

**ASMI Complaints Panel Final Determination 01/17**

**Meeting held on October 31, 2017**

**Reckitt Benckiser (Australia) Pty Limited (“RB”)**

**v.**

**GlaxoSmithKline Consumer Healthcare Australia Pty Ltd (“GSK”)**

**Children’s Panadol “Buddy Bear” campaign**

1. RB initiated this complaint formally by letter dated August 31, 2017. GSK responded formally by letter dated September 25, 2017 and RB referred the complaint to ASMI on October 3, 2017.
2. Attachments 2 and 3 to GSK’s formal response were removed by ASMI from the material provided to the Panel in accordance with section 9.4.2.7 of the ASMI Code of Practice 2016 (“ASMI Code”) because they contained informal correspondence between the parties. The Panel draws no adverse inferences from this.
3. RB complains that GSK’s in-store advertising material for its “Buddy Bear” campaign for Children’s Panadol (“the campaign”) appeals to minors and is directed to minors, in breach of section 5.3.4 of the ASMI Code which provides:

*“Only those therapeutic goods listed in Appendix 5 of the Therapeutic Goods Advertising Code may be advertised to minors”.*

Children’s Panadol is not included in that Appendix.

4. The in-store advertising material comprised unbranded green paw prints on the floor of pharmacies, leading to an upright display board featuring an unbranded bear balloon; shelves stocked with Children’s Panadol and other boxes and signage with the green, white and red colours of that product; depicting the brand “Panadol Children’s” and bearing messages, including:

- (a) “Nothing is more effective. Plus it’s gentle on tummies”
- (b) “Unwell little one? Smile again with Buddy Bear.”

[Image of Buddy Bear]

Win a build-a-party from build-a-bear Workshop

Panadol Children’s

For your chance to WIN 1 of 25 parties for your child

1. Colour in the flyer
2. Take a photo and upload to [panadol.com.au/buddybearparty](http://panadol.com.au/buddybearparty)

[In fine print] Conditions apply, see [Panadol.com.au/buddybearparty](http://Panadol.com.au/buddybearparty). AU residents 18+ only.
5. Photographs of the in-store advertising material are attached.
6. RB says the in-store advertising material appeals to minors and is directed to minors. In particular, the paw prints through the store and the bear positioned alongside Children's Panadol products clearly attract children and promote the medicine to children.
7. GSK says the campaign is directed toward parents. The advertising is a campaign to encourage parents to win a "Build-A-Party" for their child by colouring-in an in-store flyer and then that parent enters the draw by submitting a photo of the coloured-in item via an online portal. GSK chose to employ unbranded bear balloons expressly to address the unlikeliest of scenarios, namely that a child would associate the image of an unbranded bear with Children's Panadol.
8. GSK says both the paw prints and the display are well within the pharmacy so there is no likelihood that a child will wander into a pharmacy attracted by paw prints at the entrance. The whole premise of this pharmacy-only campaign is to encourage parents, once in the pharmacy, to enter the promotion on behalf of their children. The only occasion where any association between Children's Panadol and Buddy Bear occurs is within a pharmacy through promotional material directed to an adult contemplating a product purchase. Therefore GSK is confident that this campaign is in full compliance with the ASMI Code (and thereby the TGAC).
9. In order to provide context to the Panel, GSK provides examples of other non-GSK 'teddy bear' related promotional materials, namely iNova Pharmaceuticals' Duro-Tuss Children's Cough Liquid "Colour in for a chance to win a teddy bear" and RB's Nurofen for Children "Enter for your chance to win a winter warmer package", both of which featured teddy bears and images of teddy bears. In the RB material the teddy bear bore the Nurofen for Children brand.
10. GSK says its material is at least as compliant as that of the Duro-Tuss material.
11. GSK complained to RB in 2015 that its material breached clause 5.3.4 of the ASMI Code and RB withdrew it, while arguing that the competition was open only to adults and the prize was only for adults. GSK says it is unacceptable for RB to present a set of arguments in their defence that are clearly at odds with the position they have presented in this formal complaint.
12. In conclusion, GSK says it is clear from the TGAC that the pertinent word in relation to the intent of the advertising to minors is "directed". GSK is confident that it has not directed anything towards minors. In similar circumstances iNova believe that they have not directed promotional materials towards minors and even RB, by their own arguments (branded Nurofen for Children teddy bear aside) believe this type of promotional material is in compliance with the ASMI Code (and TGAC) when the advertising is addressing a competition that is directed to an adult shopping in a pharmacy. The complaint against GSK is not valid.

### Panel consideration

13. In considering this complaint, the Panel needs to determine how the advertising material, taken as a whole and in the context in which it is presented, would be likely to be understood by those likely to be affected by it, including the astute and the gullible, the intelligent and the not so intelligent, the well educated and the poorly educated, acting reasonably.<sup>1</sup> Likewise, the conformity of an advertisement with the TGAC should be assessed in terms of its probable impact upon the reasonable person to whom the advertisement is directed.<sup>2</sup> Accordingly, the intention of the advertiser is irrelevant to this assessment.

14. As mentioned, section 5.3.4 of the ASMI Code provides:

*“Only those therapeutic goods listed in Appendix 5 of the Therapeutic Goods Advertising Code may be advertised to minors”.*

15. Section 4(2)(j) of the TGAC provides:

*“An advertisement for therapeutic goods must not...be directed to minors, except the therapeutic goods listed in Appendix 5”.*

16. Hence the ASMI Code uses the expression “advertised to minors” while the TGAC uses the expression “directed to minors”.

17. Two of the three examples of techniques that may be considered inappropriate and contrary to the provisions of section 5.3.4 of the ASMI Code, set out in the explanatory notes, are:

- Encouragement or support of the positioning of non-prescription consumer healthcare products where they are readily accessible to children.
- Direction of advertising of non-prescription consumer healthcare products to children, except for those listed in Appendix 5 of the TGAC.

18. The Panel notes that the Australian Association of National Advertisers (AANA) has adopted a Code For Advertising and Marketing Communications to Children, in which “Advertising or Marketing Communications to Children” are defined as:

*“Advertising or Marketing Communications which, having regard to the theme, visuals and language used, are directed primarily to Children and are for Product”.*

19. An accompanying Practice Note provides:

*“Whether an advertisement or marketing communication is “directed primarily to children” is an objective test based on the factors described below.”*

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<sup>1</sup> *Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd* [1982] HCA 44 and *Taco Co of Australia v Taco Bell Pty Ltd* [1982] FCA 136.

<sup>2</sup> TGAC 3(2).

20. One factor is the nature of the product or service, in relation to which the Practice Note says:

*“Some marketing communications are for products which are of principal appeal to children, however, if the messaging and creative is not also directed primarily to children, the marketing communications do not fall under the Code. Examples are marketing communications for toys or child entertainment which can be enjoyed by children but which are directed to adults or parents to purchase the toy or entertainment”.*

21. In the present case the AANA Code does not apply. It is therefore unnecessary to decide whether the advertising is primarily directed to children. While some parts are directed to parents, such as the wording of the instructions as to how to enter the competition, other parts are directed to children, in particular the paw prints, the (unbranded) bear balloon and the pictures of teddy bears. Some of the wording used, such as: “gentle on tummies” and “Unwell little one? Smile again with Buddy Bear” could be reasonably understood as directed to children as well as to parents.

22. Of these, the most significant are the paw prints, which children could be expected to follow and to bring their parents with them. Upon reaching the display, both parents and children would see the material described above.

23. In determining whether the advertising is directed to minors, the paw prints and the display should be considered as a whole and in their context. While some elements are, as mentioned, addressed solely to parents, other elements are directed to children. The Panel considers that, taken as a whole, the advertising is directed both to parents and to children. Accordingly, the Panel sees no difference between the branded teddy bear in the RB advertisement, the picture of an unbranded teddy bear juxtaposed to bottles of Duro-Tuss Children’s cough liquid in the iNova Pharmaceuticals’ advertisement (neither of which were the subject of a formal ASMI complaint) and the unbranded teddy bear balloon and teddy bear pictures juxtaposed to boxes of Children’s Panadol in the GSK advertisement. Indeed, the paw prints leading to the display and the display itself appear designed to position Children’s Panadol products where they are accessible to children.

24. The Panel considers that a display to which children are attracted by paw prints on the floor of a pharmacy, which depicts toys which can be enjoyed by children, such as a teddy bear balloon and pictures of teddy bears, juxtaposed to boxes of Children’s Panadol, constitutes an advertisement of Children’s Panadol to minors. This is so even though it is also an advertisement of Children’s Panadol to adults and only an adult can enter the competition. By thus attracting children to the display and positioning Children’s Panadol products where they are accessible to children, the probable impact of the advertising campaign upon children is to associate the teddy bear balloon with Children’s Panadol.

## **Conclusion**

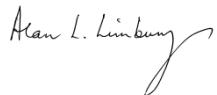
25. The Panel therefore finds GSK to be in breach of section 5.3.4 of the ASMI Code. This is a Minor Breach, having no safety implications and no effect on how consumers or healthcare professionals will view the product or its competitors.

26. Having considered all the circumstances set out in section 10.1.3 of the ASMI Code, the Panel notes that, although the campaign ended in around August this year, GSK

in its formal response stated that it would not be withdrawing the in-store advertising material from circulation. The Panel therefore requires GSK to discontinue any such advertising forthwith; to use its best endeavours to retrieve any such in-store advertising material within the next call cycle; and to inform the ASMI Chief Executive Officer when this has been done.

Dated: November 17, 2017

For the ASMI Complaints Panel



Alan L. Limbury

Chairman

**Note:** although this is called a Final Determination, each party has a right of appeal to the Arbitrator. If no appeal is lodged this determination will be published on the ASMI website once the time for lodging an appeal has expired. If there is an appeal, the Arbitrator's determination will be published on the ASMI website together with this determination. Until publication on the website, parties and their representatives should maintain the privacy of these proceedings.

## Annexure



Photo taken on Friday 11<sup>th</sup> August at Terry white Chemist – Chatswood Chase





Panadol Children's

gsk

**WIN**  
A BUILD-A-PARTY  
FROM  
BUILD-A-BEAR  
WORKSHOP

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[panadol.com.au/buddybearparty](http://panadol.com.au/buddybearparty)

Conditions apply. See [panadol.com.au/buddybearparty](http://panadol.com.au/buddybearparty). All residents 16+ only. Starts 21/7/17. Ends 31 August 2017.   
ALWAYS READ THE LABEL. Use only as directed. For the temporary relief of pain and fever.   
Incorrect use could be harmful. Consult your healthcare professional if symptoms persist.   
Trade marks are owned by or licensed to the GSK group of companies.   
CHANZCH-PRM85158173

UNWELL LITTLE ONE?  
SMILE AGAIN WITH  
**BUDDY BEAR**

gsk

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