

Application for Clearance relating to Cartel Provisions

ANYTIME NZ LIMITED

PURSUANT TO SECTION 65A OF THE COMMERCE ACT 1986

20 SEPTEMBER 2021

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1. Executive Summary

Introduction

- 1.1 This is an application made by Anytime NZ Limited (**Applicant**) under section 65A of the Commerce Act 1986 (**Act**) for a clearance relating to cartel provisions.
- 1.2 The Applicant proposes entering into contracts or arrangements that contain or may contain cartel provisions.
- 1.3 The Applicant seeks clearance on the basis:
- (a) the Applicant and any other parties to the proposed contracts or arrangements will be involved in a collaborative activity;
 - (b) each cartel provision in the contracts or arrangements is reasonably necessary for the purpose of the collaborative activity; and
 - (c) entering into the contracts or arrangements, will not have, or would not be likely to have, the effect of substantially lessening competition in a market.

Factual Background

- 1.4 The Applicant is the New Zealand master franchisee for the global gym franchise, Anytime Fitness. The Anytime Fitness brand started in Minneapolis in the United States approximately 20 years ago. There are around 5,000 Anytime Fitness gyms operating globally. The Anytime Fitness brand entered the New Zealand market just over 10 years ago. There are currently 53 gyms operating under the Anytime Fitness franchise model in New Zealand with a further approximately [] gyms due to open over the next [] months (subject to the impact of the current COVID-19 pandemic). There are four gyms owned and operated by the Applicant itself. Full details of the Applicant and the franchisees are set out in Section 2 of this Application.
- 1.5 The Anytime Fitness business model centres on the concept of reciprocity. The Applicant and the franchisees operate under a policy whereby a member of any Anytime Fitness gym can use their key-card to access the facilities and services of any other Anytime Fitness gym (**Reciprocity Policy**). A copy of the Reciprocity Policy is **attached** to this Application at Appendix B.
- 1.6 Under the existing franchise agreements for Anytime Fitness, franchisees are required to comply with the '*Anytime Fitness Reciprocity Policy*'. A copy of a sample standard Anytime Fitness franchise agreement is **attached** at Appendix F. In particular, the existing franchise agreements state¹:
- (a) *"You agree to abide by the Anytime Fitness Reciprocity Policy as modified from time to time. This policy will likely prohibit you from selling any membership that does not provide full reciprocity benefits to all your members, and a means of accessing other Anytime Fitness centres on a 24-hour basis (typically through a key fob). This may require you, among others, to transfer members from your centre to another centre based on the current Anytime Fitness Reciprocity Policy."*
- 1.7 Over 2017, standardised pricing provisions were removed from the franchise agreements to ensure compliance with the new cartel provisions introduced by the Commerce (Cartels and Other Matters) Amendment Act 2017 (**Amendment Act**). Membership pricing guidelines, which prescribed a fixed range of minimum and maximum prices for membership fees were

¹ Clause 4.5 Standard Franchise Agreement for Anytime NZ franchisees.

also withdrawn. A copy of the withdrawn membership pricing guidelines are **attached** at Appendix G.

- 1.8 The Applicant and the franchisees have observed that the removal of the standardised pricing provisions and the pricing guidelines has had a negative effect on the proper and efficient operation of the Reciprocity Policy, and the Anytime Fitness franchise network generally.
- 1.9 In particular, the Applicant has recognised that members are incentivised to join the cheapest Anytime Fitness gym, and rely on the Reciprocity Policy to access their preferred gym based on location and service quality. The practice has given rise to two distinct issues, being:
- (a) where a gym member uses the Reciprocity Policy to visit an Anytime Fitness gym which they are not a member of, the individual franchisee of that gym does not obtain any fees from that member (and effectively provides gym access and services free of charge); and
 - (b) where a gym member transfers from their original Anytime Fitness home gym to a new Anytime Fitness gym, the new gym and its franchisee operator must either:
 - (i) honour the membership and fee terms agreed between the gym member and their original Anytime Fitness gym (which may be at a significantly reduced fee to what the new gym would typically charge); or
 - (ii) explain their gym's higher fee structure and agree with the member to amend the membership (which can cause tension from a customer relations perspective, due to customer assumptions of consistency between Anytime Fitness gyms).
- 1.10 In effect, this has resulted in a "race to the bottom" in terms of quality of access, facilities and services within the Anytime Fitness franchise.
- 1.11 To rectify this situation going forward, the Applicant proposes reintroducing standardised pricing provisions under which reasonable lower and upper limits on membership pricing by franchisees may be set by the Applicant as franchisor.
- 1.12 The Applicant considers that the standardised pricing provisions are or may be cartel provisions. Accordingly, the Applicant seeks clearance from the Commerce Commission (**Commission**) relating to the provisions under section 65A of the Act.
- 1.13 Given the nature of the issues outlined above, the Applicant submits that it is not necessary for the clearance to have a time limit (noting the ability of the Commission to revoke a clearance in any event where there is a material change in circumstances²). There is already clear evidence of the different outcomes having standardised pricing provisions and not having them, given that the standardised pricing provisions were in place up to 2017 but not afterwards. However, if the Commission is of the view that a time limit is necessary, the Applicant would not object to a 10 year limit on the clearance.

² Commerce Act 1986, s 65D(1)(b)

2. Details of Applicant and Other Parties

2.1 The Applicant's details are:

Anytime NZ Limited
Deloitte, Level 3, 24 Anzac Parade, Hamilton East, Hamilton, 3216 , New Zealand

Attention: Cameron Ward
Chief Executive Officer
021 918 332
cam@anytimefitness.co.nz

2.2 The Applicant requests that all correspondence is directed in the first instance to:

Lane Neave
141 Cambridge Terrace
West End
Christchurch 8013

Attention: Anna Ryan
Partner
03 377 6395
anna.ryan@laneneave.co.nz

2.3 The other parties to the proposed contracts or arrangements are the New Zealand franchisees of Anytime Fitness. The names and contact details of the franchisees are **attached** at Appendix A.

2.4 The sole shareholders and directors of Anytime Fitness are Paula and Richard Ball. There are no ownership or management links between Anytime Fitness and any of the New Zealand franchisees.

3. Proposed Agreement

Proposed Agreement

Please provide a copy of the proposed agreement for which you are seeking clearance. If the agreement has not been drafted or is unable to be provided, please provide a clear and detailed description of the agreement.³

3.1 The Applicant proposes reintroducing a pricing policy under the Manual, which under the current franchisee agreements between the Applicant and its franchisees, would be binding on all franchisees. The proposed form of the pricing policy is **attached** at Appendix C (**Proposed Agreement**).

3.2 The parties to the Proposed Agreement, being the Applicant and the franchisees, would enter into the Proposed Agreement immediately following the grant of clearance by the Commission.

3.3 The key terms of the Proposed Agreement are:

- (a) Anytime NZ Limited has set a minimum and maximum price policy for all memberships sold which must be adhered to by all franchisees.
- (b) Minimum and maximum prices are defined as the membership dues collected per month.

³ Commerce Commission, Commerce Act 1986: Clearance Relating to Cartel Provisions - Notice Seeking Clearance Under Section 65A Guidelines, para. 4

- (c) Minimums and maximums apply to all members.
- (d) The initial minimums and maximums set by Anytime NZ Limited are as follows:

Membership Type	Minimum	Maximum
Corporate, Student, Senior	[]	[]
Standard	[]	[]

- (e) Anytime NZ Limited may vary the minimums and maximums set by it from time to time by notice to the franchisees.
- (f) Anytime NZ Limited may also from time to time vary or replace the membership types for which minimums and maximums are set, and set new minimums and maximums for those varied or replaced membership types.

Rationale for Entering the Proposed Agreement

- 3.4 The Applicant submits that the rationale for entering the Proposed Agreement is to resolve the issues caused by gaming of the Reciprocity Policy, and in particular, address the distinct issues identified at paragraph 1.9.
- 3.5 The Applicant sets out further background information relating to these issues below, in support of the rationale for entering the Proposed Agreement.

Disproportionality Between Services and Fees

- 3.6 Under the existing franchise agreements, franchisees are losing locally-based members to non-local, cheaper gyms in the Anytime Fitness network, but are still required to provide gym access and services to these local members despite not receiving fees in exchange.
- 3.7 There are accordingly imbalances between the fees an Anytime Fitness gym may be entitled to, and the extent of access and services it provides to members. A cheaper gym in the Anytime Fitness network typically receives a greater proportion of membership fees, while also having fewer obligations to provide access and services (as a higher proportion of members access other, more local gyms). Conversely, more expensive gyms are required to serve the members of cheaper gyms in the Anytime Fitness network, while receiving a lesser proportion of membership fees for doing so.

Home Gym Transfer Issues

- 3.8 Under the Reciprocity Policy, a member's membership can automatically transfer from their home gym to a new gym if they access that new gym above a percentage usage threshold over a 60-day period. As a result, the new gym is required to accept the assignment of the member's membership on the terms arranged between the member and their previous home gym.
- 3.9 This creates an incentive for members to join cheaper, non-local Anytime Fitness gyms, knowing that their membership will automatically transfer to their local gym, but their fees will stay the same. This has resulted in some franchisees accepting lower rates than they would normally offer.
- 3.10 While the automatic transfer mechanism can alleviate some of the shortfalls in fees for affected franchisees (by providing the fees to the gym that is actually used), the transfers still result in [], and confusion among members, due to the inconsistencies in pricing among members who have transferred to their local gym, and members who started their membership at their local gym.

- 3.11 The Applicant estimates an average of [] members per month transfer from their home club to a new club, with these transfers occurring almost daily across New Zealand. While the Applicant's systems are not able to readily track whether a transfer is made from a cheaper gym to a more expensive gym (or whether a transfer occurs with or without a corresponding change of address of a member), the sheer number of transfers are indicative of the many members "gaming" the Reciprocity Policy to obtain the lowest fees possible.
- 3.12 The Applicant is aware of some members who have joined a non-local gym during periods of promotional rates (some as low as [] per week), with the intention of immediately transferring to their preferred local (but more expensive) gym.

Relationship Between Franchisees

- 3.13 The Reciprocity Policy is [

]

- 3.14 The Reciprocity Policy has resulted in [] An example of this is joint marketing and advertising, one of the major benefits of a franchise network as it aids in the creation of a strong brand. [

]

Rationale

- 3.15 The Applicant submits that entering into the Proposed Agreement would complement the Reciprocity Policy and would incentivise franchisees to compete through location suitability and quality of service, and enable a balanced and equitable distribution of members and membership fees across the Anytime Fitness network.

If the Proposed Agreement does not go Ahead

- 3.16 If the Proposed Agreement does not go ahead, the Applicant anticipates the continuation of a "race to the bottom" in terms of quality of access, facilities and services, which will adversely impact member experience, the Anytime Fitness brand, and the overall franchise network.

- 3.17 By way of example the Applicant notes that [

]. This has negatively affected member relationships and Anytime Fitness brand value.

- 3.18 If the Proposed Agreement is not entered into, the Applicant considers it likely that the good reputation of Anytime Fitness will be undermined, limiting the ability of Anytime Fitness to compete more widely against competitors such as Snap, City Fitness, and Les Mills.

4. Cartel Provisions

Identify all cartel provisions within the agreement for which you are seeking clearance.⁴

- 4.1 The Act prohibits entry into a contract or arrangement that contains a cartel provision or gives effect to a cartel provision.⁵
- 4.2 A cartel provision is a provision, contained in a contract, arrangement, or understanding, that has the purpose, effect, or likely effect of one or more of the following in relation to the supply or acquisition of goods or services in New Zealand:
- (a) price fixing;
 - (b) restricting output; or
 - (c) market allocating.⁶
- 4.3 For the purpose of this Application, the relevant cartel provisions relate to '*price fixing*'.
- 4.4 Price fixing includes fixing, controlling, or maintaining, or providing for the fixing, controlling, or maintaining of the price for goods or services that any two or more parties to the contract, arrangement, or understanding supply or acquire in competition with each other.⁷
- 4.5 The Applicant has identified the following provisions in the Proposed Agreement that are or may be '*price fixing*' provisions:
- (a) the setting by the Applicant of a minimum and maximum price policy for all memberships sold which must be adhered to by all franchisees and which applies to all members;
 - (b) the setting by the Applicant of the initial minimum and maximum prices set out in para 3.3(d) above and the Pricing Policy attached as Appendix C;
 - (c) the provision that permits the Applicant to vary the minimums and maximums set by it from time to time by notice to the franchisees; and
 - (d) the provision that permits the Applicant from time to time to vary or replace the membership types for which minimums and maximums are set, and set new minimums and maximums for those varied or replaced membership types.
- (together **Pricing Provisions**)
- 4.6 The Pricing Provisions will apply to all Anytime Fitness franchisees throughout New Zealand, for the terms of their respective franchise agreements. The Pricing Provisions relate to the membership pricing for gym services.
- 4.7 The Applicant considers the Pricing Provisions are or may be '*price fixing*', and therefore cartel provisions, as:
- (a) the Proposed Agreement constitutes a contract or arrangement between the Applicant and each franchisee in terms of section 30 of the Act;

⁴ Ibid, para. 5

⁵ Commerce Act 1986, s 30

⁶ Commerce Act, s 30A

⁷ Ibid

- (b) the franchisees would also be party to an arrangement or understanding as between themselves, in terms of section 30 of the Act, as they would each enter the Proposed Agreement, acknowledging that each other franchisee would be bound by the same terms;
 - (c) the franchisees may be in competition with each other in the regional markets identified in Section 7 of this Application, or in the more broadly defined National (or North Island) market;
 - (d) the Applicant and the franchisees may be in competition with each other in the more broadly defined National (or North Island) market; and
 - (e) the Pricing Provisions would fix or control the price for gym services provided by the Applicant and the franchisees.
- 4.8 In relation to paragraph 4.7(c), the Applicant notes that the relationship between franchisors and franchisees is frequently theorised by legal commentators to be one of competition, irrespective of the underlying co-operative elements of being part of a franchise system.
- 4.9 The Applicant submits that in considering a grant of clearance under section 65A of the Act, the Commission is not required to determine whether any particular provision is a cartel provision, provided there are reasonable grounds to believe that the provision might be a cartel provision. Accordingly, it is not necessary to conclusively establish whether the Applicant is in competition with the franchisees, or the franchisees are in competition with each other, for the purpose of this Application.
- 4.10 As the Proposed Agreement contains, or may contain, a cartel provision, the Applicant seeks clearance from the Commission in relation to the Proposed Agreement on the basis the Applicant and the franchisees are party to a collaborative activity, the Pricing Provisions are reasonably necessary for the purpose of that collaborative activity, and entering into the Proposed Agreement will not have the effect of substantially lessening competition in a market.

5. The Collaborative Activity

Describe the collaborative activity that the parties to the agreements are involved in having regard to the Competitor Collaboration Guidelines.⁸

- 5.1 A **collaborative activity** means an enterprise, venture, or other activity, in trade, that is carried on in co-operation between two or more parties, and is not carried on for the dominant purpose of lessening competition between any two or more of those parties.⁹

Activity Carried on in Co-operation

- 5.2 The Applicant submits that the operation of the Anytime Fitness franchise network is a collaborative activity between it and the franchisees, and between the franchisees themselves. Details of the Applicant and the franchisees are set out in section 2 of this Application.
- 5.3 The Anytime Fitness franchise network (including the gyms owned by the Applicant) amounts to an enterprise, venture or activity within the ordinary meaning of those terms. The franchise network also operates *'in trade'*.
- 5.4 The Applicant and each franchisee **carry on** a common and **co-operative** commercial goal of providing gym services throughout New Zealand, under shared methods of operation, branding and marketing strategies.

⁸ Notice Seeking Clearance Under Section 65A Guidelines, para. 6

⁹ Commerce Act, s 31(4)

- 5.5 A key co-operative aspect of the franchise network is the Reciprocity Policy, which provides members the flexibility to access any number of Anytime Fitness gyms from wherever they are, and for franchisees to provide access and services to members of any Anytime Fitness gym.
- 5.6 The common branding, consistent method of operation and reciprocal offering of services to gym members clearly involves a combination of business activities or joint commercial activity.

Not Carried on for Dominant Purpose of Lessening Competition

- 5.7 The main purpose of the Anytime Fitness franchise network is to enable the network of Anytime Fitness gyms to compete with other independent gym providers, through the common branding, consistent method of operation and reciprocal offering of services.
- 5.8 Among other things, the Reciprocity Policy allows Anytime Fitness franchisees to combine the geographical reach of their respective gyms in order to appeal to the needs of gym members who may frequently travel or who otherwise benefit from access to more than one gym. This promotes competition between Anytime Fitness and other fitness businesses with a reciprocal membership model, and provides the Anytime Fitness network with a competitive edge against single-service gyms.
- 5.9 As the purpose of the franchise network is to allow Anytime Fitness to compete in the market with independent gym providers, there can be no suggestion that the purpose of the franchise network is to lessen competition.
- 5.10 The Proposed Agreement, once entered into, would form part of the key agreements governing the collaborative activity, being the operation of the Anytime Fitness franchise network.

6. Cartel Provisions Reasonably Necessary

For each cartel provision, explain why the cartel provision is reasonably necessary for the purpose of the collaborative activity.¹⁰

- 6.1 The Applicant submits that the Pricing Provisions are reasonably necessary for the purposes of the collaborative activity, being the operation of the Anytime Fitness franchise network.
- 6.2 Beyond that, the Applicant submits that the Pricing Provisions are essential to avoid the risk of the breakdown of the franchise network.
- 6.3 As set out above, the removal of standardised pricing across 2017 caused adverse effects on the Reciprocity Policy, and the franchise network generally.
- 6.4 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.
- 6.5 The Reciprocity Policy is an essential pillar of the collaborative activity that enables Anytime Fitness as a chain to compete with other gym providers, by providing an attractive network of gym facilities that members can access. However, without a standard pricing model as proposed by the Pricing Provisions, the nature of the policy incentivises free riding, and a “race to the bottom” in terms of quality of facilities and services.
- 6.6 The Pricing Provisions are therefore reasonably necessary to:
- (a) allow Anytime Fitness franchise to provide a strong network of gym facilities in good locations to its members;

¹⁰ Notice Seeking Clearance Under Section 65A Guidelines, para. 9

- (b) 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
 - (c) 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 gym members, while receiving few membership fees themselves.
- 6.7 The Applicant submits that there is no feasible or practically workable alternative available to the Applicant. The Applicant has, to date, been reluctant to introduce any solution to the Reciprocity Policy issue for fear of breaching cartel laws.
- 6.8 The Applicant notes that where a member subscribes for a membership at an Anytime Fitness gym, there is a 30-day “cooldown period” before the Reciprocity Policy becomes effective. During this cooldown period, members cannot access Anytime Fitness gyms other than their home gym. Unfortunately however, this restriction has not resolved the longer term impacts of the Reciprocity Policy.
- 6.9 Franchisees also have the discretion under the Reciprocity Policy to decline a transfer if the member does not agree to the transferring gyms pricing structure. This too has not resolved the impacts of the Reciprocity Policy as members often react poorly to finding out that they need to pay a higher membership fee. The risk of that member deciding to terminate their membership and go elsewhere is high and therefore franchisees feel forced to accept the transfer at the (lower) membership fee.
- 6.10 Terminating the Reciprocity Policy is not a feasible alternative as it would result in significant detriment and disadvantage to the competitive edge of the Anytime Fitness franchise against other market leaders in the gym market.
- 6.11 Further, terminating the Reciprocity Policy is not a feasible alternative as the Reciprocity Policy is an international feature of the Anytime Fitness franchise system, and terminating the Reciprocity Policy would cause the Applicant to breach the master franchise arrangements entered into between the Applicant and the international master franchisor of Anytime Fitness.

7. Whether Likely to Substantially Lessen Competition

Market Definition

Describe the goods and/or services that are relevant to the agreement for which you are seeking clearance.¹¹

- 7.1 The relevant services for the purpose of this Application include gym services. Each Anytime Fitness gym provides the following gym services:
- (a) 24/7, 365 days a year access to gym equipment, including:
 - (i) cardio equipment (such as treadmills, bikes, rowing machines and cross-trainers);
 - (ii) weights equipment (machine weights and free weights); and
 - (iii) other miscellaneous gym equipment (such as swiss balls, medicine balls and foam rollers);
 - (b) personal training;

¹¹ Ibid, para. 10

- (c) group training/fitness classes. All Anytime Fitness gyms provide classes to some extent. A standardised group training model “AF Training” is currently part way through a New Zealand wide roll-out¹². Once this has been completed, all Anytime Fitness gyms in New Zealand will provide the same group training classes;
- (d) remote and virtual training/fitness classes.

7.2 The Applicant considers that the relevant markets for such services are regional in nature. The Applicant does not consider that a narrower market definition is appropriate for the following reasons:

- (a) One of the benefits to a customer joining an Anytime Fitness gym is that he or she can access any Anytime Fitness gym. Whilst a customer may be more pre-disposed to access the Anytime Fitness gym closest to his or her house, the Applicant considers that a customer is just as likely to access the Anytime Fitness gym that is closest to his or her work. These locations (home and work) may not be near each other, but will almost always be in the same regional area.
- (b) The market definition should be set by reference to the issue caused by the Reciprocity Policy. The issue is that the customer is identifying the Anytime Fitness gym that has the cheapest weekly rate in his or her region, attending that gym once to sign up for the cheapest membership deal and then actually using (and subsequently transferring to) the Anytime Fitness gym that is closest to his or her home or work.

7.3 The Applicant acknowledges that the leading gym brands in New Zealand all operate on a national basis, namely Snap, Les Mills, City Fitness, Jetts, Flex Fitness and Anytime Fitness. Nevertheless, the Applicant considers that gym markets are appropriately viewed as regional markets, as local gym providers amount to a significant competitive force in their respective local markets. Gym users are generally not willing to travel outside of their regional areas.

7.4 For the purpose of this Application, the relevant regional markets are those in which there is more than one Anytime Fitness franchisee. Those regional markets are the regional gym markets in:

- (a) Auckland;
- (b) Christchurch;
- (c) Hastings / Napier; and
- (d) Tauranga / Papamoa.

7.5 However, in the event the Commission considers a wider market definition is appropriate, the Application also addresses the National (or North Island) market.

Contact Details for Customers, Suppliers, Competitors and Other Market Participants

7.6 The customers of gyms are predominantly private individuals.

7.7 The Anytime Fitness franchise in New Zealand currently has a membership of approximately [] individuals.

¹² [

].

7.8 The names and contact details for the main competitors of Anytime Fitness and its franchisees in Auckland, Christchurch, Hastings / Napier and Tauranga / Papamoa are attached in Appendix E.

7.9 The Applicant is not aware of any other relevant market participants or interested parties.

Why the Proposed Agreement will not Substantially Lessen Competition

Explain why you consider that the agreement is unlikely to result in a substantial lessening of competition in any market having regard to the Mergers and Acquisitions Guidelines.¹³

7.10 The Applicant submits that the entry into the Proposed Agreement would not have, and would not be likely to have, the effect of substantially lessening competition in any relevant market.

7.11 The Applicant notes that the correct question is not whether there would be any lessening of competition as between franchisees, but whether there would be a substantial lessening of competition in the market as a whole.

7.12 However, even as between franchisees any lessening of competition would be insubstantial, particularly when factoring in the pro-competitive benefits available to the Anytime Fitness franchise should the Reciprocity Policy be able to operate efficiently.

7.13 Under the Proposed Agreement franchisees would in fact have a greater incentive to compete in terms of quality of service and facilities. This is because the Proposed Agreement would ensure that franchisees who did improve their service and facilities would not have their efforts undermined through gym members being incentivised to game the Reciprocity Policy.

7.14 Further, the Pricing Provisions would only standardise pricing to the extent reasonably necessary. The commercial realities of competing in a wider market against other 24-hour gym businesses would dictate that standardised membership fees are kept low enough to enable Anytime Fitness to effectively compete against other leading brands.

7.15 If there is any impact on competition, the Applicant submits that it could only be in those regional markets in which there is more than one Anytime Fitness franchisee. Those regional markets are the regional gym markets in:

- (a) Auckland;
- (b) Christchurch;
- (c) Hastings / Napier; and
- (d) Tauranga / Papamoa.

7.16 A list of competitors and estimated market shares in those regional markets are **attached** at Appendix D. The estimates of market shares are confidential.

7.17 Competition in many regional markets is very aggressive. In particular:

- (a) In the Auckland market, the Applicant estimates that it holds just a [] market share, with key competitors Snap, Les Mills and City Fitness each holding a greater share of the region at approximately [] each. In Auckland, vigorous price competition is prevalent with weekly membership prices being as low as \$6.00 per week for some memberships with Jetts and City Fitness, and peaking at \$45.00 per week for some premium memberships offered by Les Mills. Anytime Fitness weekly memberships vary substantially between \$12.00 and \$24.00 per week in Auckland.

¹³ Ibid, para. 11

- (b) In the Christchurch market, the Applicant estimates that it holds a market share of approximately [], against the shares of its biggest competitors Snap [], Jetts [] and City Fitness []. These gyms are also subject to aggressive price competition, with weekly membership fees ranging between \$6.00 to \$40.00 per week depending on the gym and membership type. In particular, Jetts and City Fitness have lower prices than any Anytime Fitness franchisees. In Christchurch, Anytime Fitness weekly rates fall between \$12.00 and \$21.00.
- (c) The smaller regional markets of Hastings / Napier and Tauranga / Papamoa are also very competitive with an estimated [] of the market share held by smaller, local gyms, with the remaining approximate [] share controlled in relatively even proportions between national brands such as Anytime Fitness, Snap, Flex Fitness and City Fitness:
- (i) in the Hastings / Napier market, the Applicant estimates that it has a [] market share with a number of competitors including Jetts having lower prices than Anytime Fitness franchisees; and
- (ii) in the Tauranga / Papamoa market, the Applicant estimates that it has only a [] market share with a number of competitors including City Fitness having lower prices than Anytime Fitness franchisees.
- 7.18 Nationally, the gym and fitness centre market is also highly competitive, with the Anytime Fitness brand competing against key national competitors such as Snap, Les Mills, City Fitness, Jetts and Flex Fitness. On a national level, the Applicant estimates its market share to be approximately [] - with other large national brands and local gyms comprising the remainder.
- 7.19 The current state of the national gym and fitness centre market indicates low barriers to entry in any of the local markets. Flex Fitness and City Fitness have each entered the Auckland market within the last three years, claiming estimated market shares of [] and [] respectively. As a new entrant to the Christchurch market, City Fitness has also attained an estimated [] market share in its short period of operation and is already the largest competitor in the Christchurch market. As a new entrant to the Hastings / Napier market, Flex Fitness already has a [] market share.
- 7.20 Competitors such as City Fitness and Jetts have established themselves as low-price providers on a national level, offering entry level memberships from \$6.00 per week. Providers such as City Fitness and Jetts would continue to compete through value marketing strategies. Anytime Fitness franchisees would be re-incentivised to improve and compete within wider markets on a quality / service basis, in a manner more consistent with the global strategy of Anytime Fitness.
- 7.21 The Pricing Provisions would cause no material risk of substantially lessening competition in the national, North Island or any regional market. This is due to:
- (a) Anytime Fitness holding only a fraction of the market share both nationally and within each region it operates, with the remaining share of the market split relatively evenly between other competitors;
- (b) the industry involving a large number of national brands and other competitive local gyms within particular regions – none with any established market dominance;
- (c) the fact that there are already significant competitors in each local market (particularly Jetts and City Fitness) with prices lower than all existing Anytime Fitness franchisees so that customers seeking a low cost offering will have options available to them regardless of the prices charged by Anytime Fitness franchisees;

- (d) the lack of any material barriers to entry for any new gym operators seeking to compete in any particular region (highlighted by the success of new market entrants City Fitness and Flex Fitness over the last three years);
- (e) the wide range of price and quality availability in the current national and regional markets, which ensures gym members have competitive access to a range of gym providers with different strategic focuses; and
- (f) the entrance to the market of new, competitive boutique training providers such as F45, Body Fit Training and Orange Theory.

7.22 Competition is already thriving in these markets between a number of fiercely competitive gym and fitness centre providers – each operating unique strategies in terms of value, location, quality and service. Competition in the gym and fitness service industry, both nationally and regionally, is driven through the external market contention between these operators and their brand strategies, rather than through the internal competition between Anytime Fitness franchises.

7.23 Controlling prices for Anytime Fitness franchisees (as between themselves) will therefore not materially impact on competition in any local market where consumers will continue to have other low cost (and other) options available from other significant competitors in the market. There will be no substantial lessening of competition in any local or national market considered as a whole.

8. Confidentiality

8.1 Confidentiality is requested for the information in this Application that is contained in [square brackets] and highlighted in **bold** on the basis that:

- (a) the information is commercially sensitive and valuable information which is confidential to the Applicant and/or the franchisees; and
- (b) disclosure of the information would be likely unreasonably to prejudice the commercial position of the Applicant and/or the franchisees, or the person who is the subject to the information.

8.2 Confidentiality is also requested for the documents **attached** at Appendix B (Reciprocity Policy), Appendix F (Sample Anytime Fitness Franchise Agreement) and Appendix G (Withdrawn Pricing Guidelines), and the information highlighted in yellow on lines 54 – 66 of Appendix A (Names and Contact Details of Franchisees) on the basis set out above.

8.3 Confidentiality is requested for the information highlighted in yellow on lines 1 – 53 of Appendix A (Names and Contact Details of Franchisees) on the basis of protecting the privacy of natural persons to whom the information relates.

8.4 The Applicant requests that it be:

- (a) notified if a request is made to the Commerce Commission under the Official Information Act 1982 for the release of the information for which confidentiality has been claimed; and
- (b) given the opportunity to provide submissions to the Commerce Commission on whether it should make disclosure prior to any such disclosure taking place.

8.5 This applies equally in respect of any additional information that is expressed to be confidential subsequently provided to the Commerce Commission during the course of its consideration of this Application.

8.6 Confidential and public versions of this application have been provided to the Commission.

Declaration

I, Cameron Ward, have prepared, or supervised the preparation of this notice seeking clearance.

To the best of my knowledge, I confirm that:

all information specified by the Commission has been supplied;

if information has not been supplied, reasons have been included as to why the information has not been supplied;

all information known to the Applicant which is relevant to the consideration of this notice has been supplied; and

All information supplied is correct as at the date of this notice.

I undertake to advise the Commission immediately of any material change in circumstances relating to the notice.

I understand that it is an offence under the Commerce Act to attempt to deceive or knowingly mislead the Commission in respect of any matter before the Commission, including in these documents.

I am a director/officer of the Applicant and am duly authorised to submit this notice.

Name and title of person authorised to sign:

Cameron Ward, Chief Executive Officer, Anytime Fitness New Zealand

Signature:  _____

Date: 15/09/2021

Appendix A – Names and Contact Details of Franchisees

Attached.

Appendix B – Reciprocity Policy

Attached.

Appendix C – Proposed Pricing Policy

Membership Pricing

Anytime NZ Limited has set a minimum and maximum price policy for all memberships sold which must be adhered to by all franchisees. This policy is allowable due to the global membership reciprocity benefits offered with an Anytime Fitness membership. Each club contributes to the whole brand identity, and a price policy helps to protect and preserve a positive member experience across all clubs.

Refer to your pro forma when setting membership rates. If you have any questions, please contact your Franchise Business Consultant.

Minimum and Maximum Pricing

Minimum and maximum prices are defined as the membership dues collected per month.

Minimums and maximums apply to all members.

The initial minimums and maximums set by Anytime NZ Limited are as follows:

Membership Type	Minimum	Maximum
Corporate, Student, Senior	[]	[]
Standard	[]	[]

Paid in Full Memberships

Pricing for Paid in Full (PIF) dues, when the member pays all their monthly dues in one lump sum at the point of sale, use the same criteria as members who pay on a monthly basis. Calculate the monthly rate of PIF dues by dividing the PIF dues amount by the term length in month. For example, \$600 PIF ÷ 12 months = \$50/ month. The PIF dues amount cannot include a down payment or other fees collected at the point of sale.

Variation of Minimums and Maximums

Anytime NZ Limited may vary the minimums and maximums set by it from time to time by notice to the franchisees.

Anytime NZ Limited may also from time to time vary or replace the membership types for which minimums and maximums are set, and set new minimums and maximums for those varied or replaced membership types.

Appendix D – Competitors and Market Share

Auckland Gym Market

Name of Competitor	Estimated Market Share
Anytime Fitness	[]
Snap	[]
Jetts	[]
Les Mills	[]
Flex Fitness	[]
City Fitness	[]
Other	[]

Christchurch Gym Market

Name of Competitor	Estimated Market Share
Anytime Fitness	[]
Snap	[]
Jetts	[]
Les Mills	[]
Flex Fitness	[]
City Fitness	[]
Other	[]

Hastings / Napier Gym Market

Name of Competitor	Estimated Market Share
Anytime Fitness	[]
Snap	[]
Jetts	[]
Flex Fitness	[]
Other	[]

Tauranga / Papamoa Gym Market

Name of Competitor	Estimated Market Share
Anytime Fitness	[]
Snap	[]
Flex Fitness	[]
City Fitness	[]
Other	[]

Appendix E – Contact Details of Competitors

Name of Competitor	Contact Details
Snap	Lift Brands New Zealand Limited C/- Stewart Germann Law Office, Ground Floor, Princes Court, 2 Princes Street, Auckland +1 643 9282241 bschneider@liftbrands.com
Jetts	Fitness & Lifestyle Group Bidco NZ Limited Unit 1c, 331 Rosedale Road, North Harbour, Auckland 07 39098250 adam.leake@fitlg.com
Les Mills	Les Mills New Zealand Limited 186 Victoria Street West, Auckland 09 379 9550 auckland.city@lesmills.co.nz
Flex Fitness	Flex Fitness New Zealand Limited 3 London Street, Hamilton 07 850 5556 info@flexfitnessgym.co.nz
City Fitness	CityFitness Group Limited 6/74 Quarantine Road, Annesbrook, Nelson 03 547 4774 memberservices@cityfitness.co.nz

Appendix F – Sample Anytime Fitness Franchise Agreement

Attached.

Appendix G – Withdrawn Pricing Guidelines

Attached.