

Statement of Unresolved Issues**Public version****Anytime NZ Limited****14 April 2022****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 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).
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 Act unless an exception applies.² One of those exceptions is if a cartel provision is reasonably necessary for the purpose of 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;

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).

- 4.2 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 understanding, will not have, or would not be likely to have, the effect of substantially lessening competition in a market.
5. Since registering the Application, we have published:⁵
- 5.1 a Statement of Preliminary Issues (SoPI) setting out the issues that we considered important, at the start of our investigation, in deciding whether or not to grant clearance; and
 - 5.2 a Statement of Issues (Sol) setting out the potential issues that that we had identified following our initial investigation.
6. This Statement of Unresolved Issues (SoUI) sets out the issues that have not been resolved to date and we therefore continue to test. This is so Anytime NZ and other interested parties have an opportunity to comment and provide us with additional information.
7. In reaching our current views as set out in this SoUI, 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.
8. We welcome any further submissions and evidence that can be provided to address our concerns. Commission staff are also available to meet with parties to discuss any of the issues raised in this SoUI.

The concerns we continue to test

- 9. On the basis of the information collected to date, we are currently not satisfied that every cartel provision in the Proposed Agreement is reasonably necessary for the purpose(s) of the collaborative activity or that if new parties are added to the Proposed Agreement, that the Proposed Agreement is unlikely to substantially lessen competition.⁶
- 10. While we are still investigating and have made no final decisions, we continue to have concerns as to whether the cartel provisions in the Proposed Agreement are reasonably necessary for the purpose(s) of the collaborative activity. In particular:

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.

⁵ Public versions of these documents are available on our website at <https://comcom.govt.nz/case-register/case-register-entries/anytime-nz-limited>.

⁶ Or one of the purposes, if there are multiple substantial purposes of the collaborative activity.

- 10.1 we consider that there may be means that are less restrictive for competition than the Proposed Agreement which could address the issues Anytime NZ has identified with the current operation of the Anytime Fitness network in New Zealand; and
- 10.2 we have concerns that the Proposed Agreement may not effectively target the concerns Anytime NZ submits it is seeking to address.
- 11. We note that we have not yet reached a final view on whether future franchisees (that do not currently belong to the Anytime Fitness network) who subsequently become parties to the Proposed Agreement will be covered by, and therefore can gain the benefit of, any collaborative activity clearance (if granted). This issue has implications for our assessments of whether the Proposed Agreement is:
 - 11.1 reasonably necessary for the purpose(s) of the collaborative activity;⁷ and
 - 11.2 likely to substantially lessen competition in any market.
- 12. We discuss these outstanding concerns in more detail below and invite submissions on them.

The issues we are no longer actively investigating

- 13. We are not currently actively investigating the following issues. However, as noted above, our views may change as the investigation continues. We have explained how our views may change below with respect to whether the Proposed Agreement is likely to substantially lessen competition in any market.

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

- 14. The Commission currently considers that the standardised pricing provisions in the Proposed Agreement are likely to be cartel provisions that fix, control or maintain prices.
- 15. The Commission also currently considers that there are reasonable grounds to believe that at least some of the franchisees who would be party to the Proposed Agreement are in competition with each other.^{8 9}

⁷ We currently consider that, if a clearance would cease to apply when such parties join the Anytime NZ network and become parties to the Proposed Agreement, we cannot take into account the potential for the Proposed Agreement to address concerns associated with the growth of the Anytime Fitness network, including the addition of those parties.

⁸ 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).

⁹ 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).

Whether the parties are involved in a collaborative activity

16. Based on the evidence currently before us, our current view is that Anytime NZ and the franchisees that will be parties to the Proposed Agreement are engaged in a collaborative activity, being the Anytime Fitness franchise network. We are also of the view that the collaborative activity does not have the dominant purpose of lessening competition between franchisees, so it is a collaborative activity as defined in section 31(4) of the Act.¹⁰

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

17. With respect to existing clubs in the Anytime Fitness network, we are currently of the view that the Proposed Agreement is unlikely to substantially lessen competition in any market.
18. However, if parties are able to join the Proposed Agreement after clearance has been granted and can gain the benefit of clearance, whether the Proposed Agreement is likely to substantially lessen competition would require further investigation. This is explained further in [118] to [123] below.

Process and timeline

19. We have agreed with Anytime NZ an extension of time in which to make a decision until **27 May 2022**.
20. The Commission would like to receive submissions and supporting evidence from Anytime NZ and other interested parties on the issues raised in this SoUI. We request that parties who wish to make a submission do so by **2 May 2022**, including a confidential and a public version of any submission made. All submissions received will be published on our website with appropriate redactions.¹¹ All parties will have the opportunity to cross-submit on the public versions of submissions from other parties by close of business on **9 May 2022**.
21. 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 **2 May 2022**, at registrar@comcom.govt.nz so that we can work with you to accommodate your needs where possible.

¹⁰ In order to fall within the “collaborative activity” exception contained in the Act, the Proposed Agreement must not be carried on for the dominant purpose of lessening competition between any two or more parties to the agreement: s 31(4)(b) of the Act.

¹¹ 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).

Background

The applicant

22. 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.¹² Currently, there are 53 Anytime Fitness clubs operating throughout New Zealand.¹³
23. 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 fob to access any 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

24. Anytime NZ proposes entering into agreements that contain standardised pricing provisions with Anytime Fitness New Zealand franchisees. The agreements would allow Anytime NZ to impose lower and upper limits on franchisees' membership pricing.
25. Anytime NZ submits that without standardised pricing between Anytime Fitness franchises, gym 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" within the Anytime Fitness franchise network in terms of quality of access, facilities and services.¹⁴
26. Anytime NZ identified two issues arising from the Reciprocity Policy and the lack of standardised pricing:
 - 26.1 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 to that member free of charge); and
 - 26.2 if a member's membership is transferred to a new Anytime Fitness club (as the franchise transfer rules require if that is the club that the member is predominantly using), the new club operator must either:
 - 26.2.1 accept the member at the membership fees agreed between the member and the original Anytime Fitness club (which is potentially at a lesser fee than what the new club charges); or

¹² 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.

¹³ At [1.4] of the Application.

¹⁴ At [1.8] to [1.10] of the Application.

26.2.2 explain the higher fee structure and ask the member to agree to amend their membership agreement to the higher rate (which Anytime NZ has submitted can cause customer relationship issues).

27. To address these issues, Anytime NZ proposes introducing a standardised pricing policy, which would be binding on all Anytime Fitness New Zealand franchisees, that would allow Anytime NZ to:
 - 27.1 set a price policy for all memberships sold which all franchisees must adhere to and which applies to all (new) members;
 - 27.2 set minimum and maximum prices for different membership types;
 - 27.3 change those minimum and maximum prices by notice to the franchisees; and
 - 27.4 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).

Issues where we have current concerns

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

28. For the Commission to grant clearance, each cartel provision in an agreement must be reasonably necessary for the purpose of the collaborative activity. 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 Sol¹⁵ and Competitor Collaboration Guidelines.¹⁶
29. Of particular note, whether a cartel provision is reasonably necessary for the purposes of a collaborative activity is an objective test and a fact-specific assessment. A cartel provision must be more than merely desirable, expedient, or preferable to be reasonably necessary, but need not be essential. The assessment of whether a cartel provision is reasonably necessary also requires consideration of the available alternatives.
30. 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.
31. 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.

¹⁵ At [62] to [65] of the Statement of Issues.

¹⁶ [Competitor Collaboration Guidelines](#)

Our view of the purpose of the collaborative activity

32. In its Application, Anytime NZ submitted that the main purpose of the collaborative activity, ie, the Anytime Fitness franchise network, is to enable Anytime Fitness clubs to compete with other independent gym providers, through the common branding, consistent method of operation and reciprocal offering of Anytime Fitness gym services.
33. In our Sol, we set out our view that the dominant purpose of the collaborative activity was to allow the franchisees and Anytime NZ to work together on operational matters, such as a common branding and marketing strategy (while maintaining separate ownership structures).¹⁷
34. We also noted that we consider one of the purposes of the collaborative activity is the ability for Anytime Fitness franchisees and Anytime NZ to combine their efforts and offerings under a strong national brand, to compete effectively against other nationwide gym chains, as well as offering a competitive edge against single-site gyms.¹⁸
35. We note again that some aspects of these purposes of the collaborative activity are present in the stated purposes of the Proposed Agreement as submitted by Anytime NZ. Those aspects are:¹⁹
 - 35.1 enabling the Anytime Fitness franchise to provide a strong network of club facilities in good locations to its members;
 - 35.2 encouraging franchisees to focus on the provision of excellent facilities and services so that the chain can best compete with other gym providers; and
 - 35.3 significantly improving 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.
36. We assess below Anytime NZ's submissions together with other information that the Commission has gathered in the course of the investigation against these purposes.

Anytime NZ's submissions in response to the Sol on the Proposed Agreement being reasonably necessary to provide a strong network of gyms

37. In response to the Sol, Anytime NZ submitted that there will not be a strong network of Anytime Fitness clubs if franchisees []²⁰
Franchisees' focus on [] means they will
be hindered in their ability to effectively compete with other gym networks such as

¹⁷ At [26] and [71.1] of the Statement of Issues.

¹⁸ At [27] and [71.2] of the Statement of Issues.

¹⁹ At [67.1] – [67.3] of the Statement of Issues.

²⁰ At [12] to [13] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

Les Mills, Snap Fitness and Flex Fitness.

38. In support of this, Anytime NZ submitted that:²¹

38.1 [

38.2

38.3]
;

38.4 the growth of the Anytime Fitness network is causing issues under the Reciprocity Policy;

38.5 it is important to consider the number of new clubs projected to open as well as the locations of new clubs in relation to existing clubs; and

38.6 [].

39. As set out above, there are 53 Anytime Fitness clubs in New Zealand.
[].²²

40. Anytime NZ's submission referred to the [] expansion plans and growth of the Anytime Fitness network [].²³ Anytime NZ has also communicated to us that
[].²⁴

41. Anytime NZ also referred to having [].²⁵
[

²¹ At [15] to [27] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

²² Anytime NZ response of 17 March 2022 to Commission's request for information.

²³

[].

²⁴ Anytime NZ response of 17 March 2022 to Commission's request for information.

²⁵ Anytime NZ response of 17 March 2022 to Commission's request for information.

].²⁶

42. Anytime NZ also referred to
[

].²⁷

43. We have assessed these submissions to determine whether the Proposed Agreement is reasonably necessary to provide a strong Anytime Fitness network of clubs.

43.1 We note that Anytime NZ's expansion plans are

[

].²⁸ Currently, we remain of the view

that this planned [] growth of the network, [] indicates that the Proposed Agreement is not reasonably necessary to be able to operate a successful network of Anytime Fitness clubs which can compete against other gym networks.

43.2 We understand from some franchisees that the issue exacerbated by the Reciprocity Policy is not necessarily resulting from the lack of standardised pricing, rather it is resulting from

[

].^{29 30}

43.3 We note that Anytime NZ has

[

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44. We are not yet satisfied that the submitted aim of [] between franchisees in close proximity provides a coherent rationale for the Proposed Agreement. Looking at online pricing of Anytime Fitness clubs, there seems to be little difference [] in weekly membership pricing between clubs that are []. It seems likely that under the Proposed Agreement there will continue to be clubs in close proximity at different price points within the pricing band envisaged under the Proposed Agreement,³¹ with the potential for those differences to be at a similar

²⁶ Master Franchise Agreement at [8.2], [8.3] and Attachment 5.

²⁷ At [15] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

²⁸ As set out above, between [].

²⁹ Interview with [] (28 October 2021).

³⁰ Filenote of call with [] (22 November 2021).

³¹ For example, this may be because of the number/type of group fitness classes the clubs is offering, the size of the club, the social/economic demographics of regions or the competitive pressure that a particular club is facing from another gym outside of the Anytime Fitness network.

level to those [].

45. Based on the evidence we have collected to date; our current view remains that [] appear to be a relatively confined issue affecting a relatively small number of franchisees in Christchurch and Auckland. As set out in more detail below, we are continuing to consider our ability to take into account [] if further potential franchisees join the Anytime Fitness network in the future when we are assessing whether a cartel provision is reasonably necessary for the purpose of the collaborative activity.
46. Further, in respect of Anytime NZ's submission that [], as explained in the Sol,³² in our view the Proposed Agreement [],³³ may actually limit the ability of some Anytime Fitness franchisees to compete against lower-priced gym chains, and therefore of Anytime Fitness to provide a strong network of clubs, assuming that strong refers to competition. Although Anytime Fitness franchisees generally consider Anytime Fitness to be mid-tier in price and high-quality in terms of service offering, we understand that in some areas Anytime Fitness clubs face competitive pressure from nearby City Fitness, Snap Fitness and Jetts gyms (which generally have lower membership pricing than Anytime Fitness clubs). If the minimum price set by Anytime NZ under the Proposed Agreement is too high for some locations,³⁴ Anytime Fitness franchisees may end up losing members to other gym chains and overall be a less effective competitor.
47. We welcome further evidence and submissions from Anytime NZ and other interested parties on these issues.

Anytime NZ's submissions in response to the Sol on the Proposed Agreement being reasonably necessary for high quality facilities and services

48. Anytime NZ submitted that a franchisee's incentive to invest in first-rate services is dampened substantially if a franchisee knows that members of another Anytime Fitness club can use the Reciprocity Policy to take advantage of those better facilities while joining the club that offers lower prices and lower quality to members.³⁵
49. Anytime NZ further submitted that [].³⁶

³² At [82.2] of the Statement of Issues.

³³ How promotions work is discussed further at paragraphs [82] to [84] below.

³⁴ For example, because of the socio-economic demographics of the population in a particular area.

³⁵ At [31] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

³⁶ At [32] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

50. Anytime NZ submits that if all franchisees offered membership prices within a set band, this would provide a strong economic incentive for franchisees to invest in their facilities as a way to attract and retain members.³⁷
51. As set out in the Sol, the Commission understands that there are benefits in franchisees aligning with each other, for example, to ensure a consistent brand and image across the network, ensure the provision and maintenance of high-quality services, facilities, equipment and group fitness offerings.
52. Anytime NZ has submitted that it needs economic incentives, ie, a pricing band, to prevent free-riding and achieve this alignment across the brand. It further submitted that quality inspections are “no substitute (or match) for economic incentives”,³⁸ because the free-riding problem makes it unprofitable to invest in better facilities and services.
53. Anytime NZ identified to the Commission [] and are in close proximity to other clubs that have significantly better facilities:³⁹
- 53.1 []
- 53.2 []
- 53.3 []
- 53.4 [].
54. Anytime NZ also referred to the [].
55. Anytime NZ also submitted that it [].⁴⁰
56. Several Anytime Fitness franchisees have also conveyed to the Commission that they are in favour of the Proposed Agreement as they consider it will ensure consistency across the brand and that the Anytime Fitness brand is positioned appropriately at the mid to higher-end of the market. We set out below relevant comments made by franchisees on this issue:

³⁷ At [34] to [36] of Anytime NZ’s submission on the Statement of Issues dated 15 February 2022.

³⁸ At [34]-[35] of Anytime NZ’s submission on the Statement of Issues dated 15 February 2022.

³⁹ Anytime NZ’s response of 17 March 2022 to Commission’s request for information.

⁴⁰ At [36] of Anytime NZ’s submission on the Statement of Issues dated 15 February 2022.

- 56.1 one of the benefits of being part of the Anytime Fitness network is the similar appearance, brand image and awareness;^{41 42 43}
- 56.2 it is harmful and confusing for the brand to have clubs at diverse price points as members expect consistent pricing across the same brand;^{44 45}
- 56.3 there is inconsistency between clubs in terms of quality and this is influenced by the margins that each club is achieving, which in turn is influenced by membership pricing. Lower membership pricing means clubs are unable to provide the best equipment or customer service – by setting a minimum price this would allow franchisees greater flexibility to invest in their clubs;⁴⁶
- 56.4 it would be easier for Anytime NZ to hold individual franchisees to quality standards;⁴⁷
- 56.5 clubs that set membership pricing too low devalue the brand,⁴⁸ and there is a balance to be struck between competing with lower cost gyms and not making pricing too cheap which devalues the brand;⁴⁹ and
- 56.6 consistency of pricing is important for the brand and marketing/advertising purposes (although the flexibility to reduce the price to members if it prevents a member from leaving the club altogether would be beneficial).⁵⁰
57. As set out above, we understand the benefits of having a consistent brand image and standards across the Anytime Fitness network and could see that having a standardised pricing band may be reasonably necessary to achieve this.
58. However, we are not yet satisfied that the exercise by Anytime NZ of existing quality standard enforcement mechanisms could not effectively address these issues. In particular, we note that under an Anytime Fitness standard franchise agreement (Franchise Agreement) franchisees must:⁵¹
- 58.1 [],⁵²

⁴¹ Interview with [] (8 November 2021).

⁴² Interview with [] (4 November 2021).

⁴³ Interview with [] (27 October 2021).

⁴⁴ Interview with [] (27 October 2021).

⁴⁵ Interview with [] (9 March 2022).

⁴⁶ Interview with [] (9 March 2022).

⁴⁷ Interview with [] (9 March 2022).

⁴⁸ Interview with [] (28 October 2021).

⁴⁹ Interview with [] (14 March 2022).

⁵⁰ Interview with [] (14 March 2022).

⁵¹ [].

⁵² [].

58.2 []

58.3 []

58.4 [].

59. [].⁵³

60. We further note that there are mechanisms in the Franchise Agreement which enable Anytime NZ to:

60.1 []⁵⁴

60.2 []⁵⁵

60.3 []⁵⁶

60.4 [].⁵⁷

61. [].

62. We also understand that [].⁵⁸

63. Notwithstanding, Anytime NZ's submission that quality inspections are no match for economic incentives, we currently consider that we have insufficient evidence to demonstrate that existing mechanisms to address quality issues are inadequate to prevent free-riding, and that implementing the Proposed Agreement is reasonably necessary to remedy this issue.

⁵³ [].

⁵⁴ [].

⁵⁵ [].

⁵⁶ [].

⁵⁷ [].

⁵⁸ Interview with [](4 November 2021).

64. We also note that the Proposed Agreement may not necessarily improve economic incentives for franchisees to invest in improving the quality of their facilities, as:
- 64.1 it is not clear that franchisees which price at the lower or middle end of the pricing band permitted by the Proposed Agreement would have the financial means or incentive to invest in better facilities and services; and
 - 64.2 having an upper pricing limit on what each franchisee can charge may disincentivise franchisees from investing in equipment and better facilities. This is because the upper limit puts a cap on what each franchisee can recover through membership prices, which can make it financially unprofitable to keep investing.
65. We welcome evidence and submissions from Anytime NZ on these issues. In particular:
- 65.1 whether it has sought to rely on any of the mechanisms we have identified in the Franchise Agreement and if so, whether they were effective in addressing the issues regarding quality;
 - 65.2 [];
 - 65.3 [];
 - 65.4 details regarding the []; and
 - 65.5 [].

Anytime NZ's submissions in response to the Sol on the Proposed Agreement being reasonably necessary for the equitable allocation of membership fees between franchisees

66. In the Sol, we stated that the Proposed Agreement did not appear to be reasonably necessary to improve the equitable allocation of member fees among the Anytime Fitness franchise network.⁵⁹
67. In response, Anytime NZ submitted that a major reason for the Proposed Agreement is the

⁵⁹ At [85] to [105] of the Statement of Issues.

[

67.1

67.2

].⁶⁰

68. In the Sol we raised whether better enforcement of the 30-day cooldown period⁶¹ would assist in preventing gaming of the Reciprocity Policy.⁶² In response to this, Anytime NZ submitted that [].⁶³

69. As set out above, Anytime NZ has submitted that the [].

70. It also submits that [].⁶⁴

71. As above, we have taken the approach of assessing this submission in order to determine whether the Proposed Agreement is reasonably necessary to achieve the purpose set out in [35.3] above. The Commission understands that Anytime NZ's concern is that []. We do not currently consider the equitable allocation of fees to be a substantial purpose of the collaborative activity, but we acknowledge it may affect, for example, the ability of the network of Anytime Fitness clubs to operate effectively.

72. Based on the evidence we have collected to date, our view remains that concerns with the allocation of membership fees between franchisees appears to be a reasonably confined issue affecting a relatively small number of franchisees in Christchurch and Auckland. While we understand that some franchisees may be frustrated with this problem, we have not been provided with evidence to suggest that it is a significant issue for those affected and that it affects their ability to compete with other gyms.

⁶⁰ At [40] and [41] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

⁶¹ When a new member signs a membership agreement, there is an initial 30-day period where members can only access their home club, ie, the club that they joined up to.

⁶² At [108] of the Statement of Issues.

⁶³ At [46] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

⁶⁴ At [38] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

73. As set out at paragraphs [94] to [117] below, we are continuing to consider the extent to which issues related to new Anytime Fitness clubs opening, such as the increased potential for inequitable allocation of membership fees, affect whether the Proposed Agreement is reasonably necessary for one (or more) of the collaborative activity's purposes. However, we currently consider that our reasons for not being satisfied that the Proposed Agreement is reasonably necessary to improve the allocation of membership fees between franchisees (outlined below) would apply even taking into account [].
74. To the extent that there are [], the issue is temporary. That is:
- 74.1 there is an initial 30-day "cooldown" period where, according to the membership agreement, new members are only permitted to access their home club (ie, the key fob which allows entry only works at the home club); and
- 74.2 the transfer mechanism is triggered if a member uses a club above a certain percentage of time over a 60-day period. On the expiry of that 60-day period the member's membership and their fees will then transfer to the club that the member is using the majority of the time.⁶⁵
75. With respect to the initial 30-day period where new members may only access their home club, Anytime NZ has submitted that:
- 75.1 []⁶⁶; and
- 75.2 []⁶⁷.
76. As set out in the Sol, on the transfer of a membership, franchisees have the discretion to discuss with the transferring member the potential for charging the member 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

⁶⁵ At [3.8] of the Application.

⁶⁶ Anytime NZ RFI response dated 15 November 2021.

⁶⁷ At [46] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

network or revert to patronising their original club.⁶⁸ Feedback from franchisees has been that they either take the approach of:

- 76.1 predominantly, choosing to leave members on their existing prices as they would rather have a new member (even at lower rates) than risk them walking away from their club; and/or
 - 76.2 discussing with the member moving them to a higher rate which is in line with the new club's current membership rates. Once an explanation is given as to why, most members are usually happy with the new higher membership fee (although some do choose to leave).
77. Anytime NZ submitted that giving members a better explanation of pricing changes on transfer between clubs would still result in negative member experiences and perception of the brand. Anytime NZ further submitted that it could also risk franchisees inadvertently breaching section 80 of the Act for aiding/abetting a section 30 breach.
78. Currently, we are not persuaded that the 30-day cooldown period is []. While we understand that clubs want to be customer-focused and provide a positive experience to all members, we consider it fair and reasonable to explain to members at the outset that there is a 30-day initial period where they can only access their home club, and how the Reciprocity Policy and transfer rules work. If this is adequately explained to members at the outset, that may mitigate the risk of a [] from a member when those rules are enforced. We consider this to be comparable to, for example, explaining to members that different tiers of membership entitle them to different levels of access to a club's facilities.⁶⁹
79. It is not clear to us that Anytime NZ and franchisees explaining the application of the Reciprocity Policy, particularly the rules that apply during the 30-day initial period and that when a member is transferred to a new home club their membership fee will be determined by their new home club, would put Anytime NZ and franchisees at risk of breaching the Act.
80. With respect to [], we consider that:
- 80.1 if an adequate explanation is given to a member at the time of signing up to an Anytime Fitness membership, this continued access could reduce and members are more likely to sign up to the club they intend to use regularly (although they may use the cheaper pricing at another club to barter down the price);

⁶⁸ At [6.9] of the Application.

⁶⁹ See for example, <https://www.cityfitness.co.nz/memberships> and <https://www.jetts.co.nz/memberships/>.

80.2 while we acknowledge that no systems currently exist which would enable clubs to monitor how many times a member has attempted to access their 'non-home club' in the initial 30-day cooldown period, the barriers to introducing such systems appear low. For example, clubs could record these visits in a database which all staff are able to access and consequently identify when a non-home club member is repeatedly visiting the club;

80.3 it is only an issue for the first 30 days of a new member's membership, and after 30 days these visits would start to count toward a transfer so the 'non-home club' that is being used may eventually see the benefit from that member; and

80.4 most Anytime Fitness franchisees that have engaged with us said that the issue of clubs not receiving fees from 'non-home club' members likely evens 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.

81. Based on this evidence, our current view is that the Proposed Agreement is not reasonably necessary to address these issues related to inequitable allocation of membership fees. We welcome submissions or further evidence on this point (eg, impact on a franchisee's financial position, or running of their business).

Promotions

82. In the Sol, we also considered that the possibility for [].⁷⁰ In response to this, Anytime NZ submitted that [

[].⁷¹ However, Anytime NZ has since clarified that promotions will fall within the ambit of the Proposed Agreement where they impact on [].⁷²

83. []. It has stated that if clearance is granted, it intends to provide guidance and education to franchisees on running promotions and will monitor these to the

⁷⁰ At [101] of the Statement of Issues.

⁷¹ At [48] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

⁷² Anytime NZ response of 17 March 2022 to Commission's request for information. [].

extent practical.⁷³

84. We note that we have not seen a copy of the promotion guidelines that Anytime NZ proposes to share with franchisees. We draw Anytime NZ's attention to the fact that depending on the form and substance of these guidelines these may be separate cartel provisions. To the extent that they are, these would not fall under the Proposed Agreement and gain the benefit of clearance (if granted).

Alternatives

85. As outlined at the start of this section, part of the assessment of whether a cartel provision is reasonably necessary includes looking at possible alternative options to the Proposed Agreement. The Sol set out some possible alternative options for Anytime NZ to consider.⁷⁴ While we have dealt with some of Anytime NZ's submissions on these alternatives above, we also consider Anytime NZ's submissions on the alternatives in the paragraphs below.

86. We asked in the Sol whether it would be practical for membership payments during the 60-day period (prior to transfer) to be apportioned between clubs based on usage (therefore eliminating any free-riding).⁷⁵ Anytime NZ submitted that:⁷⁶

86.1 [];

86.2 [];

86.3 it would be impossible to police member visits to clubs fairly or effectively;

86.4 such a system would make it harder for franchisees to forecast revenue; and

86.5 [].

87. While we acknowledge that this wash-up mechanism is [].

⁷³ Anytime NZ response of 17 March 2022 to Commission's request for information.

⁷⁴ At [110] to [114] of the Statement of Issues.

⁷⁵ At [113.1] of the Statement of Issues.

⁷⁶ At [51-52] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

88. However, we acknowledge that implementing this type of system would only address the inequitable allocation of membership fees and not the other issues that have been identified, such as brand consistency.
89. We also questioned in the Sol whether it would be possible to restrict the geographical scope of the Proposed Agreement to areas where the Reciprocity Policy is causing problems.⁷⁷ Anytime NZ has submitted that due to the
[
]. Anytime NZ also submits that if a small number of clubs diverged from the Proposed Agreement this might undermine the perception of Anytime Fitness as a network with consistent policies and procedures. As outlined above, we acknowledge the benefits of having consistency of quality across the brand.
90. However, as explained further below,
[

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91. We also asked Anytime NZ whether the Reciprocity Policy could be modified by introducing one of the following changes:
- 91.1 a requirement on members to use their home club a specific percentage during each 30-day period;⁷⁸ and/or
- 91.2 shortening the time period before a transfer is triggered.⁷⁹
92. Anytime NZ submitted that both these alternatives are
[

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93. We acknowledge that these modifications to the Reciprocity Policy and transfer system, as with the wash-up system, may not be able to sufficiently address the brand consistency and quality issues that have been identified by Anytime NZ and Anytime Fitness franchisees. We are still considering whether there are other possible alternatives that could address these brand and quality issues, including changes to the enforcement of existing quality requirements in the Franchise Agreement, and how they affect our analysis. We seek further submissions or evidence on this point.

⁷⁷ At [113.2] of the Statement of Issues.

⁷⁸ At [113.3] of the Statement of Issues.

⁷⁹ At [113.4] of the Statement of Issues.

Application of collaborative activity clearances to parties added to agreement at a later stage

94. Collaborative activity clearances can only be granted for proposed contracts, arrangements or understandings (agreements), rather than agreements that have already been entered into.⁸⁰ This means that the parties that benefit from any collaborative activity clearance will always be proposed or intended parties to an agreement.
95. Anytime NZ's Application identifies the intended parties to the Proposed Agreement as Anytime NZ and the existing New Zealand franchisees of Anytime Fitness, who are listed at Appendix A of the Application.⁸¹ We refer to those parties as the **original parties** to the Proposed Agreement. If clearance is granted, the original parties will be protected by the clearance when they enter into the Proposed Agreement and give effect to it.
96. Anytime NZ has also indicated that it intends that any new franchisees who later join the Anytime Fitness network, and are not one of the original parties to the Proposed Agreement, would also be bound by the Proposed Agreement and have the benefit of clearance. We refer to those parties as **further parties**. The effect of further parties joining the Proposed Agreement at a later date is reflected in Anytime NZ's submissions on why the Proposed Agreement is reasonably necessary.
97. Our Competitor Collaboration Guidelines state that "if a new party joins an agreement that has been given clearance, the agreement is considered to be a new agreement and therefore no longer has the benefit of clearance".⁸² Anytime NZ has submitted that a clearance given to Anytime NZ and the original parties should continue to apply if further parties become party to the arrangements, and those further parties would also gain the benefit of clearance.⁸³
98. We are continuing to consider whether a collaborative activity clearance, if granted, could continue to apply to the original parties and extend to further parties if further parties join the Proposed Agreement. We are considering this issue with reference to the following considerations:⁸⁴
 - 98.1 the purpose of the collaborative activity exception and the collaborative activity clearance regime;
 - 98.2 the text used in the provisions of the Act relating to collaborative activity clearances;
 - 98.3 broader contextual considerations, being:

⁸⁰ Section 65A(1) of the Act. See also [139] of our Competitor Collaboration Guidelines.

⁸¹ At [2.3] and Appendix A of the Application.

⁸² Collaborative Activity Guidelines at [138].

⁸³ At [72] of Anytime NZ's submission on the Statement of Issues dated 15 February 2022.

⁸⁴ The meaning of legislation is ascertained from its text and in light of its purpose and its context (section 10 of the Legislation Act 2019).

98.3.1 whether the addition of further parties produces a new “contract, arrangement or understanding” for the purposes of the Act; and

98.3.2 a comparison of the provisions in the Act relating to collaborative activity clearances and authorisations of restrictive trade practices.

99. We also set out below the implications of further parties having the benefit of any clearance granted for our consideration of whether the Proposed Agreement is likely to substantially lessen competition in any market. We have addressed the implications of this issue for our consideration of whether the Proposed Agreement is reasonably necessary for the purpose of a collaborative activity throughout this SoUI.
100. We invite further submissions on whether a collaborative activity clearance (if granted) can continue to apply to the original parties and extend to further parties if they later join the Proposed Agreement, and the implications of this for our consideration of whether the Proposed Agreement is likely to substantially lessen competition in any market.

Whether a collaborative activity clearance applies following the addition of further parties

Purpose of the collaborative activity exception and collaborative activity clearance regime

101. Anytime NZ submitted that the legislature intended to allow members of a franchise chain to be able to rely on the collaborative activity exception and seek clearance when appropriate. Anytime NZ submits that it would be surprising in the extreme if a franchise network didn't grow (and expand its numbers) over time. An interpretation that did not permit parties in a franchise network to rely on clearance of provisions in a standard franchise agreement would largely render nugatory the benefits of the collaborative activity clearance process.
102. In making this submission, Anytime NZ referred to the discussion in the Commerce Select Committee's report on the Commerce (Cartels and other Matters) Bill on franchise arrangements, suggesting that the Select Committee expected that franchises were the type of collaboration that could be expected to be able to rely on the collaborative activity exception and seek clearance. Anytime NZ also submitted that the driver for amending the Bill to include what is now section 31(3) of the Act was the fact that such restraints were common in franchise arrangements.
103. The Commission acknowledges that there may be other common types of collaborative activities in respect of which the participating parties change over time, such as cooperatives.
104. However, the Commission notes that:
- 104.1 the discussion of franchise arrangements in the Select Committee's report appears to be limited to the collaborative activity exception, as opposed to collaborative activity clearances. There is an important distinction between the two, as the Act requires the Commission to consider an additional limb under the test for granting a collaborative activity clearance that does not

appear in the test for the collaborative activity exception (being whether the agreement will substantially lessen competition in a market). Comments relating to the application of the collaborative activity exception therefore cannot be assumed to apply equally to the availability of collaborative activity clearances;

104.2 the Select Committee did not go so far as to say that the collaborative activity exception is intended to cover all franchise agreements. Rather, it seemed to envisage the possibility that there will be some circumstances where franchise agreements are covered by the collaborative activity exception, but others where they are not; and

104.3 while the purpose of legislation is an important factor in its interpretation, it is not the only factor. We consider other factors relating to the text and context of the statutory provisions relating to collaborative activity clearances below.

Whether the addition of further parties produces a new “contract, arrangement or understanding”

105. In *Commerce Commission v Air New Zealand*, the High Court considered whether amended pleadings relating to market definition raised a fresh cause of action in the context of an alleged contravention of section 27 via former section 30 of the Act.⁸⁵ At [266], the High Court described a cause of action as follows:

The question is whether the amended market pleadings raise fresh causes of action. The relevant principles were considered in *Ophthalmological Society of New Zealand Inc v Commerce Commission*¹⁶⁸ and *Transpower New Zealand Ltd v Todd Energy Ltd*¹⁶⁹ and are not in dispute. **A cause of action is a factual situation the existence of which entitles one person to obtain a legal remedy against another. An amended pleading raises a fresh cause of action if it is something essentially different from that which was pleaded earlier. Whether there is such a change is a question of degree.** A plaintiff will not be permitted to set up a new case varying so substantially from the previous pleadings that it would involve investigation of factual or legal matters, or both, different from what have already been raised and of which no fair warning has been given.

(Emphasis added.)

106. There will likely be circumstances in which a fresh cause of action arises when a further party is added to a contract, arrangement or understanding, because the addition of that further party makes the contract, arrangement or understanding ‘essentially different’ from what it was before. For example, in a scenario where there is a pre-existing cartel agreement, a fresh cause of action will likely arise when a new party joins the cartel, including with respect to the original parties to the cartel agreement. This is because the original parties will now be engaging in cartel conduct with a new party. However, the conduct may otherwise remain unchanged.

⁸⁵ (2011) 9 NZBLC 103,318 (HC).

107. On this analysis, the addition of a further party to the contract, arrangement or understanding would create a new contract, arrangement or understanding, because no other element of the analysis required under section 30 has changed.
108. In contrast, section 58B of the Act provides that an authorisation for a restrictive trade practice can be expressed as applying to a person who “becomes a party to the proposed contract or arrangement at a time after it is entered into or becomes a party to the proposed understanding at a time after it is arrived at”. The reference to a single contract, arrangement or understanding in this provision of the Act suggests that one contract, arrangement or understanding is not replaced with another with the addition of a further party.
109. However, we note that there are some distinctions between the two regimes that suggest that collaborative activity clearances do not continue to apply once further parties are added, and this language may merely reflect those differences. These are discussed further below.

Words used in the provisions relating to collaborative activity clearances

110. Anytime NZ submits that it is clear that a person applying for a collaborative activity clearance under section 65A must be a person who proposes to enter the agreement. However, the protections conferred by a collaborative activity clearance by section 65B extend to any “party” to who enters the agreement, and any “person” who gives effect to it, without specifying any requirements for when they enter the agreement or requiring that they be original parties to the Proposed Agreement.
111. The Commission also notes that the focus of the protections in section 65B are on the “contract, arrangement or understanding to which the clearance relates”, rather than the point at which a party joins the contract, arrangement or understanding.
112. However, those observations do not address the preliminary question of whether a contract, arrangement or understanding is replaced with a new contract, arrangement or understanding when a further party is added to it. Further, the weight that can be placed on section 65B’s reference to a clearance relating to a contract, arrangement or understanding may be limited by the reference to a clearance being given to a “person” (ie, the applicant) in section 65D(2) of the Act.
113. In addition, to the extent that the authorisation regime may be relevant to the interpretation of the collaborative activity clearance regime, the authorisation regime also includes references to authorisations relating to contracts, arrangements or understandings, while separately providing an express power for the Commission to state that an authorisation applies to further parties who may subsequently join an agreement (discussed further below).

Comparison of provisions relating to collaborative activity clearances and authorisations of restrictive trade practices

114. A general principle of statutory interpretation is that a section of an Act must be read in the light of the Act as a whole. As part of this principle, “a section that at first sight

seems clear may need to be read down to reconcile it with another section with which it appears somewhat inconsistent”.⁸⁶

115. The regime for authorisations of restrictive trade practices includes a specific provision that empowers the Commission to express an authorisation as applying to further parties who later join a contract, arrangement or understanding.⁸⁷ There is no equivalent power in the regime for collaborative activity clearances. This could suggest that collaborative activity clearances are not intended to be capable of extending to further parties who subsequently join a contract, arrangement or understanding (but does not necessarily provide any guidance on the continued application of a clearance to the original parties once further parties have joined).
116. Anytime NZ has submitted that it was necessary to include this power in the authorisation regime because section 58B(1) expressly limits the persons who can rely on an authorisation to those named or referred in the application for authorisation. As discussed above, the protections of a collaborative activity regime are conferred broadly to parties who enter into a contract, arrangement or arrive at an understanding and persons giving effect to a contract, arrangement or understanding.
117. However, there are indications in the legislation that features of the authorisation regime which the statute expressly provides for cannot be implied to also be available in the collaborative activity clearance regime,⁸⁸ even if they would be consistent with the overall purpose of the collaborative activity exception and clearance regime. The Act includes some powers in both the authorisation provisions and the collaborative activity clearance provisions that are equivalent to one another.⁸⁹ In many cases, this is through the use of a provision that directly carries over some authorisation provisions to the collaborative activity clearance regime.⁹⁰

Implications for analysis of whether Proposed Agreement is likely to substantially lessen competition

118. Our Sol provides an overview of the analysis we have undertaken of whether the Proposed Agreement would be likely to substantially lessen competition in any market. This analysis is based on the existing Anytime Fitness franchisees as listed in the Application.⁹¹ It assesses whether the loss of competition between Anytime

⁸⁶ Ross Carter *Burrows and Carter Statute Law in New Zealand* (6th ed, LexisNexis, Wellington, 2021) at 335-340.

⁸⁷ Section 58B(2) of the Act.

⁸⁸ We note that the differences between the provisions in the authorisation regime and collaborative activity regime could also support the position that the benefit of a collaborative activity clearance is not necessarily limited to those named in the application. This is because the collaborative activity clearance regime makes no reference to parties named in an application, whereas the authorisation regime does (section 58B(1)).

⁸⁹ See the powers to revoke a clearance (ss 65 and 65D), to consult with any person the Commission considers may be able to assist (s 60(3A) and s 60(3A) via s 65C(1)), to decline to register an application that does not comply with the Commission’s requirements (s 60(4) and s 60(4) via s 65C(1)), and to return an application that relates to matters unlikely to be proceeded with (s60(7) and s 60(7) via s 65C(1)).

⁹⁰ Section 65C(1). For more detail, refer to the previous footnote.

⁹¹ At [46]-[57] of the Statement of Issues.

Fitness franchisees from the Proposed Agreement would enable Anytime Fitness clubs to profitably raise prices or reduce quality or innovation, and/or increase the potential for remaining competitors to modify their conduct to limit competition among themselves.

119. As noted in the Sol, our view is that competition between gyms primarily takes place in local markets. We have therefore focused our competition assessment on local areas where there are at least two competing Anytime Fitness franchisees within a 10-minute drive of each other. We found that most Anytime Fitness clubs are in locations in close proximity to at least two sites of other national gym brands which combined with the likely presence of other independent gyms means that the Proposed Agreement is unlikely to lead to a substantial lessening of competition in the markets in which existing Anytime Fitness franchisees compete.
120. Anytime NZ has also submitted that:
- 120.1 the Commission should be forward-looking in its analysis of whether the Proposed Agreement is likely to substantially lessen competition; and
- 120.2 the Commission's power to revoke a clearance in the event of a material change of circumstances under section 65D of the Act provides an appropriate safeguard against the risk of the addition of further parties leading to a risk of a substantial lessening of competition.
121. Anytime NZ has provided the Commission with some information regarding proposed locations and the predicted year of opening for new clubs. However, the information currently available about proposed locations, who the franchisees are, and timing of opening for new locations is not a complete set of information. Anytime NZ has advised that it intends to open between [].⁹² While Anytime NZ has provided some information regarding the regional and suburban areas of the locations of these proposed clubs and the year they are expected to open, [].⁹³ We also note that [].
122. Our analysis of whether the Proposed Agreement is likely to substantially lessen competition in a market is necessarily based on our current knowledge of the location of an Anytime Fitness club and the market in which it operates. An assessment of the likely competitive effects of the Proposed Agreement from the addition of further parties to the Proposed Agreement would be at best speculative without knowledge of the location of those parties, the timing of their entry and the

⁹² [

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⁹³ [

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location and entry and expansion plans of current and future competitors. This is likely to be a significant hurdle to the Commission's ability to be satisfied that the Proposed Agreement will not be likely to substantially lessen competition in any market. We welcome further evidence on how the Commission can be satisfied that further parties joining the Proposed Agreement in any local market in New Zealand would be unlikely to lead to a substantial lessening of competition.

123. The Commission agrees that the revocation power was introduced as a safeguard for competition, in recognition of the fact that collaborative activity clearances grant immunity over the long-term and the impact of an agreement on competition may change over time. However, in this case, the Commission is not yet confident that the safeguard would be sufficient to protect against a substantial lessening of competition in a market. Unlike the authorisation regime for restrictive trade practices, the Commission has no power to impose conditions on any clearance granted that would facilitate monitoring of whether the addition of further parties to the Proposed Agreement is likely to lead to a substantial lessening of competition in a market.⁹⁴ This can be contrasted with other changes in circumstances which can be more easily monitored (such as, for example, the exit of a competing national brand).

Next steps in our investigation

124. The Commission is currently scheduled to decide whether or not to give clearance to the collaborative activity by **27 May 2022**. However, this date may change as our investigation progresses.⁹⁵ In particular, if we need to further test and consider the issues identified above, or additional evidence we receive, the decision date may be extended.

Making a submission

125. 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 SoUI.
126. 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 **2 May 2022**.

⁹⁴ For example, the imposition of a condition that would require Anytime NZ to notify the Commission when further parties join the Proposed Agreement, and provide location information for the further parties. Similarly, the Commission is not able to impose a time limit on the duration of any clearance granted, although this concern could be mitigated through the incorporation of a duration limit in the terms of the Proposed Agreement.

[]

⁹⁵ 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.

127. 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.