

**Original Enterprises Pty Ltd** (ACN: 155 331 829) as trustee for the DMAP Trust (ABN is 46 142 317 901) trading as **“Funk Cider”**  
[hereinafter referred to as **“the Seller”**]

**Terms and Conditions of Trade for the Supply of Cider and/or Other Beverages to Customers**  
[hereinafter referred to as **“Terms”**, **“Cider”** and **“the Customer”**]

**Application**

Unless otherwise agreed in writing these terms apply to all dealings between the Seller and the Customer.

**1. Ordering and Acceptance**

- 1.1 The Customer hereby states and warrants that they are 18 years of age or over and are not purchasing cider or other alcoholic beverages for or on behalf of persons under the legal drinking age;
- 1.2 If the Customer in the course of their business retails or on-sells the Cider and/or other alcoholic Cider of the Seller, the Customer warrants that they possess all the relevant licenses and permits to do so and it is the Customer's responsibility to supply the Seller with their Liquor License number and hold the Seller harmless from any prosecution and other actions that may be taken against the Seller for supplying cider and other beverages for commercial purposes to unlicensed persons;
- 1.3 Cash sales will be processed upon receipt of cleared funds for the full value of the order plus freight costs (if applicable);
- 1.4 Online/website orders will be processed upon receipt of full payment by credit/debit cards or other methods as may be agreed at the Seller's sole discretion;
- 1.5 The Seller may at its sole discretion accept verbal or phone orders from credit account customers, but to avoid errors orders should be emailed or written;
- 1.6 A binding contract will be established immediately the Customer instructs the Seller to supply Cider and/or the Seller ordering supplies or commencing any processes on behalf of the Customer and the Customer may be liable for all costs in the event of cancellation;
- 1.7 **“The Customer”** in these Terms is the person who places the order;
- 1.8 Any terms or conditions of the Customer's order deviating from or inconsistent with these Terms are expressly excluded and rejected by the Seller. This exclusion and rejection includes any statement by the Customer that the Customer's terms and conditions shall prevail;
- 1.9 The Customer agrees that in the event of any dispute concerning an order (including any question of identity or authority or any telephone, facsimile or email order) that the internal records of the Seller will be prima facie evidence of what was ordered;
- 1.10 A quotation, estimate or any other document issued by the Seller (apart from a Confirmation of Order document) is not an offer to supply Cider;
- 1.11 Each order placed by credit account Customers shall be deemed to be a representation of solvency and the Customer shall inform the Seller of any factors that could affect the commercial decision by the Seller to accept the order and/or grant credit. Failure to pay the Seller in accordance with these Terms shall be deemed to be prima facie evidence that the Customer had no reasonable grounds for making a solvency representation and that the representation was unconscionable, misleading and deceptive.

**2. Customer Fully Responsible for Cider Storage, Kegs and Return of Kegs**

- 2.1 Because Funk Cider is free of preservatives and unpasteurised the kegs **MUST** be stored in a coolroom at **a temperature no higher than 4 degrees Celsius** immediately upon delivery as contained in the Delivery Clause herein to prevent fermentation, loss of flavour and other deterioration. The Seller accepts no responsibility if the Customer breaches this requirement and any other storage instructions provided to the Customer by the Seller;
- 2.2 Unless the Customer has bought and fully paid for kegs the Customer acknowledges and agrees that kegs are the property of the Seller and the Customer holds the kegs solely as bailee for the Seller's benefit;
- 2.3 The seller is fully responsible for the safe keeping of the kegs and for all damages, theft or loss until they are returned to the Seller in a clean and undamaged condition promptly upon the Seller's request, time being of the essence;
- 2.4 If kegs are returned to the Seller undamaged for the purpose of refilling as part of a new order there will be no charge for their return provided the kegs are located in the Greater Perth Metropolitan area. The Seller shall pay the cost of return if they do not request a reorder refill or if the Customer is located beyond the Perth Metro area;
- 2.5 If the Customer fails to return kegs in an undamaged condition in the time specified by the Seller, the Customer shall immediately pay the full retail replacement cost of the kegs the Customer has failed to return or has returned in a damaged condition (minor wear and tear excepted) time being of the essence;
- 2.6 Each keg has a serial number and seals and the Customer shall not under any circumstances tamper, erase or otherwise interfere with the serial numbers and/or seals.

**3. Price and Payment**

- 3.1 The Seller's price lists are subject to change without notice;
- 3.2 Unless stated otherwise GST and any other taxes shall be payable by the Customer;
- 3.3 Quotations are based on costs at the time of the quotation and are subject to change if the Customer does not accept the quotation within the period specified in the quotation or within 30 days if no period is shown;
- 3.4 At the Seller's sole discretion, the Seller may require a non-refundable deposit before producing Cider and other beverages on the Customer's behalf;
- 3.5 Payment is strictly on the basis of the Seller's payment terms as introduced from time to time. If no specific payment terms have been agreed, payment must be made immediately upon demand by the Seller, time being of the essence as to this obligation.
- 3.6 If the Seller agrees to accept payment by credit card the Seller reserves the right to recover the credit card commission;
- 3.7 Payment shall only occur when cleared funds from the Customer have been received by the Seller for all amounts outstanding;
- 3.8 The Seller may, at its sole discretion and without prejudice to its other rights and remedies, withhold supply and demand immediate payment of all amounts owing if the Customer's account is overdue or the Seller is concerned over the Customer's ability to pay;
- 3.9 The Customer shall not be entitled to set off against any moneys owed (or allegedly owed) to the Customer by the Seller or withhold payment or deduct money from an invoice because a portion of the invoice is disputed by the Customer;
- 3.10 If the Customer is a regular buyer and requests a credit facility (which the Seller is not obliged to provide) the Customer warrants that they shall strictly adhere to the Seller's payment terms, time being of the essence as to this obligation;
- 3.11 The Seller can demand immediate payment of any or all amounts owed even if they are not currently due if the Customer becomes insolvent, proposes or enters into an arrangement with creditors or an administrator, receiver, liquidator or similar person is appointed in respect of the Customer or any asset of the Customer.

#### **4. Delivery and Delay**

- 4.1 Unless otherwise specified in the price or in the Seller's quotation the Customer is responsible for all delivery costs;
- 4.2 If the Customer collects the Cider from the Sellers premises delivery takes place immediately the Cider leaves the Seller's premises;
- 4.3 If the Customer, their transport contractor, courier or other party collects the Cider from the Seller's premises they are deemed to be the Customer's agent and delivery takes place immediately upon collection of the Cider;
- 4.4 For Cider delivered directly by the Seller to the Customer's premises delivery takes place when the Cider is delivered to the said premises and the Customer is entirely responsible to immediately store it in accordance with Clause 2 herein;
- 4.5 The Seller reserves the right to deliver part orders at its entire discretion;
- 4.6 A certificate or delivery docket purporting to be signed by an officer or agent of the Customer confirming delivery shall be prima facie evidence of delivery;
- 4.7 The Customer shall not be relieved from its obligations to the Seller for any delay in delivery.

#### **5. Returns and Claims**

- 5.1 Because Funk Cider is free of preservatives and unpasteurised, the Customer is fully responsible for storing the Cider strictly in accordance with Clause 2 herein. Unless there has been a manufacturing, brewing or processing defect as determined by the Seller, the very nature of the product and its packaging renders it impractical to return and it is therefore not returnable;
- 5.2 Claims and defect requests must be notified to the Seller immediately the Customer becomes aware of the alleged defect or within 7 days of delivery (time being of the essence) whichever is the sooner specifying the alleged defect and no claims shall be accepted by the Seller thereafter apart from those specified by law;

#### **6. Conversion and Tampering**

- 6.1 Any tampering with kegs and/or the contents and/or misuse of the packaging and/ labelling of Funk Cider including, but not limited to, reusing or refilling empty or partially empty kegs of the Seller and other containers of the Seller with any other Cider or products of any description and/or using any brand labels for any purposes whatsoever is strictly prohibited;
- 6.2 If the Customer, or any other party authorised by the Customer, converts, transforms or incorporates the Cider in whole or in part into other beverages or otherwise changes the Cider, the Customer shall be totally liable for any losses incurred by The Seller, including full legal costs, as a result of any such actions and for all claims made by any other parties;
- 6.3 Any breach by the Customer of the Seller's conversion and tampering requirements contained herein or as stipulated by federal and/or state laws or council regulations shall be regarded as a material breach of these Terms and the Seller may, without notice, impose any or all of the penalties contained in these Terms. These may include, but are not limited to, immediate cessation of deliveries, withdrawal of product guarantees and obligations and the taking of legal action against the Customer and/or any other remedies and to seek financial compensation from the Customer;
- 6.4 Funk Cider is produced in certified food processing premises and in the event that the Customer is in breach of the conversion and tampering prohibitions and of food/beverages safety/storage legislation the Customer may face criminal and civil prosecution for injuries, poisoning or other incidents attributable to all such events and the Customer shall indemnify and keep the Seller indemnified from all and any claims from any parties whatsoever for all damages and/or all fines and/or all compensatory claims of whatever nature;
- 6.5 The Customer shall not seek any compensation or make any claims on the Seller for any losses or alleged losses that may occur from the Seller exercising its rights herein and shall indemnify and keep the Seller indemnified from all and any claim for damages and/or losses (consequential or otherwise) made by any other parties.

#### **7. Force Majeure**

The Seller shall not be liable for any default or delay due to any act of God, war, power, equipment failure, terrorism, strike, lock-out, industrial action, fire, flood, storm, tempest or any other events beyond the Seller's control.

#### **8. Risk and Insurance**

- 8.1 All risks pass to the Customer upon delivery as defined in these Terms and it is the Customer's responsibility to arrange insurance;
- 8.2 If any Cider, kegs or other property of the Seller are damaged, destroyed or stolen prior to payment being received (or before the kegs are returned to the Seller in a clean and undamaged condition) and ownership of the Cider passing to the Customer, the Seller is entitled to payment in full;
- 8.3 If the Cider kegs or other property of the Seller are damaged, destroyed or stolen prior to payment being received (or before the kegs are returned to the Seller in a clean and undamaged condition) the Seller is entitled to the insurance proceeds for the Cider and the kegs. Presenting these Terms to the Customer's insurers is sufficient evidence of the Seller's rights to the insurance proceeds.

#### **9. Seller's Liability**

The maximum liability of the Seller for any and all claims made by the Customer or any other parties shall not exceed the purchase price received by the Seller for the Cider. The Seller shall not be liable for any further payments either to the Customer or to any other parties for any alleged losses, damages, injury, illness, indirect and/or consequential loss and/or expense except where the Customer is defined as a consumer within the meaning of the Commonwealth Competition and Consumer Act 2010.

#### **10. Payment and Default**

- 10.1 If the Seller has granted a credit facility to the Customer (which the Seller is not obliged to provide) the Customer warrants that they shall strictly adhere to the Seller's payment terms as contained herein and as may be amended by the Seller from time to time;
- 10.2 In the event of default the Customer shall indemnify and reimburse the Seller for all costs and disbursements in collecting outstanding debts from the Customer which shall include dishonour fees, full legal costs on a solicitor-own-client basis, collection agency costs, investigators costs, court, judgement enforcement and bailiff fees, search agent costs, time, travel and all other collection costs;
- 10.3 If the Customer breaches any of its obligations the Seller may exercise all its rights plus suspend or terminate the supply of Cider and demand the immediate return of all kegs and the Seller will not be liable for any alleged loss or damage suffered by the Customer or any other parties as a result of the Seller exercising its rights;
- 10.4 The Seller reserves the right to charge interest at 10% a month from the day the account becomes overdue and compounded monthly until all outstanding moneys have been paid in full;
- 10.5 If an account is more than 60 days overdue the Seller reserves the right to charge administration costs of \$25 or 10% (whichever is the greater) up to a maximum of \$250.00) shall be charged to the Customer and payable immediately.

#### **11. Security for Payment**

- 11.1 If the Seller allows the Customer extra time to pay moneys or perform obligations for which no guarantees or other securities have been provided, the Seller may require security for payment including a guarantee by a director or other persons connected with the Customer;

11.2 Any requirement for security or guarantees is without prejudice to other rights or remedies the Seller may have and does not affect the Seller's reservation of title in the Cider, kegs and other property of the Customer.

## **12. Personal Property Securities Act 2009 ("PPSA") and Personal Property Securities Register ("PPSR")**

12.1 If the Customer has been granted a credit facility or otherwise owes the Seller moneys or other obligations for the loan/hire of kegs, sales of Cider, goods and other products provided by the Seller the Customer consents to the Seller registering a Security Interest on the PPSR in a manner the Seller deems appropriate for Cider and other products sold to the Customer and for kegs loaned or hired to the Customer in accordance with these Terms and the Customer agrees to provide all assistance required by the Seller to register such Security Interests;

12.2 The Customer acknowledges and agrees that these Terms create a Security Interest in the Secured Cider, and to avoid doubt, the proceeds of sale of the Secured Cider for the purposes of the PPSA;

12.3 The Customer acknowledges and agrees that if any part of the Secured Cider becomes the inventory of the Customer, the Customer will not permit any other security interest (including, but not limited to, floating or other charges, liens or pledges) to be raised in respect of the Secured Cider unless the Seller has perfected the Security Interest prior to the Customer's possession of the Secured Cider;

12.4 The Seller may have a "Purchase Money Security Interest" ("PMSI") and/or other security interests on the PPSR and in the event that the Seller has not registered a perfected PMSI on the PPSR the Customer consents to the Seller registering a PMSI on the PPSR;

12.5 To avoid doubt, the following definitions of the PPSA apply to the Seller's Terms: Financing Statement, Financing Change Statement and Security Interest have the same meaning as defined by the PPSA and a Security Agreement is a security agreement created between the Customer and The Seller in the PPSA;

12.6 The Customer acknowledges and agrees that by placing orders for Cider and the loan or hire of kegs the Seller's Terms constitute a Security Agreement for the purposes of the PPSA in such Cider/kegs/other goods/property and create a Security Interest in all those previously supplied which have not been fully paid for and for Cider/kegs/other goods/property to be supplied in the future, and to avoid doubt, the sale proceeds of the Secured Cider, other goods/property and for the loan/hire of kegs;

12.7 The Customer agrees to do everything the Seller requests including, but not limited to, signing and completing documents without delay to register and/or perfect any Security Interest and for the Seller to exercise its rights in connection with the Secured Cider and proof that the Customer has complied with these Terms;

12.8 The Customer agrees to indemnify and reimburse the Seller on demand for any losses and costs incurred by the Seller in relation to the PPSA, including any registration, or any response to an amendment, demand or a request under section 275 of the PPSA;

12.9 The Customer agrees not to register or permit a third party to register a Financing Statement, a Financing Change Statement or any other document in respect of a Security Interest on Cider, other beverages and for the loan/hire of kegs supplied by the Seller that have not been fully paid for or for kegs not returned in good condition;

12.10 The Customer agrees to promptly tell the Seller of any material change in its methods and policies of selling Cider supplied by the Seller or storing of kegs which would change the nature of the proceeds of such sales and Security Interest of the kegs;

12.11 With regard to sections 95, 96, 115, 125 and any other parts of the PPSA and amendments thereto, the Seller and the Customer agree that, to the extent allowed by the PPSA, these do not apply to any Security Interests created by these Terms. Furthermore, the Customer waives its rights to receive notices under sections 95, 118, 121(4), 130, 132(3)(d) and 132(4) together with verification statements unless all such notices are a requirement of the PPSA in which case all notices or documents must be given in accordance with the PPSA;

12.12 To the extent permitted by the PPSA the provisions of sections 127, 129(2) and (3), 132, 134(2), 135, 136(3), (4) and (5) and 137 will not apply to the enforcement of the Seller's Security Interests;

12.13 With regard to sections 142 and 143 of the PPSA the Customer waives its rights as a grantor and/or a debtor under the PPSA;

12.14 The Customer shall unconditionally approve any actions taken by the Seller under clauses 11.1 to 11.13.

## **13. The Commonwealth Competition and Consumer Act 2010 ("CCCA")**

These Terms are not intended to have the effect of contracting out of any provisions of the CCCA except where permitted by law. If the Customer buys Cider, other products or goods as a consumer, these Terms shall be subject to protection of consumers' rights legislation and shall not affect the consumer's statutory rights.

## **14. Passing of Title/Reservation of Title**

14.1 Notwithstanding the delivery of Cider and/or the loan/hire of kegs title remains with the Seller until all moneys have been paid in full and the Customer has fulfilled all its obligations to the Seller;

14.2 Until all events in 14.1 occur title in the Cider and other property of the Seller that may be in Customer's possession remains with the Seller as unpaid vendor/owner of the kegs and the Customer may only hold the Cider and/or the loan/hire of kegs as bailee for the Seller's benefit. Whilst holding the Cider and kegs of the Seller as bailee, the Customer shall ensure they remain identifiable as the Seller's Cider/kegs/other property and safely store and insure them for loss or damage for the Seller's benefit;

14.3 The Customer holds and agrees to hold the proceeds of any sale of the Cider, other property or the Customer's unauthorised sale of kegs on trust for the Seller in a separate account into which no other money shall be paid; however failure to deposit the proceeds of sale into a separate account or to keep the money separate will not affect the Customer's obligation to deal with the proceeds as trustee of the proceeds for the Seller;

14.4 For Cider on which title has not passed to the Customer, and/or for the loan/hire of kegs the Seller can instruct the Customer to return them (or any part of them) to the Seller if the Customer's obligations under these Terms have not been fulfilled;

14.5 The Customer will not charge the Cider or the Seller's kegs or other property in any way or grant or otherwise give any interest in the Cider/kegs or other property until clean title passes to the Customer;

14.6 If the Seller becomes aware of a breach of these Terms or of an insolvency event (or likelihood of such an event) the Seller and/or any representative of the Seller may as the invitee of the Customer enter upon or into the premises where the Seller may believe the Cider, kegs/other property are stored to inspect and/or remove them and the Seller shall not be liable for any alleged loss or damage as a consequence of such inspection and/or removal and without being exposed to any claim by the Customer or any other parties for trespass, detainee, conversion, or for any other reasons;

14.7 The Seller can issue proceedings to recover the price of the Cider even if ownership has not passed to the Customer.

## **15. Intellectual Property and Brand Protection**

Ownership of all intellectual property owned by and/or developed by the Seller including, but not limited to, brewing recipes, formulae and techniques, the brands, trademarks, other recipes, copyright and all other property and/or information remain with the Seller and the Customer will promptly advise the Seller of any breach or infringement of its rights by any party.

**16. Set Off and Application**

16.1 The Seller shall be entitled to set off against any moneys owed to the Customer an amount equal to the total of all moneys at such time then owed by the Customer or on the Customer's behalf to the Seller;

16.2 The Seller shall be entitled to apply any moneys received from or on behalf of the Customer to any and all amounts owed by the Customer as it sees fit and the Customer waives any rights of notification of any such allocation.

**17. No Waiver**

No waiver by the Seller of any rights or provisions of these Terms shall at any time be deemed or implied to limit or exclude any of the Seller's rights against the Customer under these Terms.

**18. Privacy Act**

Customers requesting a credit account (and those who already have an account) and/or the guarantor/s agree and consent to the Seller obtaining and exchanging credit information from the Customer's suppliers and other parties nominated by the Customer and for the Seller to obtain reports and other information from credit reporting agencies and other sources on credit information about the Customer in relation to credit provided by the Seller and the ability of the Customer to pay its bills as and when they fall due.

**19. Termination/Cancellation**

The Seller can cancel orders from credit account Customers without notice if the Customer breaches any conditions of these Terms or becomes or is in jeopardy of becoming insolvent (or dies if the Customer is a natural person) and all outstanding moneys owing to the Seller shall be payable immediately together with moneys owing to third parties for contracts entered into for the Customer's benefit.

**20. Credit Account Customer Restructure**

20.1 Credit account Customers shall notify the Seller in writing of any change in their structure, including any change in ownership or sale of any material part of their business within 7 days of any such change. The Customer will be liable to the Seller for any purchases from the Seller until such notice is given;

20.2 The Seller reserves the right to review or withdraw any credit facilities granted to the Customer and to review or cancel any orders upon any change in the Customer's structure, change in ownership or sale of any material part of its business.

**21. Notices**

Notices from the Seller to the Customer are served when delivered by hand, sent by mail, document exchange, facsimile or email and shall be treated as given when: if delivered by hand when delivered; if sent by mail or document exchange, 48 hours after posting; if sent by fax, and/or email when the fax machine confirms transmission or when the email system confirms transmission. A notice given after 5pm and/or on a day which is not a Business Day is treated as given on the next following Business Day.

**22. Disputes**

If a dispute arises between the Seller and the Customer and a solution thereto is contained in these Terms then such solution shall be a binding full and final settlement of the dispute provided such solution is not in breach of any legislation. If no solution to the dispute exists in these Terms and the dispute cannot otherwise be resolved within 30 days from the date of the dispute then either party can refer the matter to an independent party or mediator. If the Seller or the Customer fail to agree on a party/mediator the dispute shall be referred to a party/mediator in accordance with the 'Governing Law and Changes to Terms of Trade' clause in these Terms. The Customer shall be liable for the full resolution costs and if this contravenes the Governing Law the parties will equally contribute to the resolution costs.

**23. Severability**

If any part of these Terms is found to be unenforceable for any reason or in breach of any legislation then that part will be severed from these Terms and will not affect the validity or enforceability of any other part of these Terms.

**24. Governing Law and Changes to Terms of Trade**

24.1 The laws of Australia apply to these Terms and to all contracts or other agreements between the Seller and the Customer and are subject to the jurisdiction of the courts and tribunals of Western Australia;

24.2 These Terms can only be amended with the written consent of the Seller provided such amendments are not in breach of any legislation and all such amendments will be effective from the date they are notified to the Customer. The Customer will be deemed to have accepted these Terms and any changes thereto upon placing further orders with the Seller;

24.3 The Seller reserves the right to license or sub-contract all or any part of its entitlements and obligations at any time.