

## Statement of Preliminary Issues

### Anytime NZ Limited

5 October 2021

### Introduction

1. On 21 September 2021, the Commerce Commission (Commission) registered an application (Application) from Anytime NZ Limited (Anytime NZ) seeking clearance under section 65A of the Commerce Act 1986 (the Act) relating to proposed agreements with its franchisees that contain or may contain cartel provisions.<sup>1</sup>
2. Anytime NZ is the New Zealand master franchisee for the global gym franchise Anytime Fitness. Anytime NZ is also the owner and operator of four New Zealand Anytime Fitness gyms. The Anytime Fitness business model allows a member of any Anytime Fitness gym to use their key-card to access the facilities and services of any other Anytime Fitness gym. Anytime NZ refers to this as its Reciprocity Policy. Currently, there is no standardised membership pricing between Anytime Fitness gym franchisees.
3. Anytime NZ submits that without standardised pricing between the franchisees, members are incentivised to join the cheapest Anytime Fitness gym and then rely on the Reciprocity Policy to access their preferred gym (based on location and services offered). Anytime NZ further submits that this has resulted in a “race to the bottom” in terms of quality of access, facilities and services within the Anytime Fitness franchise.<sup>2</sup>
4. To address issues related to disproportionality between services that gyms provide and fees received and gym transfer issues that Anytime NZ says are caused by the Reciprocity Policy, Anytime NZ proposes introducing a pricing policy that contains standardised pricing provisions. These would be binding on all Anytime Fitness New Zealand franchisees (Proposed Agreement). The Proposed Agreement would allow Anytime NZ to impose lower and upper limits on franchisees’ membership pricing.
5. Under section 65A of the Act a party that proposes to enter into agreements with their competitors that 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<sup>3</sup> unless an exception applies.

---

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

<sup>2</sup> At [1.8] to [1.10] of the Application.

<sup>3</sup> Sections 30 and 30A of the Act.

One of those exceptions is if a cartel provision is reasonably necessary for a collaborative activity, as defined in the Act.<sup>4</sup>

6. 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.
7. The Commission will give clearance under section 65A of the Act if it is satisfied that:
  - 7.1 the applicant and any other party to the proposed contract, arrangement, or understanding are or will be involved in a collaborative activity; and
  - 7.2 every cartel provision in the contract, arrangement, or understanding is reasonably necessary for the purpose of the collaborative activity;<sup>5</sup> and
  - 7.3 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.
8. This statement of preliminary issues sets out the issues we currently consider to be important in deciding whether or not to grant clearance for the Proposed Agreement.<sup>6</sup>
9. We invite interested parties to provide comments on the Proposed Agreement's likely effect on competition. We request that parties who wish to make a submission do so by **15 October 2021**.
10. The Commission acknowledges that some interested parties may face challenges during some COVID-19 alert levels. This may impact their ability to submit within this timeframe. If you would like to make a submission but face difficulties in doing so within the timeframe, please ensure that you register your interest with the Commission as soon as possible, and no later than **15 October 2021**, at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) so that we can work with you to accommodate your needs where possible.

## The applicant

11. The Anytime Fitness brand started in the United States approximately 20 years ago and there are around 5,000 Anytime Fitness gyms operating globally. The Anytime

---

<sup>4</sup> 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).

<sup>5</sup> 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.

<sup>6</sup> The issues set out in this statement are based on the information available when it was published and may change as our investigation progresses. The issues in this statement are not binding on us.

Fitness brand entered the New Zealand market just over 10 years ago.<sup>7</sup> Currently, there are 53 gyms operating under the Anytime Fitness brand throughout New Zealand.<sup>8</sup>

## Our framework

12. Our approach to analysing a collaborative activity clearance application is based on the principles set out in our Competitor Collaboration Guidelines (CCGs).<sup>9</sup>

### Defining a collaborative activity

13. The Act defines a “collaborative activity” as:<sup>10</sup>
- 13.1 an enterprise, venture or other activity in trade that is carried on in cooperation by two or more persons; and
  - 13.2 such enterprise, venture or other activity in trade is not carried on for the dominant purpose of lessening competition between any two or more of the parties.<sup>11</sup>
14. The Commission’s CCGs outline how we will assess whether something amounts to a collaborative activity.
15. The first part of the definition establishes the scope of the collaboration between the parties. The parties need to be combining their business, assets, or operations in some way in a commercial activity. There needs to be something more than an agreement between competitors about how to run their separate business.
- 15.1 A ‘commercial activity’ is something relating to the buying and selling of goods or services or the acquisition of land.<sup>12</sup>
  - 15.2 ‘Carrying on in cooperation’ means that the parties must be combining their businesses, assets, or operations in some way in a commercial activity, or otherwise operating a commercial activity jointly. ‘Carrying on’ suggests some degree of continuity or repetition.<sup>13</sup>
16. The second part of the definition is that the collaborative activity must not be carried out for the dominant purpose of lessening competition between the parties to the agreement.

---

<sup>7</sup> 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.

<sup>8</sup> At [1.4] of the Application.

<sup>9</sup> Commerce Commission, *Competitor Collaboration Guidelines*, January 2018. Available on our website at [www.comcom.govt.nz](http://www.comcom.govt.nz)

<sup>10</sup> Section 31(4) of the Act.

<sup>11</sup> This purpose may be inferred from the conduct of any relevant person or from any other relevant circumstance, as per section 31(5) of the Act.

<sup>12</sup> CCGs at [103].

<sup>13</sup> At [105].

17. A dominant purpose is the main or principal purpose.<sup>14</sup> The dominant purpose that the parties are jointly working towards must not be to lessen competition between them.
18. 'Not for the dominant purpose' is a primarily objective test, although evidence of what the parties were trying to achieve will also be relevant.<sup>15</sup> Parties must be able to explain why the dominant purpose of their activity is benign or pro-competitive. If they are unable to do so, then it is likely we will infer that their dominant purpose is to lessen competition between the parties.<sup>16</sup>

**Cartel provision must be reasonably necessary for the purpose of the collaborative activity**

19. A cartel provision is a provision of an agreement between competitors that has the purpose, effect or likely effect of:
  - 19.1 fixing, controlling or maintaining prices;
  - 19.2 restricting output; or
  - 19.3 allocating markets.
20. These three types of cartel provisions are not mutually exclusive and may overlap. For example, a provision may both fix prices and restrict output.
21. For the Commission to grant clearance, each cartel provision in an agreement must be reasonably necessary for the purpose of the collaborative activity. This is an objective test. The cartel provisions do not need to be essential, but must be more than merely desirable, expedient or preferable.<sup>17</sup>
22. The Commission's CCGs explain that to assess whether a cartel provision is reasonably necessary, we will:
  - 22.1 look to understand what interest(s) the parties are trying to protect or promote;<sup>18</sup>
  - 22.2 look to understand how important or significant that interest(s) is in assisting the parties to achieve the purpose of the collaboration;<sup>19</sup>
  - 22.3 consider the scope of the cartel provision; including duration, geographic scope, relationship to the parties' businesses, and the products and markets to which the provision applies;<sup>20</sup> and

---

<sup>14</sup> At [109].

<sup>15</sup> At [113].

<sup>16</sup> At [116].

<sup>17</sup> At [121] to [126].

<sup>18</sup> At [128].

<sup>19</sup> At [129].

<sup>20</sup> At [131.1].

- 22.4 consider the available alternatives that would enable the parties to pursue their collaboration and protect the collaborative interest.<sup>21</sup>

**Satisfying the Commission that the agreement is not likely to substantially lessen competition**

23. The final step of our analysis is assessing whether entering into the agreement or giving effect to any provision in the agreement would be likely to have the effect of substantially lessening competition in a market.<sup>22</sup> This assessment includes all the provisions in the agreement, not just the cartel provisions.<sup>23</sup>
24. In this part of our assessment, ‘likely’ means a real and substantial risk, or a real chance; ie, more than a possibility, but it does not need to be more likely than not.<sup>24</sup>
25. ‘Substantial’ means real or of substance. A lessening of competition that is not substantial will not prevent us from granting clearance.<sup>25</sup>
26. We determine whether a substantial lessening of competition is likely by comparing the likely state of competition if the Proposed Agreement proceeds (the scenario with the Proposed Agreement, often referred to as the factual), with the likely state of competition if the Proposed Agreement does not proceed (the scenario without the Proposed Agreement, often referred to as the counterfactual).<sup>26</sup> This allows us to assess the degree by which the Proposed Agreement might lessen competition. It includes an assessment of the evidence on whether the scenario without the Proposed Agreement is best characterised by the status quo, or whether the parties would seek alternative options.
27. If the lessening of competition as a result of entering into or giving effect to any provision in the Proposed Agreement is likely to be substantial, we will not give clearance. When making that assessment, we consider, among other matters:
- 27.1 constraint from other competitors – the extent to which current competitors compete and the degree to which they would expand their sales if prices increased;
- 27.2 constraint from potential new entry – the extent to which new competitors would enter the market and compete if prices increased; and
- 27.3 the countervailing market power of buyers – the potential constraint on a business from purchasers’ ability to exert substantial influence on negotiations.

---

<sup>21</sup> At [131.2].

<sup>22</sup> We explain how we define markets further below.

<sup>23</sup> CCGs at [145].

<sup>24</sup> At [152].

<sup>25</sup> At [149].

<sup>26</sup> *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].

## Market definition

28. We define markets in the way that we consider best isolates the key competition issues that arise from the Proposed Agreement. In many cases this may not require us to precisely define the boundaries of a market. A relevant market is ultimately determined, in the words of the Commerce Act, as a matter of fact and commercial common sense.<sup>27</sup>
29. Anytime NZ submits that the relevant product market is 'gym services' and that gym services are regional in nature (ie, based on a metropolitan area). Anytime NZ does not consider that narrower geographic market definitions are appropriate because:<sup>28</sup>
- 29.1 a benefit of joining an Anytime Fitness gym is that a customer is able to access any gym in the Anytime Fitness network. This may be a gym that is situated closest to his or her home address, or a gym that is closest to his or her workplace. These locations (home and work) may not be near each other but will usually be in the same regional area.
- 29.2 the market definition should be viewed in light of the issues caused by the Reciprocity Policy, ie, a customer is identifying the Anytime Fitness gym in the region that has the cheapest weekly membership rate, signing up to that gym and then actually using (and subsequently transferring to) the Anytime Fitness gym that is closest to his or her home or work (or preferred because of the services/ facilities available).
30. We will consider whether the most appropriate market definition for assessing the Proposed Agreement is that suggested by Anytime NZ, or whether the competitive impact is better assessed with a different market definition. In particular we will consider whether:
- 30.1 a narrower geographic scope is appropriate based on how far gym users are prepared to travel to access a gym; and
- 30.2 a narrower product scope is appropriate based on differences in gym service offerings such as price, quality of services, and range of services offered.

## Preliminary issues

31. The Commission currently considers that the standardised pricing provisions in the Proposed Agreement that would allow Anytime NZ to set minimum and maximum prices for different membership types, and to change those minimums and maximum prices, are likely to be cartel provisions that fix, control or maintain prices.

---

<sup>27</sup> Section 3(1A). See also *Brambles v Commerce Commission* (2003) 10 TCLR 868 at [81].

<sup>28</sup> At [7.2] of the Application.

There are reasonable grounds to believe that at least some franchisees who would be party to the Proposed Agreement are in competition with each other.<sup>29</sup>

32. The Commission also considers that Anytime NZ and the franchisees are combining their businesses, assets, or operations in some way in a commercial activity through the operation of the Anytime Fitness franchise network, including the Reciprocity Policy.
33. At this stage, we intend to focus our investigation on whether:
  - 33.1 the Anytime Fitness franchise network is a collaborative activity; that is, whether it is being carried on for the dominant purpose of lessening competition between any of the franchisees, or Anytime NZ and any franchisee;
  - 33.2 the proposed cartel provisions are reasonably necessary for the purpose of the collaborative activity, ie, the operation of the Anytime Fitness network; and
  - 33.3 the Proposed Agreement would be likely to have the effect of substantially lessening competition in any market.

**Whether the collaborative activity is for the dominant purpose of lessening competition between the parties**

34. To grant clearance, we need to be satisfied that the dominant objective of the Anytime Fitness franchise network is not to lessen competition between any of the franchisees. In this assessment we will focus on any lessening of competition between any of the franchisees (including Anytime NZ) rather than across the market generally.
35. Anytime NZ submits that the purpose of the Anytime Fitness franchise network is pro-competitive, as it allows the Anytime Fitness franchisees to work together and combine their efforts to compete effectively against other nationwide gym networks as well as offer a competitive edge against single-site gyms.
36. Anytime NZ also submits that a key co-operative aspect of the Anytime Fitness franchise network is the effective operation of the Reciprocity Policy. It also submits that the Reciprocity Policy is an international feature of the Anytime Fitness franchise system, and is required to ensure compliance with the master franchise arrangements between Anytime NZ and the international master franchisor of Anytime Fitness.
37. We intend to test with Anytime Fitness franchisees:

---

<sup>29</sup> 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. Section 65A(3) of the Act.

- 37.1 the extent of competition between franchisees; and
  - 37.2 what they see as the main or principal reason for the Anytime Fitness franchise network, including the Reciprocity Policy.
38. In making this assessment, the Commission will also consider questions such as whether the Anytime Fitness franchise network, including the Reciprocity Policy, are intended to, for example:<sup>30</sup>
- 38.1 lower prices or increase output;
  - 38.2 create new productive capacity or new products, etc; and/or
  - 38.3 save costs.
39. We will also look more broadly at what the Anytime Fitness network is trying to achieve.

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

40. We will investigate whether, objectively, the cartel provision(s) are reasonably necessary for the purpose(s) of a collaborative activity (which, as outlined above, Anytime NZ has submitted is the operation of the Anytime Fitness network).
41. Anytime NZ submits that if the Proposed Agreement does not go ahead, the issues related to operation of the Reciprocity Policy will continue and there will be an adverse impact on members' experiences, the Anytime Fitness brand and the overall Anytime Fitness franchise network.<sup>31</sup>
42. Anytime NZ submits that the Proposed Agreement is reasonably necessary to:<sup>32</sup>
- 42.1 allow the Anytime Fitness franchise to provide a strong network of gym facilities in good locations to its members;
  - 42.2 ensure the focus of the franchisees is on the provision of excellent facilities and services so that the chain can best compete with other gym providers; and
  - 42.3 significantly improve the equitable allocation of membership fees as between franchisees, some of whom are currently required to provide services to a high number of gym members while receiving few membership fees themselves.

---

<sup>30</sup> CCGs at [119].

<sup>31</sup> At [3.16] of the Application.

<sup>32</sup> At [6.6] of the Application.

43. Anytime NZ further submits that the Proposed Agreement is essential to avoid the risk of the breakdown of the Anytime Fitness Franchise Network,<sup>33</sup> and that there is no feasible or practically workable alternative available.<sup>34</sup>
44. We intend to test whether the cartel provisions in the Proposed Agreement are reasonably necessary by:
- 44.1 investigating the nature and extent of the issues Anytime NZ has submitted are being caused by the Reciprocity Policy and the impact of those issues on the operation of the Anytime Fitness franchise network;
  - 44.2 considering what the purpose of the cartel provision(s) is/are, eg, are the proposed lower and upper limits on membership pricing designed to significantly reduce the parties' risk in achieving the purpose of the Anytime Fitness franchise network and/or the Reciprocity Policy (such as deterring free-riding);<sup>35</sup>
  - 44.3 assessing how important the cartel provision(s) are to achieving the purpose of the Anytime Fitness franchise network and/or the Reciprocity Policy;<sup>36</sup> and
  - 44.4 investigating whether there are workable alternative options available to Anytime NZ and the franchisees to address the issues that Anytime NZ submits are being caused by the Reciprocity Policy, that either do not contain a cartel provision or contain a less restrictive cartel provision.<sup>37</sup>

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

45. Anytime NZ submits that any lessening of competition would not be substantial because:
- 45.1 Anytime Fitness only holds a fraction of the market share in the markets that it submits are relevant to our assessment;
  - 45.2 the industry involves a large number of national brands and other competitive local gyms with no dominant providers;
  - 45.3 of the lack of material barriers to entry in the relevant markets and entrance of new competitive boutique training providers.
46. We will investigate whether the Proposed Agreement would be likely to substantially lessen competition in any relevant market (or markets) by assessing:

---

<sup>33</sup> At [6.2] of the Application.

<sup>34</sup> At [6.7] of the Application.

<sup>35</sup> CCGs at [128].

<sup>36</sup> At [129].

<sup>37</sup> This may include looking at other industries where reciprocity is a feature of a brand or network.

- 46.1 whether the loss of competition between the Anytime Fitness franchisees caused by the Proposed Agreement would enable them to profitably raise prices or reduce quality or innovation;
- 46.2 whether any of the relevant market(s) are vulnerable to coordination, ie, the potential for competitors to coordinate their behaviour (for example, through tacit collusion on prices) and collectively exercise market power or divide up the market such that output reduces and/or prices increase. We will also investigate whether the Proposed Agreement would change the conditions in the relevant market(s) so that coordination is more likely, more complete, or more sustainable, for example, by making the pricing offered by Anytime Fitness franchisees more transparent to their competitors;
- 46.3 the extent to which there are multiple Anytime Fitness gyms in the same market;
- 46.4 the remaining competitive constraints in the relevant market or markets, including:
  - 46.4.1 the degree of constraint that existing competitors would impose on the Anytime Fitness gyms in the relevant market or markets;
  - 46.4.2 entry and expansion, ie, how easily rivals could enter and/or expand; and
  - 46.4.3 the countervailing market power of buyers – the potential constraint on Anytime Fitness gyms from customers’ ability to exert substantial influence on negotiations.

### Next steps in our investigation

- 47. The Commission is currently scheduled to make a decision on whether or not to give clearance to the collaborative activity by **3 November 2021**. However, this date may change as our investigation progresses.<sup>38</sup> In particular, if we need to test and consider the issues identified above further, the decision date is likely to extend.
- 48. As part of our investigation, we will be identifying and contacting parties that we consider will be able to help us assess the preliminary issues identified above.

### Making a submission

- 49. If you wish to make a submission, please send it to us at [registrar@comcom.govt.nz](mailto:registrar@comcom.govt.nz) with the reference “Anytime Fitness” in the subject line of your email, or by mail to The Registrar, PO Box 2351, Wellington 6140. Please do so by close of business on **15 October 2021**.

---

<sup>38</sup> 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.

50. Please clearly identify any confidential information contained in your submission and provide both a confidential and a public version. We will be publishing the public versions of all submissions on the Commission's website.
51. 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.