



ABAC Adjudication Panel Final Determination No 59/21

Product: DDH Stunner
Company: Modus Operandi Brewing
Media: Packaging
Date of decision: 31 May 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Richard Mattick

Introduction

1. This final determination by the ABAC Adjudication Panel (“the Panel”) arises from a complaint received on 6 April 2021. The complaint concerns the packaging by Modus Operandi (“the Company”) of the product DDH Stunner.
2. Alcohol marketing in Australia is subject to an amalgam of laws and codes of practice, that regulate and guide the content and, to some extent, the placement of marketing. Given the mix of government and industry influences and requirements in place, it is accurate to describe the regime applying to alcohol marketing as quasi-regulation. The most important provisions applying to alcohol marketing are found in:
 - (a) Commonwealth and State laws:
 - Australian Consumer Law – which applies to the marketing of all products or services, and lays down baseline requirements, such as that marketing must not be deceptive or misleading;
 - legislation administered by the Australian Communications and Media Authority – which goes to the endorsement of industry codes that place restrictions on alcohol advertising on free to air television;
 - State liquor licensing laws – which regulate retail and wholesale sale of alcohol, and contain some provisions dealing with alcohol marketing;

(b) Industry codes of practice:

- AANA Code of Ethics – which provides a generic code of good marketing practice for most products and services, including alcohol;
 - ABAC Responsible Alcohol Marketing Code (“ABAC Code”) – which is an alcohol specific code of good marketing practice;
 - certain broadcast codes, notably the Commercial Television Industry Code of Practice – which restricts when advertisements for alcohol beverages may be broadcast;
 - Outdoor Media Association Code of Ethics and Policies – which place restrictions on the location of alcohol advertisements on outdoor sites such as billboards.
3. The codes go either to the issue of the placement of alcohol marketing, the content of alcohol marketing or deal with both matters. The ABAC deals with both the placement of marketing i.e. where the marketing was located or the medium by which it was accessed and the content of the marketing irrespective of where the marketing was placed. The ABAC scheme requires alcohol beverage marketers to comply with placement requirements in other codes as well as meeting the standards contained in the ABAC.
4. For ease of public access, Ad Standards provides a common entry point for alcohol marketing complaints. Upon a complaint being received by the Ad Standards, a copy of the complaint is supplied to the Chief Adjudicator of the ABAC.
5. The complaint is independently assessed by the Chief Adjudicator and Ad Standards and streamed into the complaint process that matches the nature of the issues raised in the complaint. On some occasions, a single complaint may lead to decisions by both the Ad Standards Community Panel under the AANA Code of Ethics and the ABAC Panel under the ABAC if issues under both Codes are raised.
6. The complaint raises concerns under the ABAC Code and accordingly is within the Panel’s jurisdiction.

The Complaint Timeline

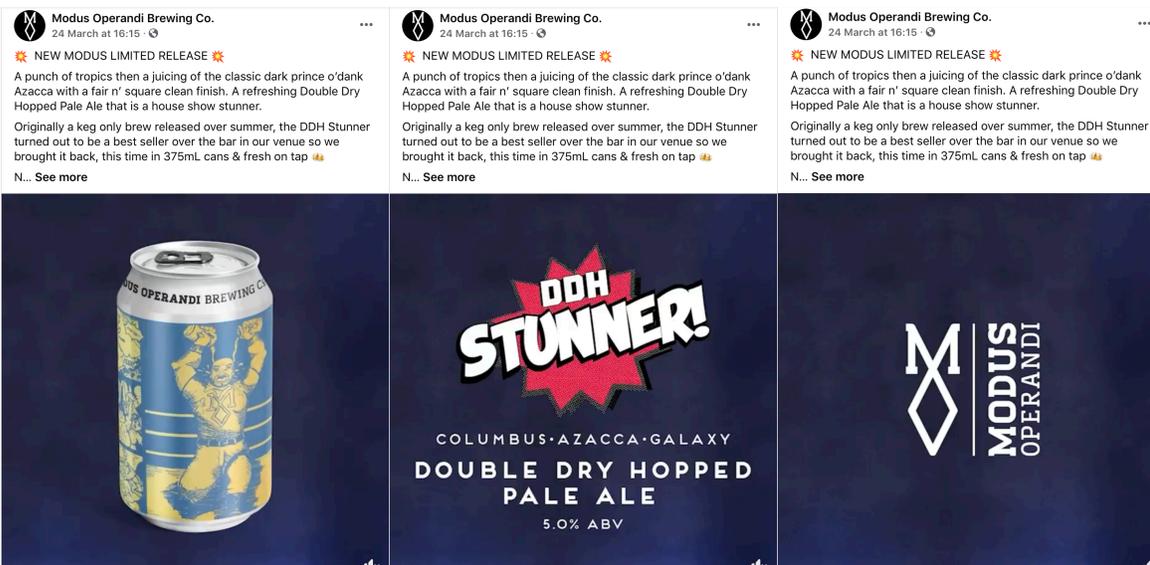
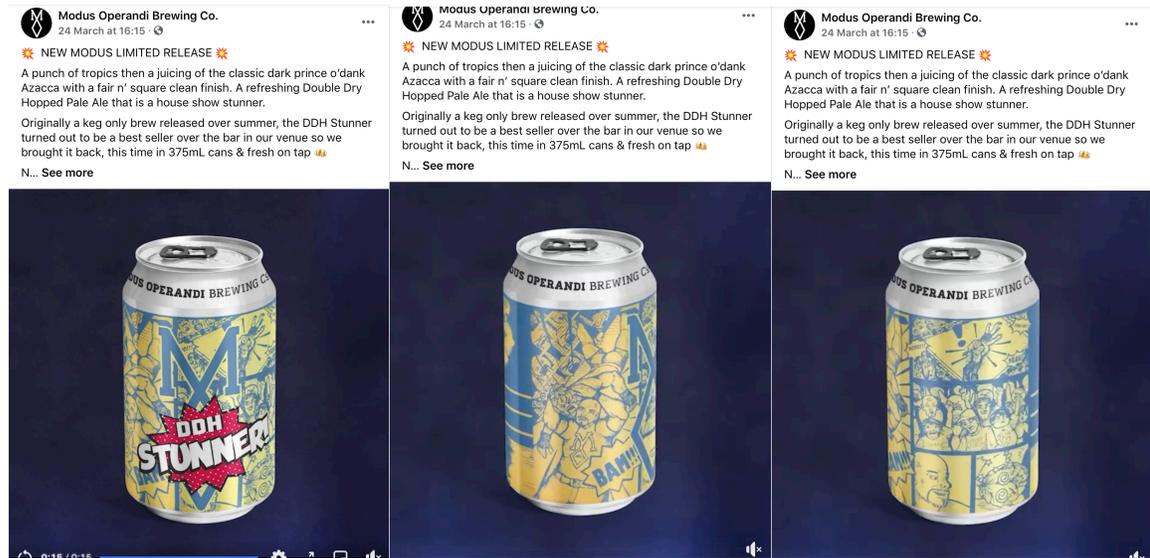
7. The complaint was received on 6 April 2021.
8. Generally, the Panel endeavours to make a decision within 30 business days of the receipt of a complaint but this timeline is not applicable due to the two-part process involved in determinations concerning product names and packaging.

Pre-vetting Clearance

- The quasi-regulatory system for alcohol beverage marketing features independent examination of most proposed alcohol beverage marketing communications against the ABAC prior to publication or broadcast. Pre-vetting approval was not obtained for the packaging.

The Marketing

- This determination relates to the packaging of DDH Stunner.



The Complaint

11. The complainant has the following concerns about the labelling and packaging seen in a Facebook post:

The can features comic book style illustrations of a professional wrestler bearing a resemblance to Stone Cold Steve Austin who had a finisher called a "Stunner". One of the panels of the illustration appear to be someone hitting a Stunner. One panel shows the wrestling attempting to drink from two cans at once which was Stone Cold's signature celebration, his character was a beer drinking redneck.

While Professional Wrestling is mostly staged, it is still premise is still based on fighting. Branding a beer based around a wrestler and their move could encourage users to take part in irresponsible behaviour, whether it is real fighting or pretending to be the wrestler the connotation is dangerous.

Stone Cold Steve Austin the character is also associated with drunkenness, drinking to gain courage or perform better. The wrestling character and the human Steve Anderson have both been involved in incidents of violence against women, to promote this person through a beer is disappointing.

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:
 - (a)(i) show (visibly, audibly or by direct implication) or encourage the excessive or rapid consumption of an Alcohol Beverage, misuse or abuse of alcohol or consumption inconsistent with the Australian Alcohol Guidelines
 - (a)(ii) show (visibly, audibly or by direct implication) or encourage irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage

The Company's Response

13. The Company responded to the complaint by letter emailed on 15 April 2021. The principal points made by the Company were:
 - Modus Operandi Brewing Co ("Modus", "MO" or "the Company") is an Australian family-owned craft brewery that was founded in 2012 in Mona Vale, on the Northern Beaches of Sydney. Since inception, MO has been the recipient of a myriad of industry and consumer awards across its SKU portfolio – most recently being recognised by the Independent Brewer's Association ("IBA" – the craft beer's peak industry body) as

having the Champion Brewery in 2019 and having a number of beers appear in the recent 2020 GABS Hottest 100.

- The Company has built its brand over the better part of a decade selling its beer nationwide.

DDH Stunner:

- DDH Stunner (“DDH” or “the Product”) is a Limited Release pale ale that was first sold in the Mona Vale brewpub venue in Summer 2020. Modus recently brewed a packaged version of the Product to sell via the Company’s website and through select independent retailers.

ABAC CORRESPONDENCE:

- Whilst not a formal signatory to the Alcohol Beverages Advertising Code (ABAC) Scheme (“the Code”), Modus Operandi has a long-standing commitment to supporting ABAC and adhering to the Code in its general dealings (and as such has historically had an excellent history in complying with the Code). The Company also maintains strict processes, both internally and externally, to ensure operational congruence is maintained with the general principles set out in the Code.
- Herein, we have compiled the ABAC objection notes received alongside the tangential response by the Company.

OBJECTION:

- An objection was made regarding a recent Facebook post by the Company that reads as follows:

“While Professional Wrestling is mostly staged, it is still premise is still based on fighting. Branding a beer based around a wrestler and their move could encourage users to take part in irresponsible behaviour, whether it is real fighting or pretending to be the wrestler the connotation is dangerous. Stone Cold Steve Austin the character is also associated with drunkenness, drinking to gain courage or perform better. The wrestling character and the human Steve Anderson have both been involved in incidents of violence against women, to promote this person through a beer is disappointing.”

MODUS OPERANDI RESPONSE:

- Whilst Modus endeavours to seek pre-approval for the release of Core Release SKU’s (and connected marketing materials) that are likely to be seen by a large audience, we did not seek pre-approval for the marketing communication related to the Product as the Product is a very small-batch Limited Release. The Product is so limited in fact that in the overwhelming majority of channels the Company has enquired with, the Product is now sold out and not able to be viewed by the public.

- The beer is in fact referencing a wrestling move 'Stunner' – we do not anticipate this breaches the code in any respect and thus have no further comment.
- Modus is of the opinion that any reasonable person understands that wrestling is a mock sport as opposed to 'fighting' sports such as Boxing/Mixed Martial Arts – therefore we disagree with the presumption of the objector that the display of an actor (also known as a 'wrestler') on the Company's products is in any way encouraging the rapid consumption of alcohol or reckless behaviour.
- The beer is in fact referencing a wrestling move 'Stunner' and the connotations of the wrestler drinking 2 cans at once – we do not anticipate this breaches the code in any respect. The icon on the back of the can is mock pouring the cans in victory. However we do recognise that this is open to interpretation and understanding the mock nature of this sport.
- Modus was not aware of the actor having a history of violence against women – had this fact come to light in the product conception stage we would never have allowed the product to be released. Modus in no way endorses violence of any kind and does not condone any violence towards women.

CONCLUDING COMMENTS:

- As owners of a craft beer brand we respect and support the work ABAC does – especially in its efforts to ensure stakeholders partake in marketing their communications in an ethical and responsible manner. We accept that more careful consideration is required surrounding products connected to the 'wrestling' theme and Modus undertakes to have any such 'wrestling' themed releases pre-approved by ABAC – regardless of the format or distribution size of any such releases. In connection to this objection we have halted further production and will discontinue this product. It may be ABAC's advice that wrestling based advertisement is a "no go zone" under the Code and we will work closely with ABAC here as required.

The Panel's View

14. This determination concerns the packaging (can design) of a Modus Operandi limited release craft beer - DDH Stunner. The packaging adopts a comic book like series of panels which depict a professional wrestling match. The front of the can features the product name and Company logo with background wrestling and crowd scenes. The side and rear of the can shows a wrestling match and crowd scenes, with one panel depicting the victorious wrestler celebrating by pouring two presumably beer cans over his head.

15. On 17 May 2021 the Panel made a provisional determination that the product packaging is in breach of Part 3 (b)(i) of the Code. Consistent with the rules and procedures applying to decisions concerning product packaging, the Company was afforded an opportunity to seek a re-hearing of the provisional determination by making further submissions. The Company has accepted the provisional determination and the Panel has proceeded to make a final determination on this complaint.
16. The complainant believes the packaging encourages irresponsible behaviour. This is based on the violent nature of wrestling and that the packaging is drawing upon the career of American pro wrestler 'Stone Cold Steve Austin' (Steve Anderson) and his signature 'finisher' move - the stunner. It is contended Mr Austin had a persona associated with drunkenness and in real life Mr Anderson had been involved in incidents of violence against women.
17. The Company advises that the product name is referencing the wrestling move of the stunner and accepts that the panel where the wrestler is shown with two beer cans is a Stone Cold Steve Austin trademark victory celebration. The Company, however, argues the packaging is consistent with ABAC standards contending:
 - a reasonable person understands professional wrestling is acting as opposed to an actual 'fighting' sport such as boxing;
 - the panel depicting the 'mock' celebration does not show alcohol consumption; and
 - the Company was not aware of any real-life violent history of Mr Anderson and the Company does not condone violence towards women.
18. Part 3 (a) (i) and (ii) of the ABAC provides that an alcohol marketing communication must not show (including by direct implication) or encourage rapid or excessive alcohol consumption, or irresponsible or offensive behaviour that is related to the consumption or presence of an Alcohol Beverage.
19. Assessment of an alcohol marketing communication against Code standards is from the probable understanding of the marketing material by a reasonable person. This means the life experiences, values and opinions found in most of the community is to be the benchmark.
20. American professional wrestling has a following in Australia and can be accessed via several television and streaming services. Some wrestlers have become mainstream and hugely popular actors, most notably Dwayne 'The Rock' Johnson. While Stone Cold Steve Austin is recognised as a major and well-known wrestler, he would not be an Australian household name. Some consumers would recognise both 'the stunner' as a wrestling move popularised by Mr Austin and the images on

the can as referring to him, however, the Panel does not consider that a 'reasonable person' could be assumed to make these connections.

21. As a general proposition, a reasonable person will be more influenced in forming an impression about a product can by the messaging and imagery on the front of the can, rather than information contained on the side and rear. This is because, for instance, an average person won't find a beer can on a shelf in a retail outlet and turn it around a full 360 degrees and study the can in fine detail. It will be major brand features, colouring, and designs on the front of the can which will grab attention. Possibly with the current product, given the storyboard style used, a consumer might spend more time absorbing the images on the sides and rear of the can than would usually be the case.
22. The Panel does believe the packaging breaches the Part 3 (a) (i) and (ii) standards. In reaching this conclusion, the Panel noted:
 - the product name, 'Stunner', may have been drawn from a wrestling move but would not in isolation of other cues be associated by a reasonable person with wrestling as such;
 - the can, however, creates a storyboard depiction of a wrestling match;
 - professional wrestling is understood to be a staged, managed 'sport' which depicts acted violent throws and holds;
 - 'Stone Cold Steve Austin' is the inspiration for the victorious wrestler depicted on the can, although this would likely be understood by only some and not all consumers; and
 - the panel displaying two cans of beer being poured in victory is creating a direct association between the presence of alcohol and rapid consumption and the staged violence of the wrestling.
23. Accordingly, the Panel makes a final determination that the complaint is upheld.