The Schedule

Item 1 of the Schedule. Dictionary of Key Terms

Key Terms used in this Agreement are identified by the use of capital letters and italic style.

“Agreement” means an executed copy of this Agreement and includes the Schedule to this Agreement which together comprise the Agreement;

“Berth” is an area of water allocated for the wet storage of a Vessel, attached to the Premises and allowing for walk-on access to a Vessel;

“BIA” means Boating Industry Association of Australia;

“Boat Lift” means a submersible elevating platform, used for vertical transportation of Vessels into and out of the water;

“Commercial Marina” has the meaning used by the New South Wales Government in its Lease issued to the Company;

“Company” means Top 8 Pty Ltd trading as Killcare Marina;

“Confidential Information” means all information disclosed by one Party to the other Party in connection with this Agreement;

“Contractor” means a Person providing any Marina Services and includes any Marina User providing a service to the Marina or its customer, but excluding Company employees;

“Custody” means the responsibility for the control of, transfer and movement of, or access to any Vessel;

“Fee” is any consideration (including disbursements) paid or payable by a Marina User to the Company for the supply of any Marina Services;

“Force Majeure” means any circumstance reasonably beyond the control of a Party which causes or results in default or delay in performance by that Party of any of the obligations arising under this Agreement and includes “acts of God”, war, hostilities, civil commotion, strikes and other industrial disputes;

“Hot Work” means the use of open fires and flames, power tools or hot rivets, grinding, soldering, burning, cutting or welding or any other repair work involving heat or creating sparks;

“In Tier” is mooring a Vessel side by side to another Vessel;

“Inappropriate Conduct” includes the Marina User engaging in conduct which, in the opinion of the Manager is prejudicial to the interests, reputation or property of the Company; repudiating or breaching any of its obligations; providing any incorrect, misleading or deceptive information; or disposing of any interest in a Vessel affected by this Agreement;

“Inclement Weather” means rough, harsh, extreme, severe weather;

“Invitee” means a Person who is invited to the Premises or is otherwise on the Premises and includes a guest of a Marina User;

“Long Stay” means a Marina User, having the Vessel moored on the Premises for more than 1 calendar month;

“Manager” means the person appointed by the Company to manage the marina or his delegate;

“Marina Regulations” means those rules drafted by the Company to satisfy its requirements pursuant to its relevant regulatory obligations and administrative requirements and includes any amendments to the rules from time to time;

“Marina Services” means those services provided by the Company in its capacity as a Commercial Marina;

“Marina Usage” means the receipt of any Marina Services;

“Marina User” means any Person (including Invitees) using or on the Premises and includes any Person receiving Marina Services;

“MSDS” means Material Safety Data Sheet;

“Owner” means the legal Owner of the Vessel, agent, Person in charge, user and includes any Person who can provide satisfactory evidence to the Manager of a relevant proprietary right to the Vessel;

“Party” means a Party to this Agreement including that Party’s executors, administrators and permitted assignees;

“Person” includes a natural Person, firm, body corporate, unincorporated association or any other business structure;

“PPE” means Personal Protective Equipment;

“Premises” means all of the structures and all of the facilities known as KILLCARE MARINA and includes the Company’s Swing Moorings;

“Relevant Person” means anyone who performs any work at the Premises and includes any Person performing any work on a Vessel;

“Short Stay” means a Marina User, having the Vessel moored on the Premises for less than 1 calendar month;

“Slipway” means any incline constructed leading to the water, used for horizontal transportation of Vessels into and out of the water.

“Swing Mooring” is a detached or freestanding structure, which consists of an anchor with a rope running to a float on the surface to which a Vessel is moored;

“Term” means that period from the date of execution by the Marina User of this Agreement until the expiry of this Agreement in accordance with Item 2;

“Utility Costs” means telephone, internet, electricity, water, garbage services;

“Vessel” includes any watercraft whatsoever using Marina Services, or the Premises and includes that watercraft’s contents, fixtures and equipment.

Item 2 of the Schedule. Expiry of Agreement

2.1 Either Party may terminate this Agreement by providing 1 month prior written notice to the other Party.

2.2 The Company may terminate this Agreement forthwith by providing written notice to any Marina User engaging in conduct which, in the opinion of the Manager is prejudicial to the interests of the Company, or is any other form of Inappropriate Conduct.

2.3 The Term of this Agreement finishes on the expiry of the relevant written notice periods referred to in this Item.

2.4 All outstanding amounts payable by the Marina User in accordance with this Agreement are required to be paid by the Marina User prior to the expiry of the Term of this Agreement.

2.5 The Company may terminate this Agreement without cause by written notice to the Marina User where: the Marina User has a receiver, liquidator, trustee in bankruptcy or official manager or administrator appointed; or, where, in the opinion of the Manager, any of the Premises becomes unserviceable.

2.6 The Marina User may terminate this Agreement by providing 1 month written notice to the Company where the Premises becomes unfit for Marina Usage for a period in excess of three continuous months.

2.7 On the expiry of this Agreement the Vessel must be removed from the Premises by the Marina User.

2.8 On the expiry of this Agreement if the Vessel has not been removed by the Marina User then the Company may:

2.8.1 Cause the Vessel to be removed and elsewhere stored/moored at the Marina User’s expense; and/or

2.8.2 Retain the Vessel until the Manager is satisfied to release it (mooring Fees will be payable in respect of any period of retention under this sub item)

Item 3 of the Schedule. Marina User Obligations

All Marina Users agree that they will:

3.1 Engage in conduct which does not adversely impact on or otherwise detracts from the good name/reputation of the Company.

3.2 Engage in conduct consistent with the Marina Regulations.

3.3 Engage in conduct which does not adversely impact on or otherwise be a cause of complaint from other Marina Users or adjacent residents.

3.4 Ensure that all activities engaged in on the Premises are legal and meet all relevant regulatory requirements.

3.5 Notify immediately the Manager where any course of conduct results in a breach of any Government law, where any incident occurs which causes damage to the Premises, breaches the Marina Regulations or causes injury to any Person.

3.6 Conduct an independent pre-inspection of the Premises to ensure that they are either individually or collectively suitable for the Marina Users’ purposes and then rely on their own judgment concerning their acceptance and use of the Premises.

3.7 Properly record and account for any Marina Usage.

3.8 Notify the Manager in writing before there is any attempt made to change, vary or transfer a legal interest in a Vessel which is using the Marina Services or the Premises.

3.9 Not transfer, assign or sub-contract any obligations or rights under this Agreement.
3.10 Acknowledge that this Agreement does not confer any rights as a tenant of or agent to the Company and that there is no partnership or joint-venture relationship created by this Agreement.

3.11 Ensure that the Marina User is responsible for the proper mooring, care, security, maintenance, protection (including fire protection), seaworthiness and other good working order of the Vessel, including the proper working order and good and substantial repair of the berthing/mooring apparatus.

3.12 Not carry out repairs and/or maintenance on the Vessel without the prior authority of the Manager.

3.13 Notify the Manager and obtain his approval prior to engaging or otherwise securing the services of Contractors. No Contractor is to commence any works without initial registration with the Company and signing the Agreement. Outside Contractors engaged by Short Stay Vessel Owners are not permitted whatsoever to use the Premises. The Company imposes additional costs on the Marina User for the use of Contractors who are not engaged by the Company.

3.14 Properly supervise any Contractor performing any works whatsoever on the Marina User’s Vessel and not hold the Company responsible for any liability however caused arising from such Contractors’ works and/or conduct.

3.15 Except as directed by the Manager, not permit any other Vessel to occupy the Vessel space allocated to the Marina User.

3.16 Ensure that no valuable items remain on the Vessel or at the Premises.

3.17 Respect and comply with all of the relevant environmental laws and Marine Regulations and recognise that all forms of pollution and contamination (including noise pollution) are prohibited on the Premises.

3.18 Repair and make good forthwith any damage caused to the Premises by any act or thing occurring on the Premises occasioned by the negligence or misfeasance of the Marina User or any servant, agent, licensee or Invitee of the Marina User.

3.19 Maintain the Premises in a neat and clean condition so as not to adversely impact on its functionality and appeal to other Marina Users or otherwise adversely interfere with the Premises’ security.

3.20 Not make or permit any structural changes whatsoever to the Premises without the prior written consent of the Manager and, where such consent is provided, incur any expense in implementing any such approved change. Reimburse the Company for any cost or expense as may be incurred as a result of any such alteration addition or installation. At all times any such alterations shall be effected under the supervision of and to the absolute satisfaction of the Manager.

3.21 Not to make or permit any connections or alterations to existing water, gas or electrical utilities, equipment or appliances unless with the written permission of the Manager in which case any such change will be at the expense of the Marina User.

3.22 Keep the locks which form part of the Marina Services provided to Marina Users secure and not use any means of securing doors and hatches other than locks which are on the Marina’s master key system. Marina Users will change at the Marina User’s cost such locks as often as the Marina’s master key system is changed.

3.23 On the expiry of this Agreement, leave or restore the Premises to its condition at the commencement of this Agreement or reimburse the Company for its expenditure in so doing.

Item 4 of the Schedule. Marina User’s Indemnities

The Marina User will receive the Marina Services and use the Premises at its own risk and will indemnify the Company against:

4.1 Any breach by the Marina User of Environmental Laws, OH&S Laws or other applicable laws and the Marina User accepts full responsibility for any such breach even if the offence occurs through the conduct of the Marina User's agents, customers, Contractors, employees or Invitees.

4.2 Any breach by the Marina User of the Marina Regulations and the Marina User accepts full responsibility for any such breach even if the offence occurs through the conduct of the Marina User's agents, customers, Contractors, employees or Invitees.

4.3 Any damage effected by the Marina User or the Marina User's Vessel to the Premises or to other Vessels in the Company's Custody and will accept full responsibility for any such damage even if it occurs through the conduct of the Marina User’s agents, customers, Contractors, employees or Invitees.

4.4 Any damage to the Marina User’s Vessel whether through the provision of Marina Services or otherwise and the Marina User agrees and acknowledges that the Company shall not be liable for the care and protection of the Vessel.

4.5 Any conduct whatsoever engaged in by any Person who may have the Vessel in Custody.

4.6 Any theft of the Vessel or tender including any loss or damage of any valuable item left on or in the Vessel or on the Premises.

4.7 Any claims or demands arising from the dismissal from the Premises of any Marina User, its employee, agent, customer, Contractor or Invitee.

4.8 Any claim by the Marina User for compensation arising from the supply by the Company of Marina Services which claim exceeds the cost of the resupply of the relevant goods and/or service.

4.9 Any claims (judicial or otherwise) by the Marina User (including its insurer or other representative) for losses, injury, damages, or other claims whatsoever (including costs and expenses).

4.10 Any penalty imposed on the Company by any government regulator which can be attributed in any way to the conduct of the Marina User whether by negligence or otherwise.

4.11 Any damage or injury caused to any Person or Vessel by Inclement Weather or other act of God.

4.12 Any act or conduct (including omission) by the Company, the Manager, employees or Contractors engaged by the Company arising from the provision of Marina Services.

4.13 Legal and other costs, charges and expenses which become payable as a consequence of or in connection with the default by any Marina User of its obligations under this Agreement.

4.14 Any claim arising from the expiry of this Agreement, including the subsequent removal and storage or mooring of the Vessel.

4.15 These indemnities continue after the expiry of this Agreement and the indemnities may be claimed before the Company incurs any expense arising from any one of them.

Item 5 of the Schedule. Marina’s Rights and Obligations

The Company (including the Manager and its Contractors or employees) will:

5.1 Permit the Marina User to use and occupy the Premises without unreasonable interference.

5.2 Pay relevant Council, utilities and other statutory bodies the water, sewerage and drainage rates, rent and other outgoings to acquit in a timely way the ongoing obligations under the Government Marina licence.

5.3 Not be responsible for any representation made about the suitability of the Premises concerning fitness for purpose.

5.4 Rely on the obligations imposed on the Marina User pursuant to Item 3.6 of the Schedule.

5.5 Retain the right to engage in any course of conduct considered necessary to ensure that the Company’s administration is conducted in a fashion which complies with appropriate regulatory (including safety) requirements.

5.6 Retain the right at anytime whatsoever and at the Marina User’s risk to board, move, drive, tow or remove any Vessel in order to comply with any regulatory or administrative requirement.

5.7 Have the right to carry out any work on the Premises.

5.8 Retain the right to make, amend or cancel the Marina Regulations or any of them as in its judgment may from time to time be prudent for the proper management, safety, care and cleanliness of the Marina for the preservation of good order and for the comfort of its Marina Users, and all such amendments and cancellations shall bind all Marina Users.
5.9 Allocate the Marina Services for a Marina User's use at its entire discretion.

5.10 Use its best efforts to allocate the specific mooring requested by the Marina User except where any such allocation is or becomes inconsistent with appropriate regulatory (including safety) requirements or orderly administration.

5.11 Retain the right for operational and other considerations to change any allocated mooring at any time and the Marina User must then ensure that the Vessel is immediately so moved to that re-allocated mooring.

5.12 Retain the right to ask the Marina User to temporarily relocate the Vessel to another allocated place at the Premises.

5.13 Deliver the Vessel to any Person offering such evidence of ownership or entitlement to receive the Vessel, as the Manager may in his absolute and unfettered judgment deem satisfactory.

Item 6 of the Schedule. Disputes

6.1 Any complaint or dispute arising from this Agreement must be in writing and given to the Manager for his initial consideration and decision which will be made within 7 days of the receipt of the written complaint.

6.2 Where a complaint or dispute is not resolved within 28 days of the provision of a notice anticipated by Item 6.1 of this Schedule then unless a solution is provided in other clauses to this Agreement, the matter may be resolved by either Party according to the non-exclusive jurisdiction of the courts of New South Wales and the laws of that State.

6.3 Marina Users agree that any dispute or disagreement between Marina Users on the Premises shall be referred to the Manager for determination and the Manager's decision shall, in all respects, be final and binding on that Marina User.

Item 7 of the Schedule. Insurances and Compliance

7.1 Marina Users must have all current insurances, licences, registrations, and permits necessary to comply with Government laws and the Marina Regulations (as amended from time to time).

7.2 Marina Users must not engage in any conduct or permit any conduct which directly or indirectly adversely impacts on the Company's insurances and will be responsible for any associated cost (including expenses) to the Company for any such conduct.

7.3 A Marina User may be asked to contribute to any increased insurance premium incurred by the Company which is consequential on the risk associated with the use of the Marina Services and the Premises by that Marina User.

7.4 All Vessels must be insured against public liability in respect of the Vessel and its fittings and contents.

7.5 Marina Users will comply with and observe during the Term of this Agreement, at their own expense and cost, any alterations, additions, and thing offered or required by any current or future Commonwealth, State or Local Government law or regulation.

7.6 Marina Users will comply with during the Term of this Agreement at their own expense and cost, any alterations, additions, and thing offered or required by the Company under the current or future Marina Regulations. The Company shall not be liable for any conduct by any Marina User which is in breach of any Marina Regulation, nor for any non enforcement of any Marina Regulation.

Item 8 of the Schedule. Fees

8.1 Marina Users will duly and punctually pay the Fees payable pursuant to this Agreement at the specified times.

8.2 The Company intends to review its Fees annually, however, the Company may review its Fees at any time and will advise the Marina User in advance of any change becoming effective.

8.3 The Company retains a lien over and the right to possession of any Vessel until the payment in full of Fees, and the Marina User authorises and agrees to such rights and the means to secure those rights.

8.4 Interest on overdue Fees at the Supreme Court interest rates is payable on Fees which remain unpaid 7 days after the due date of an invoice provided to a Marina User, but this interest imposition does not restrict the Company from any other right which may be available to recover outstanding Fees.

8.5 Marina Users, where requested by the Manager, will reimburse and pay to the Company the Marina User’s proportion of the Company’s Utility Costs.

8.6 Where Fees remain unpaid after 90 days of the completion of Marina Services and there has been no satisfactory financial arrangement made with the Manager by the Vessel Owner then, the Company may dispose of that Vessel in order to satisfy the amount of debt owing to the Company and return any balance to the Vessel Owner.

8.7 Fees are GST inclusive at the prevailing rates (as amended from time to time).

Item 9 of the Schedule. Vessel Owner's Mooring Fees

Vessel Owners will pay Mooring Fees to the Company as follows:

9.1 Short Stay Mooring Fees are payable as specified on an invoice provided to the Marina User.

9.2 Long Stay Mooring Fees are payable by calendar payments in advance on a monthly, quarterly or annual basis as follows:

9.2.1 The first payment will be on or before the commencement date with subsequent payments made before the first day of each agreed period;

9.2.2 Marina Users agree that during the Term of this Agreement, the Mooring Fees will be adjusted annually in accordance with the following formula:

\[
\text{Adjusted Fees} = \text{Current Fees} \times (100\% + \text{OCI} \%),
\]

where,

\[
\text{OCI} = \text{Percentage change of the occupancy costs payable by the Company (as defined in the Marina Regulations and is amended from time to time).}
\]

9.2.3 All Mooring Fees payable to the Company are to be paid by a standing credit card authority and the Vessel Owner agrees to sign a credit card authorization form.

Item 10 of the Schedule. Contractors

10.1 For a variety of legal, compliance and administrative reasons the Company only permits duly registered businesses with adequate insurance cover to provide services on the Premises.

10.2 Any Contractor entering upon the Premises must first notify the Manager and provide to him adequate evidence of the scope and currency of relevant insurances and other certification necessary to ensure that the Company complies with its licensing requirements and other administrative and regulatory obligations.

10.3 No Contractor is to commence any works without initial registration with the Company and signing the Agreement. If the Manager is not available or is not present, the Contractor may not commence work. The Company's registration requirements for Contractors vary from time to time depending on government amendments affecting compliance obligations. The Company reserves the right, at the Manager's absolute discretion, to reject or withdraw the privilege of entry to the Premises or provision of Marina Services by or from any Person.

10.4 Contractors must conduct their work in accordance with all relevant legislation and the Marina Regulations. All Contractors are required to submit to the Manager MSDS of any chemical they may work with before the substance is brought on to the Premises.

10.5 For the sake of clarity, Contractors are Marina Users for the purposes of this Agreement and hence the other provisions of this Agreement apply mutatis mutandis to Contractors.

Item 11 of the Schedule. Advertising and Marketing

11.1 No Person may offer, advertise or market their services while on the Premises except with the written permission of and in accordance with the guidelines prepared from time to time by the Manager.
Where Marina Users are permitted to advertise or market they agree that they will:

11.2.1 Display the address of the Marina User's business on the Premises or as being "Killcare Marina, 39 Araunle Drive KILLCARE NSW 2257", and ensure that this address is shown in all correspondence, advertising and promotional material used by the Marina User unless otherwise agreed in writing by the Manager.

11.2.2 The Company shall have the right to approve any business or trading name used by the Marina User in connection with any business conducted on the Premises and the Marina User further covenants that it will not carry on any business on the Premises without first having obtained the Company's prior written consent to the business or trading name.

11.2.3 Maintain in a good and presentable state and condition any signs featuring its name and business. Without the prior written permission of the Company not to place, replace, alter or repair any advertising sign in or upon the Premises, nor to mark, paint, drill, write upon or in any way deface any interior or exterior wall, ceiling, floor or other part of the Premises or any part thereof.

11.2.4 Marina Users affected by this sub item shall publish on the front page of Marina User's web-site a web-link to Killcare Marina's web-site and a content item which will be entirely within the discretion of the Company.

11.2.5 The Company shall publish on the front page of Killcare Marina’s web-site a web-link to Marina User's web-site and a content item which will be entirely within the discretion of the Marina User.

Item 12 of the Schedule. Manager May Request Marina User to Leave

12.1 In order for the Company to comply with its regulatory and licence obligations, and to ensure the amenity of other Marina Users and adjacent neighbours, the Manager may request a Marina User to leave the Premises and that Person is obliged to leave forthwith.

12.2 The Marina User agrees to dismiss and cause to immediately leave the Premises any employee, agent, customer, Contractor or Invitee whose conduct, in the opinion of the Manager, engages in any Inappropriate Conduct.

12.3 Where a request foreshadowed in Item 12.1 is made by the Manager to a Marina User who is the Owner of a Vessel moored on the Premises, then the Manager may further request that the Vessel also be removed and it shall be removed forthwith either by the Owner or the Manager.

Item 13 of the Schedule. Confidential Information

13.1 Each Party undertakes to keep secret and protect the Confidential Information of the other Party.

13.2 Each Party undertakes to implement appropriate policies, practices and procedures to ensure that any Persons on the Premises are made aware of and conform to the obligations arising under this Item. Without limiting this obligation, a Party must not permit unauthorised Persons to have access to places where the other Party’s Confidential Information is displayed, reproduced or stored.

13.3 Each Party must take reasonable steps to enforce the confidentiality obligations imposed by this Item including diligently prosecuting, at its own cost, any breach or threatened breach of those obligations by a Person to whom the Party has disclosed the Confidential Information.

13.4 A Party may disclose Confidential Information to its employees and Contractors on a “needs to know” basis but solely to assist in the performance of obligations arising under this Agreement on the condition that such Persons do not disclose the Confidential Information to other Persons.

13.5 The obligations on each Party under this Item survive the expiry of this Agreement.

Item 14 of the Schedule. Notices Between Parties

14.1 Any notice being any communication whatsoever is considered to be duly served if it is delivered personally to the other Party or that Party's representative or if it is delivered to the postal address of the Party provided in this Agreement.

14.2 Because the Company relies on the address provided for the purposes of communication, it is an important element of this Agreement that the Marina User not only provides an accurate address for the service of notices and communication generally but also provides particular attention to updating the Company of any change whatsoever to its principal contact address.

14.3 Where the Company relies on the address provided for the purposes of communication with a Marina User then service for the purposes of this Item will be valid even though the addressee may have been wound up or in liquidation or the addressee is absent from the place at or to which the communication is left, delivered or sent or, where the communication is sent by post, it is returned unclaimed.

14.4 Unless the Parties otherwise agree in writing, any communication arising from this Agreement may not be sent by e-mail.

14.5 A notice in connection with this Agreement will be deemed to have been received by the Party:

14.5.1 If left or delivered personally, on the same day.

14.5.2 If sent by post to an address in Australia, on the second business day after the date of posting.

14.5.3 If sent by post to an address outside Australia, on the fourth business day after the date of posting.

14.6 A notice takes effect from the time it is received unless a later time is specified in that notice.

Item 15 of the Schedule. Force Majeure

15.1 If a Party becomes aware of any matter likely to constitute a Force Majeure event affecting its obligations under this Agreement, it must within 5 business days of the occurrence of the Force Majeure event give to the other Party a notice containing full particulars, including the likely effect of the event on the relevant obligations (“the Suspension Notice”).

15.2 Where a Party has provided a Suspension Notice, the non-financial obligations of that Party under this Agreement shall be suspended, to the extent they are affected by the Force Majeure event, until the cessation of the Force Majeure event provided however that the maximum periods of suspension of obligations under this Clause shall be 6 months per event from the date of occurrence of the relevant Force Majeure event.

Item 16 of the Schedule. Counterparts

16.1 This Agreement may be executed in any number of counterparts.

16.2 All counterparts, taken together, constitute one instrument.

16.3 A Party may execute this Agreement by signing any counterpart.

16.4 This Agreement is binding on the Parties on exchange of counterparts.

16.5 A copy of a counterpart sent by facsimile or by any electronic transmission must be treated as an original counterpart, is sufficient evidence of the execution of the original and may be produced in evidence for all purposes in place of the original.

Item 17 of the Schedule. The Marina Regulations

The Marina Regulations comprise the rules drafted by the Company to satisfy the relevant regulatory and administrative obligations and requirements.