

Statement of Issues

Public version

Anytime NZ Limited

22 December 2021

Introduction

1. On 21 September 2021, the Commerce Commission (Commission) registered an application (Application) from Anytime NZ Limited (Anytime NZ) seeking clearance under section 65A of the Commerce Act 1986 (the Act) for proposed agreements with its franchisees that contain or may contain cartel provisions.¹
2. Under section 65A of the Act a party that proposes to enter into agreements with their competitors that contain or are likely to contain cartel provisions may apply for clearance. Cartel provisions, which include provisions that fix, control or maintain prices between competitors, are prohibited under the Act² unless an exception applies. One of those exceptions is if a cartel provision is reasonably necessary for a collaborative activity, as defined in the Act.³
3. If the Commission grants a collaborative activity clearance for an agreement, that agreement cannot be challenged by any person on the basis it contains a cartel provision, or as being an agreement that has the effect or likely effect of substantially lessening competition in a market under section 27 of the Act.
4. The Commission will give clearance under section 65A of the Act if it is satisfied that all of the following criteria are met:
 - 4.1 the applicant and any other party to the proposed contract, arrangement, or understanding are or will be involved in a collaborative activity; and
 - 4.2 every cartel provision in the contract, arrangement, or understanding is reasonably necessary for the purpose of the collaborative activity;⁴ and
 - 4.3 entering into the contract or arrangement, or arriving at the understanding, or giving effect to any provision of the contract, arrangement, or

¹ A public version of the Application is available on our website at [Case register](#).

² Sections 30 and 30A of the Act.

³ Section 31 of the Act. However, even if an exception applies to a cartel provision, it does not exempt the conduct from other parts of the Act (or any other laws).

⁴ Section 65A(3) of the Act states that the Commission does not need to determine whether a particular provision is in fact a cartel provision, provided there are reasonable grounds for believing it might be.

understanding, will not have, or would not be likely to have, the effect of substantially lessening competition in a market.

5. This Statement of Issues (Sol) sets out the potential issues we have identified in relation to Anytime NZ's proposal (as identified in paragraph [18] below) following our initial investigation. This is so Anytime NZ and interested parties can provide us with submissions relating to those issues.
6. In reaching the preliminary views set out in this Sol, we have considered information provided by Anytime NZ and other industry participants. We have not yet made any final decisions on the issues outlined below (or any other issues) and our views may change, and new issues may arise, as our investigation continues.

The concerns we are testing

7. At this stage, our primary concern is whether every cartel provision in the proposed contract, arrangement, or understanding is reasonably necessary for the purpose(s) of the collaborative activity.
8. At this stage, our current views are that:
 - 8.1 the proposed agreements between Anytime NZ and its franchisees are likely to contain cartel provisions that fix, control or maintain prices and some of those parties are in competition with each other;
 - 8.2 Anytime NZ and its franchisees are or will be involved in a collaborative activity; and
 - 8.3 Anytime NZ and the franchisees entering into the proposed contract or arrangement, or arriving at the understanding, or giving effect to any provision of the contract, arrangement, or understanding is unlikely to have the effect of substantially lessening competition in a market.
9. We explain our preliminary views below and invite submissions on them.

Process and timeline

10. We have agreed with Anytime NZ an extension of time in which to make a decision until **31 March 2022**.
11. The Commission would like to receive submissions and supporting evidence from Anytime NZ and other interested parties on the issues raised in this Sol. We request that parties who wish to make a submission do so by **15 February 2022**, including a confidential and a public version of any submission made. All submissions received will be published on our website with appropriate redactions.⁵ All parties will have

⁵ Confidential information must be clearly marked by highlighting the information and enclosing it in square brackets. Submitters must also provide a public version of their submission with confidential material redacted. At the same time, a schedule must be provided which sets out each of the prices of information over which confidentiality is claimed and the reasons why the information is confidential (preferably with reference to the Official Information Act 1982.)

the opportunity to cross-submit on the public versions of submissions from other parties by close of business on **22 February 2022**.

12. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission as soon as possible, and no later than **15 February 2022**, at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.

Background

The applicant

13. The Anytime Fitness brand started in the United States approximately 20 years ago and there are around 5,000 Anytime Fitness clubs operating globally. The Anytime Fitness brand entered the New Zealand market just over 10 years ago.⁶ Currently, there are 53 Anytime Fitness clubs operating throughout New Zealand.⁷
14. Anytime NZ is the New Zealand master franchisee for Anytime Fitness. Anytime NZ is also the owner and operator of four New Zealand Anytime Fitness clubs. The Anytime Fitness business model allows a member of an Anytime Fitness club to use their membership key-card to access any other Anytime Fitness club. Anytime NZ refers to this as its Reciprocity Policy. Currently, there is no standardised membership pricing between New Zealand Anytime Fitness club franchises, however there is some standardisation of service, for example, all clubs are open on a 24/7 basis.

The proposal

15. Anytime NZ proposes entering into agreements with Anytime Fitness New Zealand franchisees that contain standardised pricing provisions. The agreements would allow Anytime NZ to impose lower and upper limits on franchisees' membership pricing.
16. Anytime NZ submits that without standardised pricing between Anytime Fitness franchises, members are incentivised to join the cheapest Anytime Fitness club and then rely on the Reciprocity Policy to access their preferred club (based on location and the services offered). Anytime NZ submits that this has resulted in a "race to the bottom" in terms of quality of access, facilities and services within the Anytime Fitness franchise network.⁸
17. Anytime NZ identified two issues arising from the Reciprocity Policy and the lack of standardised pricing:

⁶ At [1.4] of the Application. There is a master franchise arrangement between Anytime NZ and the international master franchisor of Anytime Fitness, see [6.11] of the Application.

⁷ At [1.4].

⁸ At [1.8] to [1.10].

- 17.1 when a member accesses an Anytime Fitness club that they are not signed up to, that club operator does not obtain any fees from that member (ie, they are effectively providing services free of charge); and
- 17.2 if a member's membership is transferred to a new Anytime Fitness club, the new club operator must either:
 - 17.2.1 accept the member at the membership fees agreed between the member and the original Anytime Fitness club (potentially at a lesser fee than what the new club charges); or
 - 17.2.2 explain the higher fee structure and ask the member to agree to amend their membership agreement to the higher rate (which can cause customer relationship issues).
- 18. To address these issues, Anytime NZ proposes introducing a standardised pricing policy that would allow Anytime NZ to impose lower and upper limits on franchisees' membership pricing (the Proposed Agreement). The pricing policy would be binding on all Anytime Fitness New Zealand franchisees.

Criteria for granting clearance which we currently consider are met

Whether the Proposed Agreement contains, or is likely to contain, a cartel provision

- 19. A cartel provision is a provision of an agreement between competitors that has the purpose, effect or likely effect of:
 - 19.1 fixing, controlling or maintaining prices;
 - 19.2 restricting output; or
 - 19.3 allocating markets.

These three types of cartel provisions are not mutually exclusive and may overlap. For example, a provision may both fix prices and restrict output.
- 20. The Commission currently considers that the standardised pricing provisions in the Proposed Agreement that would allow Anytime NZ to:⁹
 - 20.1 set a price policy for all memberships sold which all franchisees must adhere to and which applies to all (new) members;
 - 20.2 set minimum and maximum prices for different membership types;
 - 20.3 change those minimum and maximum prices by notice to the franchisees; and

⁹ At [3.3].

20.4 vary or replace the membership types for which minimum and maximum prices are set (and set new minimums and maximums for those varied or replaced membership types),

are likely to be cartel provisions that fix, control or maintain prices.

21. The Commission also currently considers that there are reasonable grounds to believe¹⁰ that at least some franchisees who would be party to the Proposed Agreement are in competition with each other,¹¹ for the following reasons:

21.1 while a number of the Anytime Fitness clubs have common ownership, most of the clubs are independently owned. As such, they are separate people for the purposes of the Act, and are potentially competitors; and

21.2 we are of the view that actual and potential customers may view different Anytime Fitness clubs as different competitive offerings, as detailed further below.

22. We welcome submissions on this preliminary view.

Whether the parties are involved in a collaborative activity

23. The Act defines a “collaborative activity” as:¹²

23.1 an enterprise, venture or other activity in trade that is carried on in cooperation by two or more persons; and

23.2 such enterprise, venture or other activity in trade is not carried on for the dominant purpose of lessening competition between any two or more of the parties.¹³

24. Based on the evidence currently before us, our preliminary view is that Anytime NZ and the franchisees that will be party to the Proposed Agreement are engaged in a collaborative activity.

25. The Commission currently considers that Anytime NZ and the franchisees are combining their businesses, assets, or operations in some way in a commercial activity through the operation of the Anytime Fitness franchise network (including the Reciprocity Policy). This combining of operations is evidenced by, for example,

¹⁰ To grant clearance, it is not necessary for the Commission to determine whether a particular provision is in fact a cartel provision, providing there are reasonable grounds for believing it might be (s 65A(3) of the Act).

¹¹ For a provision in an agreement to be a cartel provision, it is sufficient for any two or more parties to the agreement to be in competition with each other. It is not necessary for all of the parties to the agreement to be in competition with each other (s 30A of the Act).

¹² Section 31(4) of the Act.

¹³ This purpose may be inferred from the conduct of any relevant person or from any other relevant circumstance, as per s 31(5) of the Act.

use of a common payment system and standardised membership documentation, and the common key-card system.

26. The Commission also currently considers that, objectively, the Anytime Fitness franchise network is not being carried out for the dominant purpose of lessening competition between franchisees. The Anytime Fitness network allows the franchisees and Anytime NZ to work together on operational matters, such as a common branding and marketing strategy (while maintaining separate ownership structures). We consider this to be the dominant purpose of the collaborative activity.
27. The Anytime Fitness network also allows Anytime NZ and franchisees to combine their efforts under a strong brand, allowing them to compete effectively against other nationwide gym networks, as well as offering a competitive edge against single-site gyms.
28. We welcome submissions on this preliminary view.

Whether the Proposed Agreement is likely to substantially lessen competition in any market

29. We assess whether entering into the Proposed Agreement or giving effect to any provision in the Proposed Agreement would be likely to have the effect of substantially lessening competition in a market.¹⁴
30. In this part of our assessment, ‘likely’ means a real and substantial risk, or a real chance. It means more than a possibility, but it does not need to be more likely than not.¹⁵ ‘Substantial’ means real or of substance. A lessening of competition that is not substantial will not prevent us from granting clearance.¹⁶
31. In this section we set out:
 - 31.1 Anytime NZ’s view on market definition;
 - 31.2 our preliminary view on:
 - 31.2.1 market definition; and
 - 31.2.2 the counterfactual;
 - 31.3 Anytime NZ’s view on whether the Proposed Agreement would likely lead to a substantial lessening of competition; and
 - 31.4 our preliminary view on whether the Proposed Agreement would likely lead to a substantial lessening of competition.

¹⁴ We explain how we define markets further below.

¹⁵ At [152] of our Competitor Collaboration Guidelines (January 2018) (CCGs). Accessible at: https://comcom.govt.nz/_data/assets/pdf_file/0036/89856/Competitor-Collaboration-guidelines.pdf.

¹⁶ At [149].

32. We welcome submissions on the preliminary views expressed in this section.

Anytime NZ's view on market definition

33. Anytime NZ submits that the relevant product market is 'gym services' which are regional in nature (ie, based on a metropolitan area).

34. Anytime NZ does not consider that narrower geographic market definitions are appropriate because:¹⁷

34.1 a benefit of joining an Anytime Fitness club is that a customer is able to access any club in the Anytime Fitness network. This may be a club that is located closest to their home address, or a club that is closest to their workplace. These locations (home and work) may not be near each other but will usually be in the same regional area.

34.2 the market definition should be viewed in light of the issues caused by the Reciprocity Policy, ie, in some instances a customer is identifying the Anytime Fitness club in the region that has the cheapest weekly membership rate, signing up to that club and then actually using (and subsequently transferring to) the Anytime Fitness club that is closest to their home or work (or is preferred because of the services/ facilities available).

Our current view on market definition

35. Market definition provides a framework for assessing the competitive effects of the Proposed Agreement and involves an element of judgement. The boundaries of the market do not determine the outcome of the analysis of the competitive effects as there can be constraints from outside the relevant market and segmentation within the relevant market.
36. Our preliminary view is that 'gym services' is an appropriate description of the set of services which would be subject to the Proposed Agreement. For the purposes of our analysis, we do not think it is necessary to conclude whether any specific types of gyms should be considered as part of a different market.
37. We note that there is a large degree of differentiation within the market, which influences the strength of the competitive constraint provided by different gyms. We have been considering this as part of our assessment of the competitive effects of the Proposed Agreement.
38. Our preliminary view on the geographic scope of the market is that competition for gym services occurs primarily at a local level. We note that there may be an element of national or regional competition between the large national gym chains, but that most of the competition is likely to occur between gyms in local areas as defined in more detail below, and that is where we have primarily focussed.

¹⁷ At [7.2] of the Application.

39. This view is informed by:
- 39.1 Anytime Fitness franchisees' views on:
 - 39.1.1 the typical catchment area within which they target customers;¹⁸ and
 - 39.1.2 which other gyms were viewed as competitors and the proximity of those gyms to their Anytime Fitness club;¹⁹
 - 39.2 the views of other national gym chain providers as to the catchment within which they target customers;²⁰ and
 - 39.3 an analysis of each Anytime Fitness club's member addresses and their proximity to their home club.²¹
40. Taking those matters into account, we currently consider that in assessing the extent of competition in each local area, it is appropriate to use a 10-minute drive-time zone around each Anytime Fitness club.
41. Central city clubs appear to target a slightly different member base. Interviews with Anytime Fitness franchisees and competitors suggested that the catchment area may be much smaller for central city gyms, due to gym users who are working in the city typically not being willing to drive to a gym in their lunch break or after work. To take this into account, we have also tested a 10-minute walk-time zone around Anytime Fitness clubs located in the inner city.²²

Anytime NZ's view on whether the Proposed Agreement would likely lead to a substantial lessening of competition

42. Anytime NZ submits that any lessening of competition would not be substantial because:²³
- 42.1 Anytime Fitness only holds a fraction of the market share in the markets that it submits are relevant to our assessment;
 - 42.2 the industry involves a large number of national gym brands and other competitive local gyms with no dominant providers; and

¹⁸ 13 out of 17 franchisees who responded to our questionnaire indicated they targeted customers within a 10-minute drive-time of their gym.

¹⁹ The sites listed as being strongest competitors were all within a 12 minute drive-time of the respondent's site, with most being within a 6 minute drive-time.

²⁰ Competitors listed a range of catchment areas but these were all within 2km -10km of the site.

²¹ We found that for most sites, 80% of members live within a 10 minute to 20 minute catchment area.

²² We initially tested a 5-minute walk zone, suggested as the CBD catchment by a national gym operator. There are no areas with Anytime Fitness clubs competing against each other within these areas and so this was considered not to be at risk of substantially lessening competition. To sensitivity test our results we examined a 10-minute walk zone around CBD gyms which was the narrowest zone in which there was a possible overlap.

²³ At [7.21] of the Application.

- 42.3 of the lack of material barriers to entry in the relevant markets and entrance of new competitive boutique training providers.

Our current view on the counterfactual

43. To assess the likely impact of the Proposed Agreement on competition in the market we must consider the alternative scenario without the Proposed Agreement (the counterfactual).
44. We currently consider that the most competitive likely counterfactual in this case would be the current status quo; that is, Anytime NZ continuing to operate the Anytime Fitness franchise with the Reciprocity Policy in place, but with no price limits imposed on the franchisees.
45. As set out in the analysis below on whether the cartel provisions are reasonably necessary for the purpose of the collaborative activity, we have seen no evidence to suggest that the Anytime Fitness franchise would not be able to continue operating effectively in its current form without the Proposed Agreement. In fact, Anytime Fitness has operated without the restrictions since 2017 and has continued to grow its operations during this period.

Our preliminary view on whether the Proposed Agreement would likely lead to a substantial lessening of competition

46. Based on the evidence currently before us, our preliminary view is that the Proposed Agreement is not likely to result in a substantial lessening of competition in any market.
47. In considering the impact of the Proposed Agreement on competition we have been considering two theories of harm:
- 47.1 whether the loss of competition between the Anytime Fitness franchisees from the Proposed Agreement would enable Anytime Fitness clubs to profitably raise prices or reduce quality or innovation; and
- 47.2 whether the loss of competition between the Anytime Fitness franchisees from the Proposed Agreement would increase the potential for the remaining competitors to modify their conduct to limit competition amongst themselves (for example, through tacit collusion on prices) and collectively exercise market power or divide up the market such that output reduces and/or prices increase (coordinated effects).
48. As set out in our discussion of market definition, our preliminary view is that competition takes place primarily at a local level. We therefore have been focusing our assessment on the local areas where there are at least two competing Anytime Fitness franchisees within a 10-minute drive of each other. Our analysis highlights that there are 28 Anytime Fitness clubs across Auckland and Christchurch which have another Anytime Fitness club within a 10-minute drive.

49. Due to the large number of local areas to assess, we use a filter based on the number of gyms in each area which are likely to provide a constraint to the Anytime Fitness club. We then focus on the areas which appear at the highest risk of having a substantial lessening of competition due to having fewer competitors in the area.
50. To assess which gym brands were appropriate to include in this filter we assessed the different offerings in the market and evidence from the other providers and Anytime Fitness franchisees on who they viewed as their competitors.
51. The evidence we have gathered so far indicates that:
- 51.1 Gyms such as City Fitness and Jetts are at the lower-priced end of the market, Les Mills is at the higher end; and Anytime Fitness, Snap Fitness and Flex Fitness are in the middle of the range.
 - 51.2 However, despite the price differences they all offer a similar core proposition which includes;
 - 51.2.1 access to cardio equipment, strength equipment, free weights and stretching mats;
 - 51.2.2 unlimited member access without booking;
 - 51.2.3 access to a wider network of gyms;
 - 51.2.4 personal training and classes, although these may be charged for separately.
 - 51.3 Group-fitness-based providers such as F45 gyms focus only on offering group-based activity. These gyms do not typically offer the full range of cardio and weight equipment or the ability to train independently, and do not have 24/7 access.²⁴
 - 51.4 Outside of the national gym chains, there is a wide range of independent gyms. Many of these will offer the same core services as the national chains but may be more limited; for example, not offering online workouts, or the ability to use other gyms in a network.
 - 51.5 The large national gym chains we spoke with all viewed Anytime Fitness as a competitor.²⁵ Some of the premium gyms did not view budget gyms as a competitor, and vice versa. One large national operator said they did not see gyms that specialise in group classes as a competitor as there was no reason members could not do both. They also highlighted that independent gyms could be a competitor depending on their location.²⁶

²⁴ Based on descriptions of services on websites and interviews with gym providers.

²⁵ Based on interviews with City Fitness, Jetts, Flex Fitness and Les Mills.

²⁶ Interview with [] (26 October 2021).

- 51.6 City Fitness, Flex Fitness, Jetts, Les Mills and Snap Fitness were all named by various Anytime Fitness franchisees as the strongest competitors to the franchisee's club. F45 was not named as a strongest competitor but was listed by some franchisees as being a competitor.²⁷
- 51.7 Location was frequently highlighted as an important factor in choosing a gym by both national providers and Anytime Fitness franchisees. The gyms listed by Anytime Fitness franchisees as their strongest competitor also typically reflected the gyms in closest proximity to them even where there would appear to be a large degree of differentiation in product/service.
52. Our preliminary view is that Snap Fitness and Flex Fitness are likely to be the closest competitors of Anytime Fitness clubs, but that City Fitness and Jetts at the lower priced end and Les Mills at the higher end are all also likely to provide a constraint on Anytime Fitness and should be included in our initial competitor count of each local area. We do not include F45 due to the greater degree of differentiation and do not include independent gyms due to the wide range of different offerings in the market.
53. In applying this competitor count we found that most Anytime Fitness clubs are in locations in close proximity to at least two sites of other national gym brands (within a 10 minute drive).²⁸ We currently consider that this, in addition to the likely presence of other independent gyms and the greater spread in location between Anytime Fitness clubs than other gyms, means that the Proposed Agreement is unlikely to lead to a substantial lessening of competition in these markets.
54. There are two local markets (Ferrymead in Christchurch and Kumeu in Auckland) that may be at a higher risk of a substantial lessening of competition with the Proposed Agreement. This is because there is only one other national gym brand within a 10-minute drive-time of the Anytime Fitness clubs in those markets and another Anytime Fitness within the 10-minute drive area.
55. For the Ferrymead and Kumeu markets, we have considered whether there are other independent gyms in these markets and the constraint that other national gyms just outside the boundary of the local market may provide as well as the proximity of the Anytime Fitness clubs. We have identified that:
- 55.1 within a 10-minute drive of the Ferrymead club is a Snap Fitness and two other independent gyms which offer similar 24/7 access and core services and appear likely to provide an additional constraint.²⁹ There are also a number of other specialised gyms such as Female Federation and F45 which are in very close proximity to the Ferrymead club although more differentiated and so likely to provide weaker constraint. Importantly, the nearest Anytime Fitness club to Ferrymead is on the edge of the 10-minute drive-time zone (Hereford Street) and so the level of competition currently

²⁷ Survey responses from franchisees.

²⁸ Including Snap Fitness, Jetts, City Fitness, Flex Fitness and Les Mills. We assessed drivetime using HereR API at 6pm in a weekday.

²⁹ Canterbury Sports Performance Centre and Apollo Fitness.

between the Anytime Fitness clubs may be weaker than other gyms in closer proximity.

- 55.2 within a 10-minute drive of the Kumeu club is a Snap Fitness and two other independent gyms which offer similar 24/7 access.³⁰ The two independent gyms are in close proximity to the Anytime Fitness club. There are also a number of differentiated offerings such as F45 and CrossFit which may provide a weaker constraint. The nearest Anytime Fitness club to Kumeu is Anytime Fitness Westgate, which is on the edge of the 10-minute drivetime zone and so the level of competition currently between the Anytime Fitness clubs may be weaker than other gyms in closer proximity. There is also a City Fitness just beyond this area which is also likely to provide some constraint.
56. As noted in our discussion of market definition, for clubs located in the centre of a city, we also conducted a sensitivity test for our analysis using a narrower market based on a 10-minute walk-time. Using this assessment, there are two Anytime Fitness clubs (Wyndham Street and Lorne Street) in central Auckland that are within the same local market. In assessing the constraints on these clubs, we have identified that:
- 56.1 within a 10-minute walk of the Anytime Fitness Lorne Street club there is a City Fitness and a Just Workout gym, which both offer 24/7 gym services as well as a number of differentiated offerings including a One Five One (a premium offering) and the Atrium Club (a men-only gym). Also, a Jetts gym is just outside of the 10 minute walking zone, which is close to the nearest other Anytime Fitness club (Wyndham Street).
- 56.2 within a 10-minute walk of the Anytime Fitness Wyndham Street club there is a City Fitness, Jetts and Les Mills, as well as the Just Workout and other more differentiated offerings including One Five One and Atrium Club.
57. We currently consider that the other competitors in these local areas (Kumeu, Ferrymead and Auckland CBD) have a sufficient presence such that the Proposed Agreement is unlikely to lead to a substantial lessening of competition in these markets. This assessment also takes into account that:
- 57.1 there is a large degree of differentiation between offerings and pricing in each local market (which is often not transparent). This means the Proposed Agreement is unlikely to lead to a substantial lessening of competition through increasing the risk of coordinated effects in any market;
- 57.2 the impact of the Proposed Agreement is focused on limiting price competition and there will likely remain some aspect of competition between Anytime Fitness clubs on quality of service offering; and
- 57.3 barriers to entry are typically low in the market for gym services and several competitors have plans to expand. However we note that the largest barrier

³⁰ Fit Factory Kumeu and Kumeu Gym.

appears to be finding an appropriate site which can be challenging for any one particular local area.³¹

58. We welcome submissions on these preliminary views.

Issues where we have current concerns

The cartel provisions must be reasonably necessary for the purpose of the collaborative activity

59. For the Commission to grant clearance, each cartel provision in an agreement must be reasonably necessary for the purpose of the collaborative activity.
60. We consider that where a collaborative activity has multiple substantial purposes, a cartel provision that is reasonably necessary for at least one of the substantial purposes will satisfy the 'reasonably necessary' test. We welcome comments on this interpretation of the legislation.
61. For the reasons set out below, we are not currently satisfied that the Proposed Agreement is reasonably necessary for any of the purposes of the collaborative activity.

The Commission's approach to the 'reasonably necessary' standard

62. The Commission's approach to assessing whether a cartel provision is reasonably necessary for the purposes of the collaborative activity in question is set out in our Competitor Collaboration Guidelines.³²
63. The Guidelines note that:
- 63.1 whether a cartel provision is reasonably necessary for the purposes of a collaborative activity is:
 - 63.1.1 an objective test, taken at the time the cartel provision was entered into or given effect to; and
 - 63.1.2 a fact-specific assessment.
 - 63.2 a cartel provision:
 - 63.2.1 need not be essential to be reasonably necessary; but
 - 63.2.2 must be more than merely desirable, expedient, or preferable to be reasonably necessary – something more is required.
 - 63.3 determining whether a provision is reasonably necessary requires consideration of the available alternatives.

³¹ Based on interviews with Anytime Fitness franchisees and other gym providers.

³² At [120] – [133].

64. The Guidelines explain that to assess whether a cartel provision is reasonably necessary, we will:
- 64.1 look to understand what interest(s) the parties are trying to protect or promote by using the cartel provision;³³
 - 64.2 look to understand how important or significant that interest(s) is in assisting the parties to achieve the purpose of the collaboration;³⁴
 - 64.3 consider the scope of the cartel provision; including duration, geographic scope, relationship to the parties' businesses, and the products and markets to which the provision applies;³⁵ and
 - 64.4 consider the available alternatives that would enable the parties to pursue their collaboration and protect the collaborative interest.³⁶
65. What is reasonably necessary will depend on the particular facts and circumstances of each case.³⁷

Anytime NZ's submissions on whether the Proposed Agreement is reasonably necessary for the submitted purposes of the collaborative activity

66. Anytime NZ submits that if the Proposed Agreement does not go ahead, the issues related to the Reciprocity Policy as set out at [17] will continue, which will adversely impact members' experiences, the Anytime Fitness brand, and the overall Anytime Fitness franchise network.³⁸
67. Anytime NZ submits that the Proposed Agreement is reasonably necessary for the purposes of the collaborative activity (being the operation of the franchise network).³⁹ Anytime NZ further submits that the Proposed Agreement is reasonably necessary to:⁴⁰
- 67.1 allow the Anytime Fitness franchise to provide a strong network of club facilities in good locations to its members;
 - 67.2 ensure the focus of the franchisees is on the provision of excellent facilities and services so that the chain can best compete with other gym providers; and

³³ At [128].

³⁴ At [129].

³⁵ At [131.1].

³⁶ At [131.2].

³⁷ At [122].

³⁸ At [3.16] of the Application.

³⁹ At [6.1].

⁴⁰ At [6.6] of the Application. As noted at [111] and [120] of the CCGs, a collaborative activity can have multiple purposes.

- 67.3 significantly improve the equitable allocation of membership fees as between franchisees, some of whom are currently required to provide services to a high number of members while receiving few membership fees themselves.
68. Anytime NZ further submits that the Proposed Agreement is essential to avoid the risk of the breakdown of the Anytime Fitness franchise network,⁴¹ and that there is no feasible or practically workable alternative available.⁴²
69. We set out our current views on whether the Proposed Agreement is reasonably necessary for each of Anytime NZ's submitted purposes of the operation of the Anytime Fitness franchise network.

Our view of the purpose of the collaborative activity

70. We acknowledge Anytime NZ's submissions about why the Proposed Agreement is reasonably necessary as noted at [67] above, and we adopt those submitted purposes in our 'reasonably necessary' analysis below.
71. However, we currently consider that the purpose of the collaborative activity (being the Anytime Fitness franchise network) may be more limited and specific. As set out at [26] above, we are of the preliminary view that the purpose of the Anytime Fitness network is to allow the franchisees and Anytime NZ to:
- 71.1 predominantly, work together on operational matters, such as a common branding and marketing strategy (while maintaining a separate ownership structure); and
- 71.2 combine their efforts and offerings under a strong brand, to compete effectively against other nationwide gym networks, as well as offering a competitive edge against single-site gyms.
72. We consider that some aspects of these purposes are present in the purposes submitted by Anytime NZ, and so we have taken the approach of assessing the reasonable necessity of the Proposed Agreement for those purposes. However, we are still considering whether all of the submitted purposes are relevant for this analysis.

The Proposed Agreement does not appear to be reasonably necessary for the purpose of providing a network of gyms

73. Based on the evidence currently before us, we are not yet satisfied that the Proposed Agreement is reasonably necessary for Anytime NZ to provide a strong network of gym facilities in good locations to members.
74. We currently consider that achieving this purpose appears to already be possible without the Proposed Agreement, as evidenced by:

⁴¹ At [6.2] of the Application.

⁴² At [6.7].

- 74.1 the significant number of Anytime Fitness clubs (53) spread throughout New Zealand towns and cities;
- 74.2 Anytime NZ's expansion plans, ie, [] clubs are expected to open over the next [] months⁴³ and it [];⁴⁴ and
- 74.3 the steady growth of the Anytime Fitness franchise network, for example, [].⁴⁵
75. Our current view is that the Proposed Agreement is not reasonably necessary to, for example, align the franchisees' incentives to operate the Anytime Fitness network successfully or significantly reduce the cost of operating the franchise network.
76. While we acknowledge that it need not be impossible to operate the network without the Proposed Agreement, it is not currently clear to us that without it, it would be materially more difficult for the Anytime Fitness franchise network to operate.
77. We welcome further evidence and submissions from Anytime NZ and other interested parties on whether the Proposed Agreement is reasonably necessary for the purpose of providing the Anytime Fitness network.

The Proposed Agreement does not appear to be reasonably necessary for the provision of excellent facilities and services so that Anytime Fitness can best compete with other gym providers

78. Anytime NZ submits that:⁴⁶

Without standardised pricing, there is no incentive to compete on the basis of quality. Franchisees are instead incentivised to reduce membership prices, in knowledge that other franchisees (who may offer better locations, facilities and service) are likely to bear a disproportionate burden of the obligations to service such members.

79. We understand that in suggesting the Proposed Agreement, Anytime NZ is trying to align franchisees' incentives in terms of where they focus their competitive efforts.
80. However, based on the information we currently hold, we are of the view that currently there is insufficient evidence to support the submission that price competition between Anytime Fitness franchisees is creating a 'race to the bottom' in terms of quality.
81. First, in respect of encouraging high-quality facilities and services:

⁴³ At [1.4].

⁴⁴ [].

⁴⁵ [].

⁴⁶ At [6.4] of the Application.

- 81.1 we acknowledge that there are benefits in franchisees aligning with each other, for example, to ensure consistent, high-quality branding, club fitout, equipment and group fitness offerings;
- 81.2 however, in our view, these benefits are all possible without the Proposed Agreement. [redacted],⁴⁷
[redacted],⁴⁸
- 81.3 we understand from some Anytime Fitness franchisees that there is pride in offering high quality facilities and services and it is an important part of each club’s appeal;⁴⁹ and
- 81.4 further, as noted earlier, we understand the Anytime Fitness network has been operating this way (without standardised pricing) since 2017, and there has not been a material decrease in quality since that time. As such, we are not yet convinced that not having the Proposed Agreement in place will materially affect Anytime NZ and the Anytime Fitness franchisees’ ability to achieve the submitted purposes of the collaborative activity in future.

82. In respect of Anytime Fitness clubs competing against other branded gyms:

- 82.1 we consider that the Proposed Agreement would limit intra-brand competition (ie, competition between Anytime Fitness franchises) in order to focus on inter-brand competition (ie, competing with other branded and independent gyms). With this aim, the Proposed Agreement is intended to align the franchisees’ incentives on providing quality services to compete against other national gym brands and local and specialist gyms;
- 82.2 in our view, the Proposed Agreement may have the effect of limiting the ability of some Anytime Fitness franchises to compete against lower-priced gyms. Although Anytime Fitness franchisees generally consider Anytime Fitness to be mid-tier in terms of price and high-quality in terms of service offering, we understand that some Anytime Fitness clubs face reasonably significant competitive pressure from nearby City Fitness and Jetts gyms (which generally have lower membership pricing than Anytime Fitness clubs); and
- 82.3 similarly, for Anytime Fitness clubs that offer superior quality facilities and services (such as bespoke group fitness classes) we consider that the upper range of the Proposed Agreement may not be high enough to take the costs of providing these into account.

⁴⁷ [redacted].

⁴⁸ Interview with [redacted] (27 October 2021) and interview with [redacted] (28 October 2021).

⁴⁹ Interview with [redacted] (27 October 2021) and interview with [redacted] (28 October 2021).

83. Our current view is that the Proposed Agreement is not reasonably necessary to encourage Anytime Fitness franchisees to continue to provide high quality facilities and services, in order to compete with both other Anytime Fitness clubs and other gyms.
84. We welcome further evidence and submissions from Anytime NZ and other interested parties on whether the Proposed Agreement is reasonably necessary for Anytime Fitness clubs to:
- 84.1 provide high quality services and facilities; and/or
- 84.2 compete effectively against other gym brands.

The Proposed Agreement does not appear to be reasonably necessary to significantly improve the equitable allocation of membership fees between franchisees

85. Based on the evidence currently before us, the Proposed Agreement does not appear to be reasonably necessary to improve the equitable allocation of member fees among the Anytime Fitness franchise network.
86. As set out above at [17], Anytime NZ submits that the Reciprocity Policy creates two issues:
- 86.1 **Issue One:** under the Reciprocity Policy, clubs are required to provide services to members of other clubs, and do not receive fees for doing so, which raises a ‘free-riding’ issue; and
- 86.2 **Issue Two:** where a member’s use of the Reciprocity Policy triggers a club transfer, a club may receive a transferred member who is on a lower membership rate than what the new home club charges.
87. Our current view is that these issues appear to be []⁵⁰

Issue One: clubs providing services for no fees in return

88. We understand that member free-riding can occur in the following ways:
- 88.1 members are incentivised to join a lower-priced club, and then use the Reciprocity Policy to access their preferred (often higher-priced) club. This club must then provide services to these members without receiving any fees in exchange (up until the point at which a transfer is triggered);⁵¹ and
- 88.2 clubs sign up members at low membership prices, knowing they will predominantly use another, more expensive, club in the Anytime Fitness network but they will get the membership fees (up until the point at which a

⁵⁰ See [].

⁵¹ See [94] and [95] for an explanation of when a member transfer is triggered.

transfer is triggered). In this scenario, there may be less incentive for lower-priced clubs to compete on the basis of quality or service.

89. In our view, there may be genuine reasons for Anytime Fitness members to use the Reciprocity Policy and access multiple clubs in the network. For example:

89.1 a member may choose to use one Anytime Fitness club because it is in a conveniently close location to their home, and at other times may access another club because it is in a conveniently close location to their work; or

89.2 a member may travel around New Zealand or the world, and so may wish to access many different Anytime Fitness clubs over a period of time.

In these instances, as outlined by Anytime NZ, a club provides services to members without receiving any fees from those members.

90. Most Anytime Fitness franchisees that engaged with us did not see this as having a negative impact on the operation of their club or clubs, and said that it was simply a part of belonging to a franchise network. Further, there is a view among the majority of Anytime Fitness franchisee that we spoke to that:

90.1 the benefits of the Reciprocity Policy are a selling point for the Anytime Fitness brand, and this benefit outweighs the drawbacks; and

90.2 the issue of clubs not receiving fees from 'non-home club' members would likely even out over time, as there are probably relatively similar numbers of their own members who are making use of the Reciprocity Policy and using other Anytime Fitness clubs.

91. Based on this evidence, our current view is that the Proposed Agreement is not reasonably necessary to prevent this issue. In fact, the ability for members to access multiple Anytime Fitness clubs under the Reciprocity Policy is a key benefit of the Anytime Fitness franchise structure, and, based on the view of the majority of franchisees that we interviewed and who responded to our survey, any detriments that flow from it are outweighed by this benefit.

92. We welcome submissions or further evidence on this point.

Issue two: the transfer of lower-rate members to new clubs

93. For some franchisees (but not all), the more significant issue arises where an existing Anytime Fitness member is transferred to their club on lower membership rates than what that franchisee currently charges.

94. Under the Reciprocity Policy, when a member uses a club above a certain percentage over a 60-day period, the transfer mechanism is automatically triggered and the

member's membership (and their fees) will switch to the club that the member is using the majority of the time.⁵²

95. On transfer, franchisees have the discretion to discuss with the transferring member the potential for them to be charged a higher membership fee than what they are currently paying. If the member does not agree to the new home club's pricing structure, then the transfer can be declined and the member has the choice to leave the Anytime Fitness network.⁵³
96. Anytime NZ submits that this approach has not resolved the issue as members often react poorly to being asked to pay a higher membership fee, and there is a high risk that a member will terminate their membership (so franchisees feel obliged to accept transferring members at the existing membership rate).⁵⁴
97. We tested this submission with franchisees that we interviewed. The feedback we received was that:
- 97.1 many franchisees accept the transferred membership as is (ie, with lower fees). For some, this was an absolute; for other franchisees it depended on factors such as how busy their club was or what fee the member was on. For example, if the member's current fee was close to the new club's corporate or student rate, the franchisee would accept the transfer 'as is';^{55 56 57 58 59}
- 97.2 some franchisees would discuss with the transferring member an increase to their membership fees. Most franchisees we spoke to said that if they took this option, although it might be an uncomfortable conversation, ultimately the majority of members were usually happy to pay the adjusted price and stayed with the Anytime Fitness network,⁶⁰ although some do refuse and leave;⁶¹
- 97.3 some franchisees commented that a transfer is essentially a 'free' member to their club, ie, they don't need to put in any resources to obtain that member. So a transfer, even at a lower fee, is a 'win' for their club;^{62 63} and
- 97.4 only one franchisee commented that they try to adjust membership fees (upwards) but members tend to push back on an increase (quoting the

⁵² At [3.8] of the Application.

⁵³ At [6.9]

⁵⁴ At [6.9]

⁵⁵ Interview with [] (4 November 2021).

⁵⁶ Interview with [] (4 November 2021).

⁵⁷ Interview with [] (28 October 2021).

⁵⁸ Interview with [] (27 October 2021).

⁵⁹ Interview with [] (22 November 2021).

⁶⁰ Interview with [] (27 October 2021).

⁶¹ Interview with [] (28 October 2021).

⁶² Interview with [] (4 November 2021).

⁶³ Interview with [] (28 October 2021).

Reciprocity Policy) and so they generally end up accepting transferring members on their existing rates.⁶⁴

98. Based on the feedback received to date, we do not currently consider that this is a significant issue for most clubs in the Anytime Fitness network. Although there is a risk that some members will leave for a competitor, this appears to be relatively low.

99. We also understand sometimes this issue arises where a person has been a member of Anytime Fitness for a considerable period of time and was signed up on a low membership fee which has not been adjusted over time.

100. [].⁶⁵
[]

101. [].⁶⁶ In our view, this creates the possibility [] to undercut the Proposed Agreement and undermine its effectiveness. This may suggest that differentiated pricing is not as problematic to operation of the Anytime Fitness network as Anytime NZ submits.

102. It is also unclear how the Proposed Agreement will take into account pricing of group fitness classes and application of the Reciprocity Policy. Presently, some clubs include group fitness classes as part of their standard weekly membership fees, while other clubs have a separate weekly membership fee for group fitness training (which is in addition to a standard membership).

103. [].⁶⁷

104. The Proposed Agreement and Reciprocity Policy do not appear to address this issue. In particular, it is not clear whether:

104.1 some clubs will continue to offer their own classes as part of the standard weekly membership fee. As stated earlier, if there is a specified maximum price it may impede their ability to do so;

⁶⁴ Interview with [] (8 November 2021).

⁶⁵ [].

⁶⁶ [].

⁶⁷ [].

- 104.2 the Reciprocity Policy excludes all group fitness classes, or only the Burn Base Build product; or
- 104.3 there will be minimum and maximum pricing introduced for group fitness classes (separate to the current proposed range). Currently, we understand that this is not part of the Proposed Agreement.
105. We welcome further evidence and submissions from Anytime NZ and other interested parties on how this will work as this may affect our analysis.

Measures taken by Anytime NZ that have not resolved the issue

106. The Reciprocity Policy already has some mechanisms to deal with effects of members ‘gaming’ the policy. However, Anytime NZ and some Anytime Fitness franchisees have submitted that these have not resolved the issues Anytime NZ identifies.
107. After a member initially signs up to an Anytime Fitness club there is a 30-day cooldown period where a member can only access their home-club (ie, the key-card only works at the member’s home-club).⁶⁸ However:
- 107.1 Anytime NZ submits that while this restriction was []⁶⁹, it has not resolved the longer-term impacts of the Reciprocity Policy; and
- 107.2 evidence from some franchisees that we have spoken to is that this 30-day cooldown period is not being enforced by all franchisees. In particular, during staffed hours, gym staff are manually letting members into the club before their cooldown period is up (on the basis that they want members to have a positive experience with the Anytime Fitness network).^{70 71 72}
108. We consider that if all franchisees followed the recommended procedures that relate to the 30-day cooldown period, this may decrease the number of members joining a cheaper club with the intention of immediately switching club. Feedback from franchisees and other gym providers indicates that location and convenience are key factors for customers when deciding on a gym. If a member signed up to a less expensive club, and so was unable to access their closest most convenient club for the first 30 days, this could limit ‘gaming’ of the Reciprocity Policy.
109. As outlined above, after 60 days an automatic transfer is triggered to the club that is being predominantly used by a member. Although this doesn’t stop ‘gaming’ entirely, we consider that it may disincentivise clubs to free-ride on other clubs within the network, as ultimately they would only be receiving fees for three months

⁶⁸ At [6.8] of the Application.

⁶⁹ [].

⁷⁰ Interview with [] (28 October 2021).

⁷¹ Interview with [] (4 November 2021).

⁷² Interview with [] (27 October 2021).

(this includes the first 30 days when the member only has the ability to use its home-club), until the member is transferred to the new club.

Alternative measures to the Proposed Agreement that may be available

110. Part of the assessment of whether a cartel provision is reasonably necessary includes consideration of practical alternative options available to the parties that either do not involve a cartel provision, or use a less restrictive cartel provision.⁷³ These will often be alternatives that the parties have themselves considered and discarded, and the reasons why any alternative has been rejected will be relevant to our assessment. It may also involve looking at evidence from comparable collaborations (either in New Zealand or overseas) and what they do.
111. To date, Anytime NZ has not provided us with evidence of any alternatives it has considered.
112. Although it is not the Commission's role to provide alternative workable solutions to parties, where the Commission considers there are potential alternative options it will usually test those with the parties. The parties should be able to explain why they have chosen to use a cartel provision to achieve the purpose(s) of the collaborative activity rather than the suggested alternatives.
113. The Commission invites submissions and evidence on whether there are practical alternatives available to Anytime NZ that do not involve using a cartel provision, or a less restrictive cartel provision, that would achieve substantively the same outcome as the Proposed Agreement. Alternatives might include:
- 113.1 Anytime NZ could use the dataset of members' activity (in the 60-day period) to apportion membership payments to each club based on usage (a 'wash up'). This apportionment could be limited to members that are predominantly using a non-home club. As outlined above, any free-riding is limited to the 60 days following the 30-day cooldown period.
- 113.2 Reducing geographic scope or duration of the Proposed Agreement. As currently drafted the Proposed Agreement is broad in scope as it indefinitely applies to all franchisees (irrespective of whether they are impacted by the issues identified at [17]). The scope of the Proposed Agreement could be limited to where there is evidence that free-riding is a significant issue.
- We also consider that the open-ended length of the Proposed Agreement may not be reasonably necessary. (Anytime NZ notes that it would not object to a 10-year limit on any clearance granted.⁷⁴)
- 113.3 Anytime Fitness franchisees being more upfront with members about operation of the Reciprocity Policy and transfer of memberships between clubs (including the potential for membership pricing to change when the member's home club changes). This could include an email or text

⁷³ CCGs at [127].

⁷⁴ At [1.13] of the Application.

notification to members just before the expiration of the 60-day period informing the member that a transfer is about to be triggered.

113.4 Anytime NZ submits that terminating the Reciprocity Policy is not a feasible alternative as:⁷⁵

113.4.1 it would disadvantage the Anytime Fitness network in its ability to compete against other gyms; and

113.4.2 it would cause Anytime NZ to breach the master franchise arrangement with the international master franchisor of Anytime Fitness.

We understand these concerns. However, we are considering whether the Reciprocity Policy and transfer system could be modified to alleviate the issues described at [17]. For example:

113.4.3 introducing a requirement for members to use their home club at least a specific percentage during a 30-day period; or

113.4.4 shortening the 60-day period before a transfer is triggered.

114. We welcome further evidence and submissions from Anytime NZ and other interested parties on whether the Proposed Agreement is reasonably necessary to improve the equitable allocation of membership fees between franchisees; whether the alternative options proposed above (whether alone or in combination) are practical and achievable; and whether they would address the issues as identified by Anytime NZ.

Other reasons given for introduction of the Proposed Agreement

115. We note that some Anytime Fitness franchisees have provided other reasons for wanting implementation of the Proposed Agreement, including:

115.1 avoiding price competition between Anytime Fitness franchisees,^{76 77 78}

115.2 helping with members' expectations, ie, many members expect there to be standardised pricing across the same brand;^{79 80} and

⁷⁵ At [6.10] and [6.11].

⁷⁶ Interview with [] (4 November 2021).

⁷⁷ Interview with [] (27 October 2021).

⁷⁸ [].

⁷⁹ Interview with [] (27 October 2021).

⁸⁰ Interview with [] (28 October 2021).

115.3 low pricing being harmful for the brand, and that pricing should reflect the quality of Anytime Fitness’s offering and position in the market as a mid-tier to premium gym.^{81 82}

116. While we understand these concerns, based on the evidence currently available, we do not consider that they provide a sufficient basis for the Proposed Agreement being reasonably necessary for the operation of the Anytime Fitness network. We welcome further evidence and submissions from Anytime NZ and other interested parties on these points.

Next steps

117. The Commission is currently scheduled to decide whether or not to give clearance to the collaborative activity by **31 March 2022**. However, this date may change as our investigation progresses.⁸³ In particular, if we need to further test and consider the issues identified above, or additional evidence we receive, the decision date is likely to extend.

Making a submission

118. We welcome any further evidence and other relevant information and documents that Anytime NZ or any other interested parties are able to provide regarding the issues identified in this Sol.

119. If you wish to make a submission, please send it to us at registrar@comcom.govt.nz with the reference “Anytime Fitness” in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **15 February 2022**.

120. All information we receive is subject to the Official Information Act 1982 (OIA), under which there is a principle of availability. We recognise, however, that there may be good reason to withhold certain information contained in a submission under the OIA, for example in circumstances where disclosure would unreasonably prejudice the supplier or subject of the information.

⁸¹ Interview with [] (27 October 2021).

⁸² Interview with [] (28 October 2021).

⁸³ The Commission maintains a clearance register on our website at: <http://www.comcom.govt.nz/clearances-register/> where we update any changes to our deadlines and provide relevant documents.