

Progressive Enterprises Limited: investigation closure report

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Purpose of this report

1. This report summarises the outcome of the Commerce Commission's (the Commission) investigation into whether Progressive Enterprises Limited (Progressive) may have breached the Fair Trading Act 1986 (Fair Trading Act) or Commerce Act 1986 (Commerce Act) through some of its business practices when dealing with suppliers. Progressive owns the Countdown supermarket chain in New Zealand.
2. In our view Progressive did not engage in conduct that was likely to have breached the Fair Trading Act or the Commerce Act.
3. This summary report was prepared to ensure that there is a sufficient public record of our views, the decisions we took not to take the allegations any further and the reasons why we reached these views. The report is intended to assist participants in the supermarket industry, complainants, witnesses and the general public (including businesses) to understand the investigation and its outcomes.
4. We have prepared this summary report of our investigation findings so that it can be released in its entirety under the Official Information Act 1986, s 16(1)(e).
5. The Commission makes this report publicly available in accordance with its statutory functions and powers, including under:
 - 5.1 section 6 of the Fair Trading Act allowing the Commission to publish reports and information regarding matters affecting the interests of consumers; and
 - 5.2 section 25 of the Commerce Act allowing the Commission to make information available with respect to the carrying out of its functions and the exercise of its powers.
6. From the outset of our investigation numerous suppliers asked that they not be identified. Therefore, this report does not contain information that would identify individual suppliers. We would oppose the release of that information under the Official Information Act.
7. The Commission emphasises that the views we have formed and are contained in this report, have not been tested in court. Where we have made assessments, we have proceeded on the basis that the conduct described could ultimately be proven in court. However, only a court can make findings of fact or law, and this report does not purport to do so. Rather, it records the Commission's view on this investigation and the reasons for its decision not to take the investigation any further.

Executive summary

Our investigation

8. We commenced our investigation in February this year. We investigated conduct initially alleged by Shane Jones, then a Labour MP, and the Food and Grocery Council (FGC), together with other conduct identified during our investigation.

No further action against Progressive

9. We have completed our investigation. We do not intend to take any action against Progressive. The conduct we investigated was in our view not likely to be unlawful.

The matters we investigated

10. The matters we investigated can broadly be grouped into five categories, namely whether Progressive:
 - 10.1 sought payments and/or improved performance from some suppliers to compensate Progressive for lack of profits in the previous year under improper threat of commercial sanction. We refer to this category as **retrospective payments**;
 - 10.2 dealt with suppliers in a misleading or deceptive manner by making deductions from supplier invoices or seeking payments to which Progressive was not entitled under its contracts with suppliers, or otherwise misrepresenting its entitlement to do so. We refer to this category as **deductions from supplier invoices**;
 - 10.3 sought or received information about the future pricing and promotional intentions of its competitors, or otherwise engaged in conduct that might reduce competition with other retailers. This category of conduct included the exchange of potentially commercially sensitive information, suggestions as to how suppliers should deal with competing retailers, a clause in Progressive's terms of trade stating it will buy at the best price, and agreements to avoid product promotions clashing with competitors' promotions. We refer to this category as **conduct affecting retail markets**;
 - 10.4 used improper threats of commercial sanction or took advantage of a substantial degree of market power by refusing to accept wholesale price increases. We refer to this category as **conduct affecting wholesale markets**;
or
 - 10.5 favoured its transportation subsidiary over other transportation providers to gain a competitive advantage – we refer to this category as **conduct concerning preferential treatment of its own transport subsidiary**.
11. We acknowledge that distinct lines cannot be drawn between some of the categories of conduct.

12. Our investigation examined whether, in our view, through any of this conduct Progressive:
- 12.1 took advantage of substantial market power to eliminate or deter competing retailers or suppliers in breach of section 36 of the Commerce Act;
 - 12.2 entered into any arrangements with suppliers or other retailers that had the purpose, effect or likely effect of substantially lessening competition in breach of section 27 or sections 27 via 30 of the Commerce Act;
 - 12.3 made false or misleading representations in relation to the existence or effect of its contractual rights or otherwise engaged in misleading or deceptive conduct in breach of sections 9 and/or 13(i) of the Fair Trading Act; or
 - 12.4 made threats or engaged in intimidating behaviour amounting to coercion in breach of section 23 of the Fair Trading Act.

Summary of our views

13. We reached the following views. We have summarised these by reference to the five categories of conduct described above, noting that our analysis considered different examples of conduct within each category.

General context

14. Progressive explained to us that in mid to late 2013 it changed its approach in dealing with its suppliers, in pursuit of a strategy to ensure its everyday prices were competitive. Much of the conduct we investigated occurred after this time.

Retrospective payments

15. Progressive assertively communicated its expectations for improved performance and margin to two suppliers. Progressive advised that it may have to consider how it sourced, ranged, displayed and promoted the suppliers' products if the suppliers failed to meet Progressive's expectations. The two suppliers concerned were large multinational companies.
16. Progressive used an analysis of historical sales data to demonstrate the extent of what it considered to be each supplier's underperformance. The difference between the supplier's financial performance and Progressive's expectation for financial performance against the category average for the relevant period was termed an 'ask'.
17. The suppliers each described confusion in their initial discussions with Progressive as to whether the 'ask' was a request for a lump sum payment, or other compensation for past underperformance, or was the amount of margin improvement required of the supplier in the future. However, the initial confusion was resolved with subsequent communications, and neither supplier felt coerced by improper threats of commercial sanction to concede to Progressive's requests. Ultimately, in both

cases the suppliers reached negotiated supply outcomes relating to future performance which were of benefit to both parties. No retrospective payments were made.

18. We do not consider that the evidence suggested that Progressive misrepresented any contractual entitlements to request retrospective payments or otherwise engaged in misleading or deceptive conduct.
19. While the two suppliers no doubt felt under commercial pressure to improve performance during their discussions with Progressive, the evidence does not suggest that this pressure amounted to coercion.
20. Nor did the evidence suggest that Progressive's conduct was directed towards suppressing wholesale or retail competition.

Deductions from supplier invoices

21. We consider that deductions Progressive was alleged to have made in breach of its terms of supply were agreed between the parties, or were the subject of genuine contractual disputes as to Progressive's entitlement to make the deductions. We do not consider that Progressive misrepresented its contractual position in these cases or was otherwise misleading or deceptive. Nor did we see evidence of any conduct amounting to coercion.
22. Some suppliers told us that Progressive had applied its early settlement discount even when it did not pay its invoices on time. The evidence provided to us did not show that Progressive misrepresented its entitlement to apply its early settlement discount. Nevertheless, in some cases suppliers found the terms of trade relating to the early settlement discount to be unclear. We raised this with Progressive. While Progressive considers that its early settlement discount terms are clear, it is revising its explanation of this discount. We consider making the terms clearer will benefit suppliers.

Conduct affecting retail markets

23. We were provided with evidence that two suppliers gave information to Progressive about one of Progressive's competitor's future pricing. There was also evidence that Progressive had suggested how other suppliers should deal with competing retailers. However, that evidence did not suggest that Progressive entered into, or attempted to enter into, an anti-competitive agreement or understanding with any competing retailer, either directly or via suppliers.
24. Progressive's terms of trade include a provision that 'Woolworths will always buy at the best price'. This type of clause is often described as a 'most favoured nation clause'. A most favoured nation clause can ensure a particular buyer obtains products from a supplier on terms that are at least as good as those provided to other buyers. It has the potential to be pro or anti-competitive depending on the circumstances. We did not see any evidence that Progressive included or used the

most favoured nation clause to lessen competition between it and other retailers, for example, by facilitating anti-competitive information sharing, excluding a new entrant or niche retailer, or requiring suppliers to increase their wholesale prices to Progressive's competitors.

25. We consider that Progressive and at least some of its suppliers have an understanding that those suppliers would not support another retailer to promote the same stock keeping unit (SKU)¹ at the same time as Progressive was promoting that SKU.
26. The evidence provided to us did not suggest that these understandings substantially lessened competition. We were not provided with any evidence that competing retailers had also agreed to avoid promotional clashes.

Conduct affecting wholesale markets

27. In response to requested or announced supplier price increases, Progressive considered whether to promote or switch to competitive alternatives. In one case Progressive accepted a price increase; in another Progressive provided reasons for rejecting a price increase; in another a price increase was avoided in exchange for greater ranging in store; and in a final example, Progressive agreed a lesser price increase. While some of these suppliers may have felt under commercial pressure not to follow through with proposed price increases, that pressure did not amount to coercion. The evidence did not show that Progressive sought to reduce competition by negotiating strongly on price.

Conduct concerning preferential treatment of Progressive's transport subsidiary

28. While Progressive altered its delivery schedules, these changes affected all transportation providers equally and did not include preferential treatment of its transportation subsidiary to exclude other transport providers.

Some observations on the implications of our investigation for commercial parties

29. Notwithstanding our view that Progressive's conduct in each investigated case was not likely to be unlawful, our investigation identified two areas where commercial parties should be reminded to take particular care.
 - 29.1 The first is that parties should avoid ambiguity in communications and written terms of trade (especially standard form documents). Precision and clarity of meaning, purpose, and intention avoids ambiguity that can have the potential to mislead. Conduct can be misleading even when not intended to be.
 - 29.2 The second is exchanging information about future competitor behaviour, or discussing supplier interactions with a competitor. These types of exchanges create an environment in which anti-competitive agreements or conduct can

¹ A unique identifier for each distinct product.

easily emerge. This creates significant risk for the parties involved, including employees. Such exchanges and discussions should be avoided.

Structure of this report

30. The balance of this report explains in more detail our investigation and the reasons why we have decided not to take further action.
31. The report begins by explaining our investigation. We then describe some of the key background facts and give an overview of the legal provisions of the Commerce Act and the Fair Trading Act we applied, before detailing our assessment of the evidence.

Our investigation

Initial complaints

32. On 12 February 2014, we received a written complaint from Shane Jones, then a Labour MP, about the behaviour of 'Woolworths' (owner of Progressive which owns Countdown). Mr Jones' complaint outlined concerns that constituents had raised with him that 'Woolworths supermarkets is currently engaging in anti-competitive and allegedly extortionary behaviour', and centred on:

... allegations that Woolworths is demanding large payments from suppliers allegedly to defray margins or losses on earlier transactions, the threats being made include the blacklisting of their products from the supermarket and extend to blacklisting if the demands themselves are disclosed.

33. Mr Jones' complaint followed a speech he made in Parliament earlier in the day on 12 February in which he made similar allegations. In that speech, as in his letter of complaint to us, Mr Jones referred to suppliers being concerned about their on-going ability to supply products through Countdown if they complained directly about the tactics suppliers said were being used.
34. The same day, the FGC's Chief Executive, Katherine Rich, stated that its members had similar concerns:

We are aware of a number of incidents where our member companies have been asked for retrospective cash payments.

We have raised our general concerns with the supermarket concerned.

This is a serious issue that is new to the New Zealand grocery sector and we view it as an unwelcome development. We have asked our members to report further occurrences.²

² <http://tvnz.co.nz/politics-news/supermarket-giant-accused-tony-soprano-racketeering-5830572>

Our decision to investigate

35. We commenced our investigation soon after receiving Mr Jones' complaint and the FGC's statement in the media. In doing so, we took into account our enforcement criteria. The factors that influenced our decision to open an investigation included:
- 35.1 the potential that evidence supporting Mr Jones' allegations could establish breach of one or more of the Acts that we enforce;
 - 35.2 the fact that the New Zealand supermarket industry is highly concentrated and it is an important industry in New Zealand, meaning the scope for detriment would be high if we found a breach;
 - 35.3 we needed to gather information and conduct interviews to understand the allegations better; and
 - 35.4 the allegations were serious and generated a high level of public interest.

How we investigated

36. We met twice with Mr Jones to discuss his complaint, and he provided us with information from a number of parties that had contacted him. We tried to speak to those parties to understand their concerns first-hand.³
37. When we announced our investigation, we encouraged anyone who had information relevant to the allegations to contact us. However, suppliers expressed concerns about their ongoing relationship with Progressive if they provided information. We announced that we would keep the identity and/or the information provided by people confidential unless consent was given to disclose that information or the Commission was required by law to do so.
38. We received an additional 27 complaints made via the FGC and a further 27 complaints made directly to the Commission's contact centre. We spoke to the FGC to understand the nature of its members' concerns and contacted those complainants who had directly contacted the Commission and provided their contact details.
39. These complaints raised many avenues of inquiry in addition to those raised by Mr Jones. As is common in an investigation, some avenues of inquiry did not require significant investigation, while others required more in-depth work.
40. After evaluating these complaints, we issued 41 statutory notices to suppliers compelling them to provide information to us. We also conducted compulsory interviews with some of those suppliers.

³ We did not speak to parties that Mr Jones was unable to provide contact details for or we were subsequently unable to contact.

41. The 41 suppliers included suppliers that had approached the Commission, and suppliers who had not.⁴ We took this approach both to prevent suppliers who had contacted us from directly being identified and to obtain experiences from a range of suppliers of different sizes and product categories.
42. We sought information on a compulsory basis from Progressive, and we interviewed a number of Progressive employees. These employees all signed confidentiality undertakings prior to the interviews. The confidentiality undertakings restricted those employees from disclosing information provided to them during an interview to any person other than people who had signed the same undertakings.
43. Our investigation considered the information we received from Mr Jones, the FGC, direct complaints, the responses to the statutory notices we issued, the interviews we conducted with employees from both Progressive and suppliers and documents provided by relevant parties.

Relevant sections of the Commerce Act and Fair Trading Act

44. We considered the application of both the Fair Trading Act and Commerce Act to the conduct alleged and reported to us during our investigation.

Fair Trading Act provisions

45. Sections 9 and 13 of the Fair Trading Act were relevant to our investigation into whether Progressive had misled suppliers about their contractual right to make deductions from invoices or to seek payments from suppliers.
46. Section 23 of the Fair Trading Act was relevant to our investigation into retrospective payments and in particular, allegations that Progressive had behaved in a threatening or intimidating way when dealing with its suppliers. These allegations included those made by Mr Jones.
47. We discuss these sections further below.

Section 9 – misleading or deceptive conduct

48. Section 9 of the Fair Trading Act prohibits any person in trade from engaging in conduct that is misleading or deceptive, or is likely to mislead or deceive. It is not limited to misleading or deceptive conduct directed towards consumers. Section 9 also applies to conduct by one trader directed towards another trader, including dealings between large, sophisticated companies.⁵
49. When determining whether conduct is misleading or deceptive, the courts consider whether a reasonable person is likely to have been misled or deceived having regard to all the circumstances, including the characteristics of the person(s) or group to

⁴ Not all complainants received statutory notices.

⁵ *Red Eagle Corporation Ltd v Ellis* [2010] NZSC 20, footnote 11.

whom the conduct is addressed.⁶ Confusing or uncertain conduct on its own is not sufficient to be misleading. In addition, it is not determinative whether the party alleged to have engaged in misleading or deceptive conduct intended it to be so or whether any party was in fact misled.

50. Remedies for breaches of section 9 can be pursued through civil proceedings brought by the Commission or by a party to conduct which is alleged to be misleading.

Section 13(i) – false or misleading representations about rights

51. Section 13 of the Fair Trading Act contains a number of more specific prohibitions against making false or misleading representations in connection with the supply of goods or services. Section 13(i) prohibits false or misleading representations about the existence, exclusion, or effect of any right, in connection with the supply or possible supply of goods or services. Like section 9, section 13 applies to conduct between traders. A false representation is one which is untrue. Determining whether a representation is misleading requires an assessment of reasonableness in all the circumstances similar to the assessment required under section 9 which we have discussed above.
52. Breaches of section 13 can be pursued through criminal prosecution or civil proceedings by the Commission. A party affected by conduct which is alleged to breach the section can also pursue a remedy through its own civil proceeding.

Section 23 of the Fair Trading Act – Coercion in connection with the supply or possible supply of goods/services or the payment for goods or services

53. Section 23 of the Fair Trading Act prohibits any person, when in trade, from using physical force or harassment or coercion in connection with the supply or possible supply of goods or services or the payment for goods or services.
54. There is limited New Zealand case law available to guide the interpretation and application of section 23. However, we consider that coercion that breaches section 23 requires some form of improper or illegitimate pressure by one party that negates another's choice or freedom to act.
55. We say improper or illegitimate pressure because we recognise that people operate under pressure in their commercial dealings every day. The courts have recognised that in everyday, non-legal terms, anyone might feel 'coerced' if, while under pressure, they agree to do something they would prefer not to do. However, the courts have said that something more than persuasion is required to breach section 23 and not every form of pressure amounts to 'coercion' in law.

⁶ See *Red Eagle Corporation Ltd*, para [28], and *Godfrey Hirst NZ Limited v Cavalier Bremworth Limited* [2014] NZCA 418, at [51]-[53].

56. In cases involving commercial dealings, conduct which would otherwise be lawful may amount to coercion, but usually only if that conduct is in bad faith, immoral or unethical.
57. Other factors likely to be relevant in assessing whether a person's choice or freedom to act has been negated in any way giving rise to coercion are:
- 57.1 the characteristics of the person;
 - 57.2 the relationship between the parties;
 - 57.3 the time available, and the ability of the person, to consider alternative options, including the availability of professional and other advice; and
 - 57.4 whether the person did or did not protest.
58. Breach of section 23 can be pursued through civil proceedings brought by the Commission or the party alleging that they have been subject to coercion.

Commerce Act provisions

59. Section 27 of the Commerce Act was relevant to our investigation into allegations of conduct affecting both wholesale and retail markets. Section 36 of the Commerce Act was relevant to our investigation into retrospective payments and conduct aimed at protecting Progressive's competitive position.
60. Section 27 prohibits agreements that substantially lessen competition in a market, while section 30 (in effect) makes it illegal for competitors to agree to fix, control or maintain prices.
61. Section 36 prohibits a person with a 'substantial degree of power in a market' from taking advantage of that power for the purpose of:
- 61.1 restricting the entry of a person into that or any other market; or
 - 61.2 preventing or deterring a person from engaging in competitive conduct in that or any other market; or
 - 61.3 eliminating a person from that or any other market.
62. We did not reach a conclusion as to whether Progressive has a 'substantial degree of power' in any market in order to reach a conclusion for the purposes of our investigation. This was because we considered that the evidence provided to us did not show that Progressive took advantage of any substantial market power that it might have for one of the proscribed anti-competitive purposes.
63. In short, to take advantage of substantial market power a firm is required to act in a way that it would not if it was operating in a competitive market. As a result, we

have focussed on the taking advantage question in this report, together with the question of Progressive's purpose.

64. Importantly, neither section 27 nor section 36 are designed to protect individual firms in a market. Rather, they are focussed on ensuring that firms do not engage in conduct which prevents, hinders, or deters competition between firms from taking place. Proceedings can be brought by the Commission or by any other party alleging a breach of sections 27 and 36 of the Commerce Act.
65. Section 80 of the Commerce Act also provides that a party may be liable for an attempt to breach these sections. There is little New Zealand case law on what constitutes an attempt. However, a party needs to have been intending to engage in conduct that would breach the Commerce Act. In this respect, a party's conduct would need to be more than remotely connected to, or preparatory towards, a breach.

A change in Progressive's strategy

66. In mid to late 2013 Progressive changed its approach when dealing with its suppliers. Progressive was seeking to make its everyday prices more competitive, including by introducing price 'lock downs' and 'price drops'. In order to be able to drop prices while maintaining margin, Progressive focussed on obtaining better prices from its suppliers. This included Progressive not accepting price increases in the first instance, and making greater use of its sales and margin data to assess supplier performance.
67. This new strategy was first presented to suppliers by Progressive at the FGC's Annual Conference in November 2013. Progressive indicated that it received feedback from 'corners of the trade' that the presentation was 'a catalyst for some degree of anxiety'.
68. Progressive appears to have begun rolling out its new approach in early 2014. Much of the conduct we investigated occurred around this time.

Retrospective payments

What we investigated

69. It was alleged that Progressive had asked suppliers to make retrospective payments to compensate Progressive for lack of profits from a supplier's products in the previous year. These demands were said to be in the millions of dollars and were alleged to be backed by intimidation, or threats to 'blacklist' or withdraw the supplier's products from supermarket shelves (including if the demands themselves were disclosed).
70. We investigated whether Progressive made requests of this nature and, if so, whether Progressive misrepresented its rights or entitlements to seek payments or to make deductions, or had coerced its suppliers into making payments or meeting Progressive's requests.

71. We also investigated whether Progressive had taken advantage of substantial market power to seek payments or to ensure its expectations were met.

Summary of the evidence

72. The evidence indicated that in January 2014 Progressive met (separately) with two large multinational suppliers and highlighted to each of them that their products were underperforming in the relevant product categories.
73. Progressive used an analysis of historical sales data to demonstrate this underperformance. The difference between the supplier's financial performance and Progressive's expectation for financial performance against the category average for the period was termed an 'ask'.
74. Progressive discussed with those suppliers the ways in which Progressive's margin on the supplier's products could be improved. Progressive communicated that it may have to consider the way it sourced, ranged, displayed and promoted the suppliers' products if the suppliers were not able to support Progressive's desire for improved performance. However, there is no evidence of a threat to 'blacklist' at any time (either in relation to these suppliers or more generally). Progressive asked the suppliers to go away and come up with plans for addressing the issues raised.
75. The evidence indicated that there was a lack of clarity around what the 'ask' meant and how Progressive expected both suppliers to resolve the 'ask'. Progressive did not provide the underlying analysis on which it had calculated the 'ask' amounts or any explanatory documents.
76. The two suppliers were initially confused as to whether the 'ask' was a request for a retrospective payment to compensate Progressive for lack of profits, or the amount of forward looking improvement required in profitability. One supplier found Progressive's position was unclear, but it never contemplated making a retrospective payment and this was communicated to Progressive. The other supplier's representative told us 'we asked ourselves, have we just been asked to pay something in retrospect?' That supplier subsequently asked for clarification.
77. In later communications Progressive sought to clarify that its focus was forward looking – on reaching agreement on better buy prices for Progressive or promotional deals for the suppliers' products. Nonetheless there appears still to have been some residual confusion. Progressive subsequently made the position entirely clear to both suppliers.
78. Negotiations between Progressive and the two suppliers continued over a number of weeks and concluded in supply arrangements aimed at improving Progressive's sales margins and the suppliers' top line sales in the future.

Our assessment – Fair Trading Act

79. Even though there was some initial confusion as to the purpose of Progressive's 'asks', we consider that Progressive did not assert contractual rights to seek payment

or improvements in performance from suppliers that it did not have or otherwise behaved in a way that was misleading or deceptive.

80. No doubt, the suppliers felt under commercial pressure to meet Progressive's expectations for improved performance. However, the evidence did not suggest that this pressure amounted to coercion.
- 80.1 Progressive wanted a marked increase in profit performance primarily at the supplier's cost. Progressive's 'asks' were based on its analysis of its historical financial data, although this analysis was not provided to the suppliers concerned in writing. Progressive said that its analysis supported its view that the suppliers' products were underperforming in the identified categories. Progressive advised that it may have to consider how it sourced, ranged, displayed and promoted the suppliers' products if the suppliers failed to meet Progressive's expectations. Both suppliers were given the opportunity to go away and review their positions, and to attend a series of further meetings to present and discuss proposals.
- 80.2 The suppliers involved were each large multinational suppliers of popular consumer goods and considered it unlikely that Progressive could or would discontinue their product lines.
- 80.3 The suppliers did not feel coerced either by improper threats or intimidation. The suppliers would not have made a retrospective payment to Progressive. Both suppliers subsequently reached negotiated future supply terms with Progressive.

Our assessment – Commerce Act

81. We consider that Progressive's conduct did not amount to Progressive taking advantage of any substantial market power for a proscribed anti-competitive purpose.
82. The evidence did not indicate that Progressive sought to prevent or deter either supplier from competing with other suppliers, or to reduce overall competition between suppliers. It is also unlikely that Progressive would have an incentive to seek such a reduction in competition since competition between suppliers is to its benefit.
83. Further, we consider that even without substantial market power, a retailer who considered a supplier's products were not performing adequately would seek to negotiate better pricing and promotions from that supplier. We also consider that if a satisfactory outcome was not reached, it would consider options for changes to the way it sourced, ranged, displayed or promoted products, and would likely have referred to this in its pricing negotiations.

84. We accept that a smaller retailer may not be able to apply the same commercial pressure as Progressive. However, that in itself does not mean that Progressive has taken advantage of any substantial market power.

Deductions from supplier invoices

What we investigated

85. A number of suppliers indicated that Progressive had underpaid invoices by deducting amounts that were not agreed.⁷ Other suppliers expressed concern about Progressive applying the 'early settlement discount' in Progressive's standard terms of trade even when an invoice was not paid on time.
86. We considered whether these deductions amounted to misleading or deceptive conduct as to Progressive's contractual rights.

Summary of the evidence

87. There seemed to have been genuine commercial disputes in each instance of underpaid invoices we investigated. None of these suppliers described pressure accompanying this conduct which we would regard as illegitimate in a commercial context.
88. We consider that Progressive and two suppliers had agreed deductions. A further supplier said it was invoiced for the costs of a promotion which the supplier said it had not agreed to. However, this supplier was aware of the promotion, did not dispute it with Progressive at the time and the evidence suggested that an agreement to the promotion could be implied. Another supplier queried a deduction made by Progressive, but accepted the explanation provided and authorised the deduction.
89. Two other suppliers appeared to have been in genuine commercial disagreement with Progressive – in one case as to whether deductions were warranted in the circumstances, and in the other whether deductions had in fact been agreed. One was resolved and one is subject to ongoing commercial negotiation.
90. Two suppliers reported that Progressive had applied the 'early settlement discount' even when an invoice was paid late. We reviewed Progressive's terms of trade and also spoke to suppliers about their terms of trade with Progressive.
91. Progressive has standard terms of trade with most of its suppliers. It is common for Part A (entitled Commercial Terms) of Progressive's terms of trade to entitle it to an early settlement discount if Progressive pays within a specified time period.
92. Part B of the terms of trade (entitled General Terms) contains definitions of the different time periods that can apply to the early settlement discount.

⁷ Progressive was said to make the deductions by: invoicing the supplier for the amount; deducting the amount from amounts Progressive owed the supplier; or issuing a Buyer Created Credit Note (BCN) to the supplier for the amount, which Progressive then offsets against the supplier's invoices.

93. Suppliers have access to a Woolworths Australia vendor guide on its website, which contains a sample of its trading terms, including the definitions of the terms contained in Part B.⁸
94. It became apparent to us that some suppliers did not have their own copy of the terms of trade, others did not have a complete copy (ie, had Part A, but not Part B of the terms of trade), and/or others did not realise that the time periods used in Part A of Progressive's terms of trade were specifically defined in Part B of Progressive's terms of trade.

Our assessment – Fair Trading Act

95. We considered that the deductions Progressive was alleged to have made in breach of terms of supply were agreed between the parties, or were the subject of genuine contractual disputes as to Progressive's entitlement to make the deductions. We do not consider that Progressive misrepresented its contractual position in these cases or was otherwise misleading or deceptive. Nor did we see evidence of any conduct amounting to coercion.
96. In our view, the evidence provided to us did not show that Progressive misrepresented its entitlement to apply its early settlement discount. Nevertheless, in some cases suppliers found the terms of trade relating to the early settlement discount to be unclear. We considered that the early settlement terms were potentially misleading and raised this with Progressive. While Progressive considers that its early settlement discount terms are clear, it is revising its explanation of this discount. We consider that Progressive making the terms clearer will benefit suppliers.

Conduct affecting retail markets

97. Three strands of our investigation fell within this broad theme:
- 97.1 communications between Progressive and suppliers relating to a competitor's future retail prices or strategies;
 - 97.2 a term in Progressive's terms of trade with suppliers which requires that 'Woolworths will always buy at the best price' – the most favoured nation clause; and
 - 97.3 whether there was evidence of an anti-competitive agreement preventing competing retailers from promoting the same SKU at the same time as Progressive.
98. We address each in turn.

⁸

http://www.wowlink.com.au/cmgt/wcm/connect/4a6e4e80433d4a5282d19aa521a80a40/07.12.12+251168_Vendor+Guide_Booklet_POS_Update_061213.pdf?MOD=AJPERES (page 22 of guide).

Communications relating to competitors

What we investigated

99. Some suppliers provided us with communications between themselves and Progressive that led us to investigate whether Progressive had sought to influence the prices of other retailers, or to obtain information from suppliers regarding the future retail prices of competing retailers.
100. We considered whether these communications amounted to agreements that could have substantially lessened competition in a market or price fixing.

Summary of the evidence

101. The evidence indicated a number of communications took place between Progressive and its suppliers about Progressive's competitors. We saw no evidence of communications between Progressive and its competitors.
102. In the first example, a supplier advised Progressive:

Just a quick update on the [Retailer A] [Product X] Promo. Turns out they retained a low shelf price on reduced margin since Christmas, which is how they snuck this one through. The shelf price on [Product X] should revert to [Price] from the 3rd Feb so if they take [Product X] down to [Price] again, it will be signalled with a shelf price drop the week prior to the promotion.
103. Similar information appears to have been provided by another supplier in a related communication around the same time.
104. In the second example, a Progressive representative queried when it would 'see a move in retails by the wider competitive set'. The supplier replied that ultimately all pricing decisions were at the discretion of the retailer, and referred Progressive to public information suggesting that pricing had changed from previous levels.
105. Two other suppliers told us that Progressive employees had asked them to ensure Progressive's competitors increased or maintained their retail prices. Both suppliers responded by explaining that they did not have control over the pricing strategy of other retailers.

Our assessment – Commerce Act

106. We do not consider that the communications described to us were sufficient to give rise to an arrangement or understanding or conduct between Progressive and any of its retail competitors to suppress competition, or an attempt to enter such an agreement.⁹ Neither do we consider that the communications evidence agreements with suppliers that would facilitate this.
107. First, we were not provided with any evidence of direct communications between Progressive and its competitors.

⁹ Section 80 of the Commerce Act.

108. Second, we obtained no evidence that Progressive or the suppliers took any action after receiving the information. Nor that Progressive sought to enter, or attempted to enter, into an agreement with the suppliers concerned to align retail prices. Progressive advised that these communications were initiated because it was concerned that competitors may be getting a better deal from a supplier, or in breach of legislative requirements.
109. We do not therefore consider the conduct on these occasions has given rise to any agreements that breach the Commerce Act. In each case the recipient of the information took no further action. This was appropriate. However, Progressive and suppliers (and their employees) should be aware that even initiating the communications in question placed them at risk of an anti-competitive arrangement or agreement emerging from these discussions.

Progressive's most favoured nation clause

What we investigated

110. Progressive's terms of trade typically include a provision that 'Woolworths will always buy at the best price'. This type of clause is often described as a most favoured nation clause. Most favoured nation clauses are not uncommon across a range of industries. A most favoured nation clause can ensure a particular buyer obtains products from a supplier on terms that are at least as good as those provided to other buyers. These clauses have the potential to be pro or anti-competitive.
111. We investigated whether Progressive's most favoured nation clause could be substantially lessening competition between it and other retailers.¹⁰ This could happen in one of the following ways:
- 111.1 if the provision required a supplier to supply goods to Progressive at a price or percentage below the prices offered to other retailers, or to other retailers at a price or percentage higher than Progressive, rendering a competing retailer less competitively effective – this is often referred to as a most favoured nation plus clause;
 - 111.2 if the provision was targeted towards preventing expansion by other retailers;
or
 - 111.3 if the provision encouraged information sharing between suppliers and Progressive about the terms obtained by Progressive's competitors and those competitors' future pricing plans, then the provision could create or enhance an environment in which anti-competitive agreements between retailers could emerge or be monitored.

¹⁰ We consider it unlikely that these clauses would amount to Progressive taking advantage of substantial market power in breach of section 36.

Summary of the evidence

112. The most favoured nation clause appears to have been inserted by Progressive, not suppliers. Suppliers we talked to did not have a clear or consistent understanding of what the clause ‘Woolworths will always buy at the best price’ meant. We were not provided with evidence that Progressive had actively enforced the clause.

112.1 One supplier, for example, said it was not sure what the clause meant and advised that the clause did not affect its pricing in any way. Nevertheless, the supplier confirmed that Progressive did in fact have the most favourable trading terms because Progressive was the supplier’s biggest customer. The supplier said Progressive had never discussed the term with the supplier.

112.2 Another supplier interpreted the clause to mean ‘the lowest price in the market’ but had never experienced Progressive trying to enforce the clause.

113. Progressive staff indicated that the clause was driven by a desire to get competitive wholesale pricing and its expectation of getting the ‘best price’. They said that the clause has not been proactively enforced.

Our assessment – Commerce Act

114. The evidence did not suggest that this provision had the purpose, effect, or likely effect of substantially lessening competition in one of the ways discussed above.

114.1 It is not a most favoured nation plus type clause. It does not require Progressive’s wholesale prices to be a certain percentage below its competitors, or its competitors’ wholesale prices to be a certain percentage above Progressive’s.

114.2 We were not provided with evidence suggesting that Progressive included the most favoured clause to exclude a new entrant or niche retailer, or evidence that it is being used in this way.

114.3 While we have seen some sharing of information between Progressive and suppliers (which we discuss elsewhere in this report), we have seen no evidence that there is an agreement between Progressive and its competitors or that any sharing of information between Progressive and its suppliers is as a result of a most favoured nation clause.

Possible agreements to avoid promotional clashes

What we investigated

115. Many of the products consumers buy in supermarkets are sold on promotion. During our investigation, we became aware that Progressive had communicated to suppliers an expectation that its mailer promotions of a product would not ‘clash’ with the mailer promotion of the same product by a competitor.

116. We investigated whether these communications gave rise to an agreement that had the purpose, effect or likely effect of limiting price competition between Progressive and its competitors.

Summary of the evidence

117. The evidence indicated that Progressive and suppliers enter into quasi-exclusive promotion agreements. While talked about in terms of a 'no clash' policy or expectation, the effect of what is agreed is that where a supplier supports a Progressive mailer promotion, the supplier will not support another retailer to promote the same SKU at the same time as Progressive is promoting that product.
118. For example, one supplier we spoke to said it was aware of Progressive's preference not to 'clash' on promotions and it had known about this for a number of years. While the supplier did not provide examples where it had agreed to avoid promotional funding clashes, it said that it gave retailers 'clear air' to conduct their promotions – a term used to mean that no clashes should occur.
119. Another supplier provided an internal document recording that if Progressive was advertising a product at a particular retail price:
- ... no other major retailer should advertise in the same week, the same product, at the same or lower RRP.
120. The supplier concerned said this expectation had been made clear by Progressive for a number of years, although it had not explicitly agreed with Progressive to comply with it.
121. Whether amounting to a formal policy or not, Progressive staff expressed a clear preference during our interviews that promotional clashes do not occur. In addition, Progressive works with suppliers to schedule promotions and it expresses concern when a competitor offers a product cheaper than a product it has on promotion.
122. In addition, Progressive takes steps if a clash occurs. For example, faced with a clash where it was being beaten on price, Progressive employees appeared in general to request further support from a supplier to match that price, for example by supplier funding. If that was not forthcoming, Progressive would consider whether to lower its retail price, and therefore reduce its margin.
123. However, we saw no evidence of an agreement between Progressive and its competitors that it would not compete when a product was on promotion or that suppliers had facilitated such an agreement, for example by advising competing retailers of each other's promotions in advance.

Our assessment – Commerce Act

124. We consider that the evidence indicated understandings between Progressive and some suppliers that those suppliers would not support another retailer to promote the same SKU at the same time as Progressive was promoting that product.

125. The potentially anti-competitive effect of such an agreement would be that a retailer would not discount as much as it otherwise would have if it knew in advance that it would not face a supplier backed promotion by one of its competitors.
126. However, for the following reasons, we do not consider there is evidence that those understandings substantially lessen competition.
127. First, the evidence we obtained shows that retail promotion clashes still occur. Ultimately, retail price decisions are a matter for retailers not suppliers, and suppliers have limited ability to reach an agreement to control retail prices without retailer involvement (of which we have no evidence).
128. Second, a supplier is still able to support a competitor on an alternative SKU for the same product category, even when clashes are actively avoided. For example, the supplier of a soft drink brand could simultaneously promote a 1.5 litre bottle with Progressive while promoting a 2 litre bottle with another retailer. In addition, the other retailer can always promote a competing brand.
129. Third, suppliers advised us that their preference is to avoid promotional clashes. Suppliers reported that avoiding clashes increases overall sales for both suppliers and Progressive. Suppliers were concerned that retailers may not find it in their interests to invest in significant promotional activity (which benefits consumers) without having some indication from suppliers that they would not support promotions of the same product by other retailers at the same time.

Conduct affecting wholesale markets

What we investigated

130. A number of suppliers indicated that Progressive had refused their proposed price increases for product lines. We were told by these suppliers that when faced with a request for a price increase Progressive would advise the supplier that if the supplier maintained the increase, Progressive would no longer stock the product or would reduce its range of the product line within Countdown supermarkets.
131. We considered whether any refusals by Progressive could have amounted to coercion, or alternatively whether Progressive could have been taking advantage of substantial market power for an anti-competitive purpose by refusing a supplier's price increase.

Summary of the evidence

132. The evidence we received reflected business decisions made by Progressive to promote or switch to competitive alternatives in response to requested or announced supplier price increases. We also received evidence of different supplier responses to Progressive's decisions.
133. In one case Progressive accepted the price increase of the supplier, while another supplier abandoned its price increase. On one occasion Progressive provided reasons

for the rejection of a price increase: Progressive's retail pricing was uncompetitive, it had refused requests from other suppliers; and margins offered by the supplier were lower than the category average.

134. In two instances suppliers reported Progressive indicated (and in one of these cases 'threatened') it would delete the products if the suppliers maintained their price increases, or did not accept a reduced price increase. The issue was resolved in both instances. One supplier agreed to continue supply at the current price, in return for a greater ranging of its products in Countdown supermarkets. The other accepted a reduced price increase.

Our assessment – Fair Trading Act

135. We do not consider that Progressive's refusal to accept price increases or, in some cases, its accompanying threat to stop stocking products subject to a price increase, amounted to coercion.
136. Progressive made commercial business decisions to consider whether to accept the price increases or switch to competitive alternatives in response to requested price increases. This was consistent with what Progressive told us about its change in strategy in 2013 to move away from routinely accepting wholesale price increases.
137. While some of these suppliers may have felt under commercial pressure not to follow through with the price increases, any pressure did not amount to coercion. Even in the two cases where Progressive suggested that products would be deleted if price increases were maintained, a commercial resolution was achieved.

Our assessment – Commerce Act

138. The evidence provided did not show that Progressive sought to reduce competition by negotiating strongly on price. Retailers benefit from competition amongst their suppliers when they are making purchasing decisions and negotiating on price. This means that it will not ordinarily be in a retailer's interests to take actions that ultimately result in reduced competition between its suppliers. Further, consumers may benefit if, as a consequence of Progressive's negotiating position, its retail prices are lower than they would otherwise be.
139. We do not consider that Progressive's conduct in response to the proposed price increases gave rise to a taking advantage of substantial market power. In the examples Progressive acted as a retailer would have if facing price increases, but without any substantial market power. Such a retailer could choose to accept or negotiate the price increase, it could choose not to buy the product, it could purchase less, or it could find alternative suppliers. In fact, Progressive accepted some price increases, rejected some, and negotiated others.

Unfavourable delivery times

What we investigated

140. It was alleged that Progressive had changed its delivery practices at its distribution centre in Christchurch so as to offer better delivery terms to its own transport business unit, Progressive Primary Freight (Primary Freight), than to external transport providers.
141. We considered whether Progressive had taken advantage of any substantial market power by seeking to eliminate or deter competition by raising costs of external transport providers or forcing suppliers to switch to Progressive's own transport subsidiary.

Summary of the evidence

142. Primary Freight is a separate business unit of Progressive. Primary Freight does not undertake the transportation but contracts with external transport providers to provide this delivery service to suppliers. Progressive advised that suppliers are free to choose whether to use Primary Freight, the supplier's own transportation or an external transport provider.
143. The evidence we obtained showed that Progressive changed its approach to delivery times at all its distribution centres including Christchurch. These changes were applied equally to Primary Freight and external providers.
144. Specifically, in Christchurch, Progressive changed all its inward delivery times from between 5.30am to 7.30pm, to between 5pm to 11.45pm. All transport providers – Primary Freight and non-Primary Freight – were restricted to delivering goods after 5pm. Progressive says that all transport providers were notified of the proposed changes in July 2013 and asked to contact Progressive to arrange and negotiate an appropriate delivery time. Having reviewed Progressive's allocation of delivery time slots, there is a mixture of Primary Freight and external providers making deliveries at timeslots throughout the 5pm to 11.45pm period.

Our assessment – Commerce Act

145. We consider that there was no evidence that Progressive had made changes to prefer its own distribution business and exclude other external providers from favourable delivery times at its distribution centre in Christchurch. It follows that Progressive did not take advantage of any substantial market for a proscribed anti-competitive purpose.

Conclusion

146. We have completed our investigation. We do not intend to take any action against Progressive. The conduct we investigated was in our view not likely to be unlawful.

147. Notwithstanding our view that Progressive's conduct in each investigated case was not likely to be unlawful, our investigation identified two areas where commercial parties should be reminded to take particular care.

147.1 The first is that parties should avoid ambiguity in communications and written terms of trade (especially standard form documents). Precision and clarity of meaning, purpose, and intention avoids ambiguity that can have the potential to mislead. Conduct can be misleading even when not intended to be.

147.2 The second is exchanging information about future competitor behaviour, or discussing supplier interactions with a competitor. These types of exchanges create an environment in which anti-competitive agreements or conduct can easily emerge. This creates significant risk for the parties involved, including employees. Such exchanges and discussions should be avoided.