 8.4 This Agreement shall continue during this period of possession by the Marina and the Hire remains payable by the Boat Owner as if the Vessel and/or its equipment remained under the Boat Owner's control. As a condition precedent to any re-delivery of the Vessel and/or its equipment to the Boat Owner the Boat Owner on demand from the Marina shall pay to the Marina all costs incurred by the Marina for taking possession of the Vessel and/or its equipment, maintenance, storage of the Vessel and/or its equipment during the period of possession and for re-delivery of the vessel and/or its equipment to the Boat Owner and any other charges and costs paid by the Marina pursuant to the terms of this Agreement for which the Boat Owner is liable under the terms of this Agreement together with interest accrued on such money in accordance with Clause 2.

8.5 In amplification of the powers contained herein and the Boat Owner hereby appoints the Marina his attorney to act in the name of the Boat Owner in connection with the removal of any property remaining in or upon the premises at the Marina Location after the expiration or sooner determination of the term hereby granted and as such attorney the Marina may remove, store, sell or otherwise dispose of such property on behalf of the Boat Owner and at the Boat Owner's cost and expense and any costs or expenses incurred by the Marina in so doing shall be a first charge on the proceeds of the sale of such property. The Marina shall further be entitled to deduct from any surplus in its hands from the sale proceeds any amount due to the Marina hereunder before accounting to the Boat Owner in respect of such moneys. Furthermore, the Boat Owner shall pay to the Marina an occupation fee equal to the periodic hire and liability with respect to outgoings due to the termination of this Agreement from the date of termination or expiry of this Agreement until all the property as aforesaid has been removed from the Marina Location.

9. NON-ASSIGNMENT SUB-LICENSING

9.1 The non-exclusive license granted by the Marina to the Boat Owner by this Agreement shall be personal to the Boat Owner. The Boat Owner covenants with the Marina that the Boat Owner shall not assign, sub-license, or otherwise deal or purport to deal with its right to occupation of the licensed premises, or accept or demand any fee or other valuable consideration from any person for the right to occupy the licensed premises, without the prior written consent of the Marina, which consent shall be granted or refused by the Marina in its absolute discretion with or without assigning reasons therefore.

9.2 The Boat Owner warrants that he is the legal and beneficial owner or the duly authorised agent of the owner of the Vessel and that he will be personally liable for all fees, accounts, costs, claims or liabilities of whatsoever nature arising from the provisions of the Agreement. Further, the Boat Owner hereby undertakes to pay all such monies on demand by the Marina irrespective of the rights of the Marina against the Boat Owner or third party.

9.3 Any change in the effective control of the Boat Owner (where a company or a partnership) from that existing at the date of commencement shall be deemed an assignment and shall be subject to the Marina's consent as aforesaid.

9.4 Where the Boat Owner is a company or a partnership, the Boat Owner shall:

(a) Appoint as the Boat Owner's nominee a person having the effective or managerial or financial control of the Boat Owner.

(b) Not allow any person other than the Boat Owner's nominee to occupy the Berth except with the prior written consent of the Marina, which may be granted, granted on terms or refused by the Marina in its absolute discretion with or without assigning reasons therefore.

(c) Be liable and responsible for the acts and omissions of its nominee.

10. MISCELLANEOUS

10.1 This Agreement constitutes the entire Agreement of the Parties hereto with respect to the subject matter hereof and supersedes any prior agreement.

10.2 If any provision of this Agreement is found to be void, voidable or unenforceable, the enforceability of the remaining provisions shall not be in any way affected.

10.3 A written statement of the amount due from the Boat Owner signed by any person who from time to time being the CEO, Manager, or Secretary of the Marina, shall be conclusive evidence of the amount due.

10.4 Any notice by either party in respect of this Agreement shall be deemed served if in writing and sent by pre paid mail or hand delivery to the respective addresses of the parties specified in Schedule A or such other address as may be notified in writing to the other party. Any notice served by post shall be deemed effective 3 business days after the date of posting.

10.5 The parties agree that the Marina may make further Terms and Conditions for its facilities in relation to any matters not expressly dealt with in this Agreement and the Marina may vary or add to those Terms and Conditions from time to time on one (1) months notice in writing to the Boat Owner.

10.6 The Boat Owner agrees to abide by and comply with in all respects with the Terms and Conditions of the Marina as made, varied, or amended from time to time by the Marina.

10.7 The Boat Owner agrees to comply with and obey any reasonable direction given to it by the Marina, its Manager or its duly authorised agent.

10.8 The Marina may vary these Terms and Conditions by adding, altering or deleting any of them and in that event the new Terms and Conditions will be binding on the Boat Owner upon the Marina giving the Boat Owner one (1) month's notice in writing of the new Terms and Conditions.

11. GST

The Amount Payable for any taxable supply (as that expression is defined in the GST legislation) made by the Marina to the Boat Owner is exclusive of GST. The Boat Owner must pay to the Marina the amount of GST payable at the same time as the Boat Owner pays the Amount Payable. Amount Payable includes the Hire and any other money payable in accordance with this Agreement including, but not limited to the Environmental Contribution mentioned in Schedule A and utility usage fees mentioned in this Schedule B.

12. EARLY TERMINATION

In the event that the Boat Owner, during the term of this Agreement, sells the Vessel to a purchaser who relocates the Vessel from the Marina, or where, having given to the Marina one month's prior notice in writing, the Boat Owner permanently moves the Vessel from the Berth:

(i) This Agreement shall terminate upon the date of removal of the Vessel from the Berth

(ii) The Berth shall revert to the control of the Marina.

(iii) After payment of all fees due and owing by the Boat Owner to the Marina, any hire fees paid in advance, less a 10% Termination Fee on the remainder of the Term, shall be refunded to the Boat Owner on a pro-rata basis together with the Security Deposit.