



ABAC Adjudication Panel Determination No 249/21

Product: Undercover Fashion Police NEIPA
Company: Little Bang Brewing Company
Media: Packaging
Date of decision: 29 November 2021
Panelists: Professor The Hon Michael Lavarch (Chief Adjudicator)
Ms Debra Richards
Professor Louisa Jorm

Introduction

1. This determination by the ABAC Adjudication Panel (“the Panel”) concerns the packaging of Undercover Fashion Police NEIPA (“the Product”) by Little Bang Brewing Company (“the Company”). It arises from a complaint received on 20 October 2021.
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 the 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 meet 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 20 October 2021.
8. The Panel endeavours to determine complaints within 30 business days of receipt of the complaint, but this timeline depends on the timely receipt of materials and advice and the availability of Panel members to convene and decide the issue. The complaint was completed in this timeframe.

Pre-vetting Clearance

9. The quasi-regulatory system for alcohol beverage marketing features an 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 product packaging.

The Marketing Communication

10. The complaint relates to the packaging of Undercover Fashion Police NEIPA by Little Bang Brewing Company as shown below:





The Complaint

11. The complainant objects to the marketing as follows:

- *The labelling/packaging of the product is clearly derived from the popular video game franchise 'Grand Theft Auto', which strongly appeals to minors:*
- *The Grand Theft Auto video game franchise is among the most popular and recognisable in the world. Despite the game's Australian classification as R18+, it is extremely well known and popular among minors under 18 years.*
- *A report by Kaiser Family Foundation found that 85% of boys aged 15-18yrs had played the Grand Theft Auto video game. The game franchise has only increased in popularity since the report's release.*
- *Commonsensemedia.org parent and child reviews for the latest Grand Theft Auto game (Grand Theft Auto V) argue the game is appropriate for a 12 years+ audience and display the popularity and usership of the game among minors.*
- *The font, artistic design and scenery used on the product strongly resemble Grand Theft Auto font, artistic design and scenery. These similarities would lead to an association between the product and the video game, therefore having a strong appeal to minors*

The ABAC Code

12. Part 3 of the ABAC Code provides that a Marketing Communication must NOT:

(b)(i) have Strong or Evident Appeal to Minors.

13. Part 6 of the ABAC Code provides that:

Strong or Evident Appeal to Minors means:

- (i) likely to appeal to strongly to Minors;
- (ii) specifically targeted at Minors;
- (iii) having a particular attractiveness for a Minors beyond the general attractiveness it has for an Adult;
- (iv) using imagery, designs, motifs, animations or cartoon characters that are likely to appeal strongly to Minors or that create confusion with confectionery or soft drinks; or
- (v) using brand identification, including logos, on clothing, toys or other merchandise for use primarily by Minors.

The Company's Response

14. The Company responded to the complaint by letter emailed on 25 October 2021. The principal comments made by the Company were:

- Before we proceed to our comments, please find below answers to the questions outlined in the letter from ABAC:

Q1: Did the packaging referred to in the complaint receive Alcohol Advertising Pre-vetting Service Approval?

A2: The packaging was not submitted for pre-vetting. Our business model relies on producing a large variety of many small batches and as a small, independent family business, the additional cost involved with such vetting is prohibitive.

Q2: When was the Product first supplied for bona fide retail sale in the ordinary course of business in Australia?

A2: Our product, Undercover Fashion Police (New England IPA), was first released for retail sale on 22/7/2017.

Q3: Does the packaging, name and labelling of the Product breach Part 3 (b)(i) of the Code by having Strong or Evident Appeal to Minors, in particular by referencing Grand Theft Auto, which is popular amongst children?

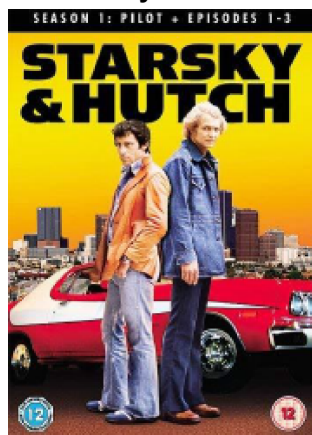
A3: No, we do not believe the presence of two ‘unfashionable’ middle-aged men, who are front and centre of this design, would be appealing to Minors. The overall design concept of Undercover Fashion Police pays homage to the retro cop shows of the 60s, 70s and 80s. In turn, these are the same inspirations adopted by the Adult video game, Grand Theft Auto, arguably resulting in similar artistic outcomes.

- We will take the opportunity to provide some background on our approach to design in general, further background on the Undercover Fashion Police label design, and respond to the specific objections raised in the complaint below.
- Little Bang Brewing Company is a multi-award winning brewery, particularly renowned for its innovative and high-quality packaging designs. It is integral to the Little Bang brand that each beer label is not merely a logo in a different colour, but a complete conceptual art piece in its own right. It is our stated intention that we never simply rip off the branding of an existing property (like some others in the craft beer world), but create fun, interesting artworks of our own, in many different styles, referencing all manner of modern aesthetics and pop-culture. We work with local artists, bringing a unique, fun and creative voice to the market.
- Little Bang’s core demographic is males aged 35 to 44, so our artwork, with its many different styles and pop-culture references, is aimed squarely at this market. Previous references include Classic Comic Books, Vintage Sci-Fi Paperbacks, Monster Movies and Traditional Botanical Illustrations.
- This is evident in the concept for Undercover Fashion Police, with its influences coming from the classic “retro” feel of a 70s cop show. Below is an earlier iteration of the artwork from 2018, when the beer was a keg-only product.



- In response to beer's popularity in keg, in 2019 we developed a complete artwork for its release in cans. This was aided by local designer and artist, Matt Kavanagh.
- The brief was to continue with the “retro cop show” feel, particularly referencing shows such as Starsky & Hutch and Miami Vice (see references below). The split-screen cinematic style that is a popular and recognisable signifier of the period (see references below) is also utilised in the design for Undercover Fashion Police. The fact that the R18+ rated, Adult video game Grand Theft Auto also references similar stylistic conventions should not, and cannot be the responsibility of Little Bang Brewing Company.

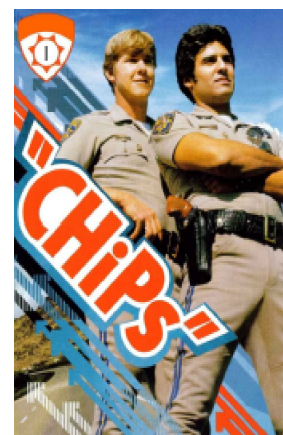
1975 Action Series,
Starsky & Hutch



1980s TV Series, Magnum,
P.I.



1970s TV Series,
CHiPs



**2017 Movie Remake,
CHIPS**



1980s TV Series, Miami Vice



- Examples of the Split Screen Stylistic Approach:

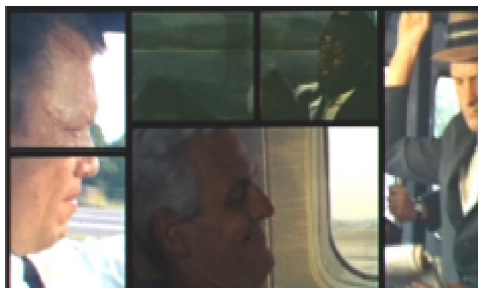
1997, Boogie Nights



2008, Mesrine: Killer Instinct



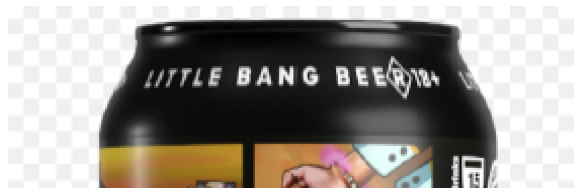
1968, The Thomas Crown Affair



- Responses to the Advertisement Objection Reason:

Objection: “The Grand Theft Auto video game franchise is among the most popular and recognisable in the world. Despite the game’s Australian classification as R18+, it is extremely well known and popular among minors under 18 years”

Response: We fail to see how the behaviour of people who are by definition breaking the law (providing R18+ material to children) can be cited as evidence against our considered design decisions. In addition, the word BEER and the easily recognisable R18+ iconography is wrapped around the neck of every can making it clearly visible from all angles and extremely clear that it is a product made exclusively for adults.

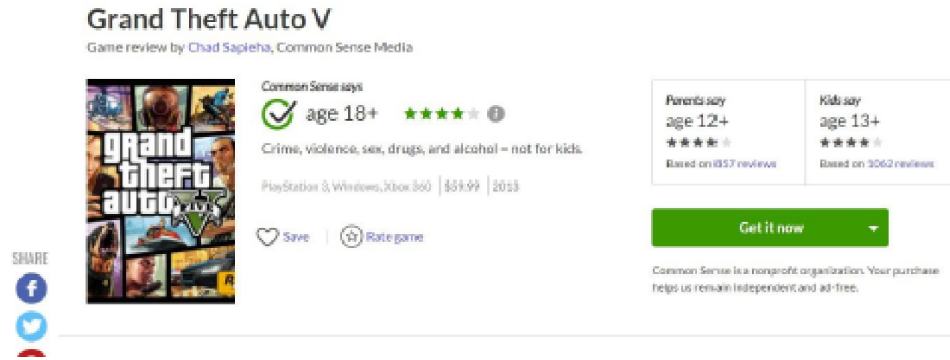


Objection: “A report by Kaiser Family Foundation in [sic] found that 85% of boys aged 15-18yrs had played the Grand Theft Auto video game. The game franchise has only increased in popularity since the report’s release.”

Response: Again, this is illegal. Regardless of whatever failures of regulation have occurred, we stress the game is not a product for children. There are a range of activities, from hot-air ballooning to driving a cement truck or owning firearms, that children may like to do, but which are fundamentally illegal for children to do. There is no difference in this case, this statistic indicates a failure of regulation in another industry, nothing more.

Objection: “Commonsensemedia.org parent and child reviews for the latest Grand Theft Auto game (Grand Theft Auto V) argue the game is appropriate for a 12 years+ audience and display the popularity and usership of the game among minors.”

Response: Please see below a screenshot of the Commonsensemedia.org entry cited above.



The objection above cites the unqualified, crowd-sourced sidebar consumer reviews while omitting the actual, official headline review endorsed by Commonsensemedia.org itself, from which I quote: “Common Sense says age 18+. Crime, violence, sex, drugs and alcohol = not for kids.”

To imply that Common Sense Media argues that the game is appropriate for children is at best disingenuous cherry-picking, at worst blatant misrepresentation in bad faith, with intent to deceive.

Objection: “The font, artistic design and scenery used on the product strongly resemble Grand Theft Auto font, artistic design and scenery. These similarities would lead to an association between the product and the video game, therefore having strong appeal to minors.”

Response: Again, correlation is not causation. Undercover Fashion Police and Grand Theft Auto both reference similar “retro” aesthetics common to 70s cop shows, as do many, many other products and properties. Added to this, both the game and the beer are mandated by law not to be provided to minors, and both are sold exclusively by licensed outlets who are required by law not to provide either of them to minors. Legally, these two products are specifically not accessible by children, and this is enforced by the appropriate law enforcement agencies. The complaint is based solely on a comparison between these two absolutely child-exclusive products, therefore it can only be a complaint against the failure of those law enforcement agencies, not against the legally-operating entities behind the products themselves.

- Little Bang Brewing Company thanks The Panel for their time and consideration.

The Panel's View

Introduction and Background

15. Little Bang Brewing Company is a local, independent brewery and taproom based in Stepney, not far from the centre of Adelaide. The brewery started as a hobby in a garage in 2013, moving to its current location in 2018, from where it now brews and packages thousands of litres on site every week, which it distributes throughout Australia.
16. The complaint raises a concern that labelling/packaging (can design) of the Company's New England Indian Pale Ale strongly appeals to minors. This argument is firstly premised on the basis that the product packaging will be readily associated with the video game 'Grand Theft Auto' (GTA). Secondly, it is argued that GTA is well known and popular amongst minors and this means the product packaging will strongly appeal to minors.
17. The Company refutes that its packaging is derived from GTA but rather the design concept pays homage to 'retro cop (TV) shows of the 60s, 70s and 80s. It is argued the packaging is aimed towards males aged 35 to 44 and would not strongly appeal to minors. It is pointed out that GTA is given a R18+ classification and like the Company's beer is not an item suitable or lawfully available to minors.
18. Before turning to these arguments, it is helpful to provide some context about the appeal of video games in Australia. The old stereotype of a gamer being a nerdy teenage boy has long been debunked by the growth and mainstream adoption of gaming worldwide and in Australia. A good snapshot of gaming in Australia is provided in the annual report commissioned by the Interactive Games and Entertainment Association and conducted by Bond University. The 2021 report showed:
 - 92% of Australian households have at least one device over which games are accessed;
 - of the gaming population, 22% are minors, 67% are aged 18 to 64 and 11% are aged over 65;
 - the average age of a gamer is 35 with 53% being male, 46% female and 1% non-binary;
 - 82% of minors aged 5 to 14 played a game at least once with 86% of persons aged 15 to 24 playing at least once in the last 12 months;

- 75% of gamers play with others regularly and 49% of parents play video games with their children; and
 - there is a strong understanding of the video game classification system with 83% of people understanding the meaning of the R18+ classification.
19. GTA is one of the world's most successful ever video games with GTA 5, released in 2013, reported to have sold over 135 million units for PlayStation, Xbox and PC versions as of 2020. Despite its age, the game continues to sell well with GTA 5 the second most popular game sold in Australia in 2020 and in November 2021 it was the 10th most sold game. This was the case even with media reports suggesting that GTA 6 will be released in 2022.
20. The age demographics of players of GTA in Australia is not readily ascertainable by a basic internet search. As noted by both the complainant and Company, the game, since its release in Australia, has had a R18+ classification given by the National Classification System. By rights, this means that a minor cannot purchase the game directly. Overseas materials tend to suggest the game is most popular with adults over 25, although the sheer strength of the game's sales in Australia suggest it is played by minors.

Strong appeal to minors- general considerations

21. The complaint brings into play Part 3 (b)(i) of the ABAC which provides that an alcohol marketing communication (which includes product labels and packaging) must not have strong or evident appeal to minors. This standard might be breached if the branding:
- specifically targets minors;
 - has a particular attractiveness for a minor beyond the general attractiveness it has for an adult; and
 - uses imagery, designs, motifs, animations, or cartoon characters that are likely to appeal strongly to minors or create confusion with confectionery or soft drink.
22. Assessment of the consistency of a marketing communication with an ABAC standard is from the probable understanding of a reasonable person. This means that the life experiences, values, and opinions held by a majority of the community is to be the benchmark. A person who interprets a marketing message in a

different way is not 'unreasonable' but possibly their understanding would not be shared by most people.

23. The Panel has considered the Part 3 (b) standard on many past occasions. While each marketing communication must always be assessed individually, some characteristics within marketing material which may make it strongly appealing to minors include:
- the use of bright, playful, and contrasting colours;
 - aspirational themes that appeal to minors wishing to feel older or fit into an older group;
 - the illusion of a smooth transition from non-alcoholic to alcoholic beverages;
 - creation of a relatable environment by use of images and surroundings commonly frequented by minors;
 - depiction of activities or products typically undertaken or used by minors;
 - language and methods of expression used more by minors than adults;
 - inclusion of popular personalities of evident appeal to minors at the time of the marketing (personalities popular to the youth of previous generations will generally not have strong current appeal to minors);
 - style of humour relating to the stage of life of a minor (as opposed to humour more probably appealing to adults); and
 - use of a music genre and artists featuring in youth culture.
24. It should be noted that only some of these characteristics are likely to be present in a specific marketing communication and the presence of one or even more of the characteristics does not necessarily mean that the marketing item will have strong or evident appeal to minors. It is the overall impact of the marketing communication rather than an individual element that shapes how a reasonable person will understand the item.
25. When assessing a product packaging, most weight is to be placed on the front of the can and its most prominent design features. This is because a reasonable consumer cannot be expected to turn a can around the full 360 degrees and study it in fine detail. It will be the overall design appearance, colour scheme and largest font messaging which will be of most influence.

Does the packaging breach the ABAC standard?

26. The Company argues that the Product packaging does not breach the ABAC standard. It is submitted:
- The label would not be appealing to Minors, as it shows two ‘unfashionable’ middle-aged men.
 - The word BEER and the R18+ iconography is wrapped around the neck of every can making it clear that the product is exclusively for adults.
 - The label aims to create a “retro cop show” feel, and utilises the split-screen cinematic style of this genre.
 - Grand Theft Auto also references similar stylistic conventions but this should not, and cannot be the responsibility of Little Bang Brewing Company.
 - The game is R18+ rated and is not a product for children. Both the game and the beer are mandated by law not to be provided to minors, and both are sold exclusively by licensed outlets who are required by law not to provide either of them to minors.
 - The statistics of children who play Grand Theft Auto indicate a failure of regulation in another industry.
 - The behaviour of people who are breaking the law by providing R18+ material to children cannot be cited as evidence against the Company’s considered design decisions.
27. That there are similarities between the product packaging and the labelling used on Grand Theft Auto games is common ground between the complainant and the Company. The similarities can be summarised as:
- the product name and GTA game both use white ‘Pricedown’ font (a style used on the TV game show ‘The Price is Right’ in the USA in the 1970s);
 - both the packaging and the game labelling employ storyboard panels each containing a drawn image of a person or an action scene; and
 - the overall design and layout of both the product packaging and the game labelling have clear resemblances.

28. There are however important differences between the game label and product packaging as well. Notably, the principal characters on the product can are two middle-aged somewhat paunchy males, whereas the GTA 5 labelling features two 'street hardened' men and a glamorous blonde woman.
29. The Company's argument that GTA is not a game for minors as evidenced by its R18+ classification is acknowledged as is the obvious point that it is unlawful to sell or serve alcohol to minors. If that was the complete answer, however, then public policy settings such as State Liquor licensing regimes and schemes such as the ABAC would not need to have provisions about marketing not appealing to minors. The reality is that life and human behaviour is somewhat more nuanced and that the government through direct regulation and the alcohol industry itself through ABAC recognise that the legal prohibitions on underage drinking need to be buttressed by standards of good marketing practice. Equally, the fact GTA carries the R18+ rating does not mean the game and its imagery will not be known to minors.
30. On balance, the Panel does not believe that a reasonable person would consider the Undercover Fashion Police NEIPA packaging to have a strong or evident appeal to minors:
- it is clear the product is an alcohol beverage and there is no reasonable prospect the product would be confused with a soft drink;
 - the stylistic similarity between the product packaging and GTA label of separate panels containing different drawn images is not as apparent from viewing the front of the can. The dominant images of the product are the product name and the images of the two men and the Company logo;
 - the overall tone of the product packaging is mature;
 - while the similarities between the labelling of GTA and the product might be recognised by some minors, the fact the game is played more heavily by adults and is rated unsuitable for minors and the differences between the packaging and game labelling diminishes the potential impact on minors; and
 - taken as a whole, the packaging would primarily appeal to older males and any appeal to minors would likely be incidental rather than strong or evident.
31. Accordingly, the complaint is dismissed.