

Determination

Anytime NZ Limited [2022] NZCC 22

The Commission:	Anna Rawlings Dr Derek Johnston Dr John Small
Summary of application:	An application from Anytime NZ Limited seeking clearance to enter into proposed agreements with its franchisees that contain or may contain cartel provisions.
Determination:	Under s 65A of the Commerce Act 1986, the Commerce Commission declines to give clearance to the collaborative activity.
Date of determination:	27 May 2022

CONTENTS

OUR DECISION3

THE PROPOSAL3

OUR FRAMEWORK.....5

SECTION 65A: COMMISSION MAY GIVE CLEARANCE RELATING TO CARTEL PROVISIONS 5

A collaborative activity 6

Reasonably necessary..... 7

Not likely to substantially lessen competition 8

SECTION 65B: EFFECT OF CLEARANCE UNDER SECTION 65A..... 8

ANALYSIS OF WHETHER CRITERIA FOR GRANTING CLEARANCE ARE MET9

 WHETHER THE PROPOSED AGREEMENT CONTAINS, OR IS LIKELY TO CONTAIN, A CARTEL PROVISION..... 9

 WHETHER THE PARTIES ARE INVOLVED IN A COLLABORATIVE ACTIVITY 9

 THE CARTEL PROVISIONS MUST BE REASONABLY NECESSARY FOR THE PURPOSE OF THE COLLABORATIVE ACTIVITY 10

Commission’s view of the substantial purposes of the collaborative activity..... 10

Provision of a strong network of clubs in good locations 11

Inequitable allocation of membership fees between Anytime Fitness franchisees..... 15

High quality facilities and services and need to achieve consistent brand image and quality standards 20

Alternatives..... 26

Conclusion on ‘reasonably necessary’ 26

 WHETHER THE PROPOSED AGREEMENT IS LIKELY TO SUBSTANTIALLY LESSEN COMPETITION IN ANY MARKET 27

DETERMINATION ON NOTICE OF CLEARANCE.....27

Confidential material in this report has been removed. Its location in the document is denoted by [].

Our decision

1. The Commerce Commission (Commission) has decided to decline clearance under s 65A of the Commerce Act 1986 (the Act) to Anytime NZ Limited (Anytime NZ) in relation to proposed cartel provisions in agreements with its franchisees. This is because there is insufficient evidence for the Commission to be satisfied in the circumstances of this particular case that every proposed cartel provision is reasonably necessary for the purpose of the collaborative activity.
2. In this case, based on the facts and submissions that Anytime NZ has provided to us, the Commission is not satisfied that those provisions that are reasonably believed might be cartel provisions are reasonably necessary to allow Anytime Fitness franchisees and Anytime NZ to work together on operational matters, such as a common branding and marketing strategy (while maintaining separate ownership structures) or to give Anytime Fitness franchisees and Anytime NZ the ability to combine their efforts and offerings under a national brand, in order to compete effectively against other nationwide gym chains and single-site gyms. Whether the provisions that are reasonably believed might be cartel provisions are reasonably necessary is one of the three limbs of the statutory test that the Commission must be satisfied is met before clearance is granted.
3. Our conclusions in relation to Anytime NZ's application are not necessarily reflective of the Commission's view about whether, in other situations, one or more cartel provisions might be reasonably necessary for the purpose of operating a franchise network.

The proposal

4. On 21 September 2021, the Commission registered an application (Application) from Anytime NZ seeking a collaborative activity clearance for proposed agreements with its franchisees that contain or may contain cartel provisions. Anytime NZ proposed introducing a standardised pricing policy that would allow Anytime NZ to impose lower and upper limits on New Zealand Anytime Fitness franchisees' membership pricing (the Proposed Agreement).
5. 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.¹ As at the date of the Application, there were 53 Anytime Fitness clubs operating throughout New Zealand.²
6. 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

¹ The Application at [1.4]. There is a master franchise arrangement between Anytime NZ and the international master franchisor of Anytime Fitness, see [6.11] of the Application.

² Application at [1.4].

this as its Reciprocity Policy. Under the terms of the franchise agreement, each franchise is required to comply with the Reciprocity Policy.³

7. The model also provides that if a member uses a club that is not their 'home' club above a certain percentage of visits over a 60-day period, their membership will be transferred to the club used most frequently.⁴
8. 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 required to be open on a 24/7 basis.⁵
9. Anytime NZ submitted that during 2017, standardised membership pricing provisions were removed from the Anytime Fitness franchise agreements to ensure compliance with the new cartel provisions introduced by the Commerce (Cartels and Other Matters) Amendment Act 2017.⁶ Anytime NZ submitted that removing these provisions has had a negative effect on the proper and efficient operation of the Reciprocity Policy and the Anytime Fitness network.⁷ In particular, Anytime NZ submitted that prospective members are incentivised to join the cheapest Anytime Fitness club and then use the Reciprocity Policy to access a different club (which they prefer because of its location and/or services). Anytime NZ submitted 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.⁸
10. Anytime NZ identified two issues arising from the Reciprocity Policy and the lack of standardised pricing:⁹
 - 10.1 when a member uses an Anytime Fitness club that is not their 'home' club, the operator of that other Anytime Fitness club does not obtain any fees from that member (ie, the club operator is effectively providing services free of charge); and
 - 10.2 if a member's membership is transferred to a different Anytime Fitness club (under the franchise transfer rules, if that is the club that the member is predominantly using), the new club operator must either:
 - 10.2.1 accept the member at the membership fees agreed between the member and the original Anytime Fitness club (which are potentially lower than what the new club charges); or

³ Clause 4.5 of the Standard Franchise Agreement for Anytime NZ franchisees.

⁴ Application at [3.8].

⁵ Clause 4.2 of the Standard Franchise Agreement for Anytime NZ franchisees [].

⁶ Application at [1.7].

⁷ At [1.7] to [1.10].

⁸ At [1.8] to [1.10].

⁹ At [1.9].

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

11. As a result of the issues outlined above, Anytime NZ proposed introducing the Proposed Agreement which would have allowed Anytime NZ to:¹⁰
- 11.1 set a price policy for all memberships sold that all franchisees must adhere to, and which applies to all (new) members;
 - 11.2 set minimum and maximum prices for different membership types;
 - 11.3 change those minimum and maximum prices by notice to the franchisees; and
 - 11.4 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).
12. Anytime NZ clarified to the Commission that
[]¹¹
13. The current form of the Proposed Agreement included two membership types:¹²
- 13.1 Corporate/Student/Senior, with a minimum of [] per week and a maximum of [] per week; and
 - 13.2 Standard, with a minimum of [] per week and a maximum of [] per week.
14. We understand that if clearance was granted, Anytime NZ may have
[]¹³

Our framework

Section 65A: Commission may give clearance relating to cartel provisions

15. Section 65A(2) of the Act states that the Commission must give a clearance if it is satisfied that:

¹⁰ At [3.3].

¹¹ Anytime NZ RFI response dated 17 March 2022.

[]

].

¹² Application at [3.3(d)].

¹³ Anytime NZ RFI response received 17 March 2022.

- 15.1 the applicant and any other party to the proposed contract, arrangement, or understanding are or will be involved in a collaborative activity; and
 - 15.2 every cartel provision in the contract, arrangement, or understanding is reasonably necessary for the purpose of the collaborative activity; and
 - 15.3 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.
16. 'Satisfied' is a standard used in other parts of the Act, such as ss 66 and 67. The fact that the Commission must be satisfied in order to grant clearance means that the onus is on the applicant to satisfy the Commission that the criteria in s 65A(2) are met.
17. The Commission can only give clearance if it is satisfied that all three limbs of the test (set out at [15]) are met.
18. Section 65A(3) states that 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 that it might be.

A collaborative activity

19. The Act defines a "collaborative activity" as an enterprise, venture or other activity in trade that:¹⁴
- 19.1 is carried on in cooperation by two or more persons; and
 - 19.2 is not carried on for the dominant purpose of lessening competition between any two or more of the parties.¹⁵
20. The Commission will take into account the following in assessing these factors:
- 20.1 '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.¹⁶
 - 20.2 a 'commercial activity' is something relating to the buying and selling of goods or services or the acquisition of land.¹⁷

¹⁴ Section 31(4) of the Act.

¹⁵ This purpose may be inferred from the conduct of any relevant person or from any other relevant circumstance, as per s 31(5) of the Act.

¹⁶ Competitor Collaboration Guidelines at [105].

¹⁷ At [103].

20.3 a dominant purpose is the main or principal purpose.¹⁸ ‘Not carried on for the dominant purpose’ is primarily an objective test, although evidence of what the parties were trying to achieve will be relevant.¹⁹ Parties must be able to explain why the dominant purpose of the activity is benign or pro-competitive. If they cannot provide such an explanation, then it is likely we will infer the dominant purpose of the cartel provision is to lessen competition.²⁰

Reasonably necessary

21. Whether a cartel provision is reasonably necessary for the purpose of the collaborative activity is assessed objectively.²¹
22. While ‘necessary’ is a high standard, it is qualified by ‘reasonably’; ie, within reason.²²
23. In order to assess whether a cartel provision is reasonably necessary, we will:
 - 23.1 look to understand what interest(s) the parties are trying to protect or promote;²³
 - 23.2 look to understand how important or significant that interest(s) is in assisting the parties to achieve the purpose of the collaboration;²⁴
 - 23.3 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;²⁵
 - 23.4 consider the available alternatives that would enable the parties to pursue their collaboration and protect the collaborative interest.²⁶
24. 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.
25. The Commission considers that where a collaborative activity has multiple substantial purposes, a cartel provision (or cartel provisions) that is/are reasonably

¹⁸ At [109]. It is possible for a collaborative activity to have multiple purposes ([111]).

¹⁹ At [113].

²⁰ At [116].

²¹ At [121].

²² At [125.1].

²³ At [128].

²⁴ At [129].

²⁵ At [131.1].

²⁶ At [131.2].

necessary for at least one of the substantial purposes will satisfy the ‘reasonably necessary’ test.

Not likely to substantially lessen competition

26. 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.
27. This assessment applies to all provisions in the agreement, not just the cartel provision.²⁷
28. In this part of our assessment, ‘likely’ has the same meaning as our analysis under ss 27 and 47 of the Act. ‘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.²⁸
29. ‘Substantial’ means real or of substance. A lessening of competition that is not substantial will not prevent us from granting clearance.²⁹

Section 65B: Effect of clearance under s 65A

30. Section 65B of the Act sets out that the effect of a clearance given under s 65A is that:
 - 30.1 a party to the contract, arrangement, or understanding to which the clearance relates does not contravene s 27 or 30 by entering into the contract or arrangement, or arriving at the understanding; and
 - 30.2 a person does not contravene s 27 or 30 by giving effect to any cartel provision in the contract, arrangement, or understanding to which the clearance relates; and
 - 30.3 section 30C(1) does not apply to any cartel provision in the contract, arrangement, or understanding.
31. As set out in our Competitor Collaboration Guidelines (CCGs), if the parties to the agreement subsequently want to enter into a new, amended, or additional agreement that contains a cartel provision, they must seek a further clearance for that new agreement. Similarly, 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.³⁰

²⁷ At [145].

²⁸ At [152].

²⁹ At [149].

³⁰ At [138].

Analysis of whether criteria for granting clearance are met

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

32. The Commission considers that there are reasonable grounds for believing the standardised pricing provisions in the Proposed Agreement that would have allowed Anytime NZ to:³¹

- 32.1 set a price policy for all memberships sold to which all franchisees must adhere, and which applies to all (new) members;
- 32.2 set minimum and maximum prices for different membership types;
- 32.3 change those minimum and maximum prices by notice to the franchisees; and
- 32.4 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),

might be cartel provisions that fix, control or maintain prices.

33. We also consider that there are reasonable grounds to believe³² that at least some franchisees who would be party to the Proposed Agreement are in competition with each other,³³ because:

- 33.1 while several of the Anytime Fitness clubs have common ownership, most of the clubs are independently owned. As such, they are separate legal persons for the purposes of the Act, and are potentially competitors;
- 33.2 we are of the view that actual and potential customers may view different Anytime Fitness clubs as different competitive offerings; and
- 33.3 some franchisees are in the same local markets.³⁴

Whether the parties are involved in a collaborative activity

34. The Commission is satisfied that Anytime NZ and the franchisees that would have been party to the Proposed Agreement are engaged in a collaborative activity.

35. 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

³¹ Application at [3.3].

³² 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).

³³ 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).

³⁴ Franchisees may also compete for the same customers where a member works in a different local area to where they reside.

franchise network (including the Reciprocity Policy). This combining of operations is evidenced by, for example, use of a common payment system and standardised membership documentation, the operation of the Reciprocity Policy itself and the common key-card system.

36. We consider that, objectively, the Anytime Fitness franchise network is not being carried out for the dominant purpose of lessening competition between franchisees. The Anytime Fitness network allows the franchisees and Anytime NZ to work together on operational matters, such as a common branding and marketing strategy (while maintaining separate ownership structures).
37. The Anytime Fitness franchise network also allows Anytime NZ and the Anytime Fitness franchisees to operate under a single brand, and compete as a united brand against other nationwide gym networks and single-site gyms.

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

38. In order to grant clearance, the Commission must be satisfied that each cartel provision in an agreement is reasonably necessary for the purpose of the collaborative activity.
39. Anytime NZ submitted that the Proposed Agreement is reasonably necessary for three reasons:³⁵
 - 39.1 to provide a strong network of gym facilities in good locations to Anytime Fitness members;
 - 39.2 to ensure the focus of Anytime Fitness franchisees is on the provision of excellent facilities and services so that the chain can best compete with other gym providers; and
 - 39.3 to significantly improve the equitable allocation of membership fees between Anytime Fitness franchisees.

Commission's view of the substantial purposes of the collaborative activity

40. The Commission considers the substantial purposes of the collaborative activity to be:
 - 40.1 to allow Anytime Fitness franchisees and Anytime NZ to work together on operational matters, such as a common branding and marketing strategy (while maintaining separate ownership structures); and
 - 40.2 to give Anytime Fitness franchisees and Anytime NZ the ability to combine their efforts and offerings under a national brand, in order to compete effectively against other nationwide gym chains and single-site gyms.

³⁵ Application at [6.6].

41. We note that some aspects of these substantial purposes of the collaborative activity are also reflected in the reasons that Anytime NZ claims that it needs the Proposed Agreement. We have assessed below whether the Commission can be satisfied on the basis of any of the reasons submitted by Anytime NZ that the potential cartel provisions in the Proposed Agreement are reasonably necessary for one of the substantial purposes of the collaborative activity.

Provision of a strong network of clubs in good locations

42. In its Application, Anytime NZ submitted that:

42.1 the Reciprocity Policy [];³⁶

42.2 the Reciprocity Policy has resulted in [];³⁷
and

42.3 franchisees are often [].³⁸

43. Anytime NZ further submitted that:³⁹

43.1 franchisees' focus on [] is hindering their ability to effectively compete with other gym networks such as Les Mills, Snap Fitness and Flex Fitness;

43.2 there is a [];

43.3 there are [];⁴⁰

43.4 there are [];⁴¹

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

³⁶ At [3.13].

³⁷ At [3.14].

³⁸ Ibid.

³⁹ Anytime NZ submission on the Statement of Issues dated 15 February 2022 at [15] to [27].

⁴⁰ Anytime NZ RFI response dated 6 October 2021 – Anytime NZ says it is aware of [].

⁴¹ Anytime NZ points to [].

43.6 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

43.7 [].

44. We consider that the evidence shows that the provision of a strong network of Anytime Fitness clubs appears to be possible without the Proposed Agreement. This is because:

44.1 53 clubs are already open in a range of locations spread across New Zealand, with [];

44.2 there are [] proposed expansion plans for the Anytime Fitness network,^{42 43} and

44.3 there is a steady growth in membership numbers - for example, [] (ie, the period following the removal of the previous pricing policy).^{44 45}

45. Anytime NZ has advised that [].⁴⁶

46. It seems likely that even if the Proposed Agreement is in place, there will continue to be clubs in close proximity at different price points within the pricing band envisaged under the Proposed Agreement,⁴⁷ with the potential for those differences to be at a similar level to those that Anytime NZ submits are currently contributing to the need for the Proposed Agreement. We consider that this points to the Proposed Agreement not being reasonably necessary.

46.1 Anytime NZ submitted that the []

⁴² Anytime NZ: Openings Forecast 2026.

⁴³ Anytime NZ Submission in response to Statement of Issues at [25], [26] and Appendix 1.

⁴⁴ Anytime NZ data: AFNZ open clubs and members.

⁴⁵ We do not have a complete set of data from other participants in the gym industry to be able to assess whether this is consistent with market growth. However, according to <https://www.ibisworld.com/nz/market-size/gyms-fitness-centres/>, between 2017 and 2022 the gyms and fitness centres industry in New Zealand declined 2.5% per year on average. It is not clear whether this is referring to membership numbers or profit.

⁴⁶ Anytime NZ response of 17 March 2022 to Commission's request for information.

⁴⁷ For example, this may be because of the number/type of group fitness classes a club offers, 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.

46.1.1

46.1.2

46.1.3

46.1.4]].

46.2 We consider that this evidence may suggest
[

].

46.3 In any event,
[

].

47. The evidence we have obtained indicates that [] that hinder their combined efforts to compete against gyms outside of the Anytime Fitness network appear to be a relatively confined issue affecting a relatively small number of franchisees in Christchurch and Auckland. Therefore, we consider that this weighs against the Proposed Agreement being reasonably necessary for the purposes of ensuring a strong gym network.

48. We acknowledge Anytime NZ's submission that 'strong' in this respect means as competitively strong as possible, and that small margins can mean the success or failure of brands.⁴⁹ Our view is that the standard of 'as competitively strong as possible' is higher than what would need to be demonstrated in order to determine whether the Proposed Agreement is reasonably necessary for the purposes of the collaborative activity.

49. When assessing whether a cartel provision is reasonably necessary for the purpose of the collaborative activity, we also considered the issue of whether there is the potential for [] to arise within the Anytime Fitness network were further franchisees to join the franchise in the future. Although we understand the potential

⁴⁸ [

]

⁴⁹ Anytime NZ: Schedule responding to miscellaneous points in response to Statement of Unresolved Issues.

for [] with a larger number of franchisees, the evidence we have considered does not suggest that this is likely in practice.

50. We have not been required to reach a definitive conclusion on whether a collaborative activity clearance would apply to further franchisees added to the Proposed Agreement at a later stage, given that we have declined this Application. However, this issue was considered in our Statement of Unresolved Issues⁵⁰ and attracted a submission from Anytime NZ.
51. Having considered Anytime NZ's submission, our current view remains as set out in the CCGs and referred to in paragraph [31] above; namely, that if further franchisees were to be added to a franchise agreement, then this would trigger a requirement to seek a further clearance in order to benefit from the protection provided by s 65B. We reached that view for several reasons, including the following:
- 51.1 Collaborative activity clearances are intended to provide statutory protection in respect of agreements that might otherwise contravene a provision proscribing serious misconduct, in the form of price fixing, output restriction, or market sharing. This militates against an interpretation which would allow the scope of a clearance to be expanded unilaterally by the applicant after it was granted through the addition of new parties, and which would shift the burden of monitoring the effect of the addition of such new parties to the Commission.
- 51.2 The matters about which the Commission is required to be satisfied before granting clearance under s 65A(2)(c) include that entering into or giving effect to the agreement will not have, or would not be likely to have, the effect of substantially lessening competition in a market. That assessment is likely to be dependent on the market position of the parties involved, which would count against an interpretation under which parties could extend the scope of the agreement unilaterally in a manner that would directly affect the assessment.
- 51.3 Section 58B(2) specifically and expressly allows for the effect of an authorisation to extend to new parties. The absence of an equivalent provision for collaborative activity clearances would tend to suggest that Parliament did not intend this effect to be implied into the clearance regime. Moreover, the fact that the Commission has explicit power to impose conditions on authorisations (s 61(2)), but cannot impose conditions on clearances, might help explain why this extension provision is workable in the context of authorisations.
52. In our view, the Proposed Agreement, []⁵¹ may limit the ability of some Anytime Fitness franchisees to compete against lower-priced gym

⁵⁰ See paragraphs [94]-[100].

⁵¹ [].

chains, and therefore affect Anytime NZ and the Anytime Fitness franchisees' combined ability to provide a strong network of clubs.

- 52.1 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 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 comparatively high for some locations,⁵² Anytime Fitness franchisees may end up losing members to other lower-priced gym chains and overall be less effective competitors.
- 52.2 We note Anytime NZ's response that it is up to Anytime Fitness (which we understand to be Anytime NZ and the master franchisor) to assess how it best competes in the gym market and that its strategy is to position itself at a certain level with quality facilities and services rather than as a budget provider (and that Anytime NZ is best placed to conduct that assessment).⁵³ While we agree that it is up to Anytime NZ as the master franchisee to set strategy and brand positioning for the franchise, in our view it could still be damaging to the process of competition in local gym markets if clubs are not able to be nimble and respond to competitive pressure, eg, [].

Inequitable allocation of membership fees between Anytime Fitness franchisees

53. Anytime NZ submitted that there are imbalances between the membership fees an Anytime Fitness club operator may be entitled to and the extent of access and services it provides to members. It submitted that a cheaper-priced club in the Anytime Fitness network typically receives a greater proportion of membership fees, while also providing fewer services (as a higher proportion of its members access other, more local, clubs). Conversely, more expensive clubs (with better facilities) are required to serve the members of cheaper clubs in the Anytime Fitness network, while receiving a lesser proportion of membership fees for doing so.⁵⁴
54. Anytime NZ further submitted that the Anytime Fitness transfer system, whereby a member's membership can transfer from their home club to a new club if the member accesses that new club above a percentage usage threshold over a 60-day period,⁵⁵ creates an incentive for members to join cheaper, non-local Anytime Fitness clubs, knowing that their membership will be able to be transferred to their local club, but in the hope their fees will stay the same. Anytime NZ submitted this has resulted in some franchisees accepting lower rates than they would normally

⁵² For example, because of the socio-economic demographics of the population in a particular area.

⁵³ Anytime NZ: Schedule responding to miscellaneous points in response to Statement of Unresolved Issues.

⁵⁴ Application at [3.6] and [3.7].

⁵⁵ Under the Reciprocity Policy the new club does not have to accept the member if the transferring member does not accept the new club's higher fees. See [68] for further details regarding how the Reciprocity Policy and transfer rules work.

offer.^{56 57} This issue and inconsistencies in pricing between clubs has resulted in [] confusion along members.⁵⁸

55. Anytime NZ estimated that on average, [] members per month transfer from their home club to a new club. However, their systems are not able to track whether.⁵⁹

55.1 a transfer is made from a cheaper club to a more expensive club; and

55.2 a transfer occurs with or without a corresponding change of a member's address.

56. Anytime NZ also submitted that as a result of the Reciprocity Policy []:⁶⁰

56.1 []; and

56.2 [].

Anytime NZ submitted that []:⁶¹

57. Anytime NZ is of the view that []:⁶²
Anytime NZ refers to the Auckland and Christchurch markets as being very important markets for Anytime Fitness and equitable allocation of membership fees in those markets is needed so Anytime Fitness can effectively compete with other gym chains.⁶³ It also submitted that this issue will be exacerbated as the network expands over time.⁶⁴

58. We understand that Anytime NZ's concern is that the inequitable allocation of membership fees will grow over time and lead to increasing issues within the Anytime Fitness network. Despite Anytime NZ's submission, we do not consider the equitable allocation of fees to be a substantial purpose of the collaborative activity. However, we acknowledge that it may affect the ability of the network of Anytime Fitness clubs to operate effectively or may cause other issues, such as leading to franchisees leaving the network or clubs being ineffective competitors.

⁵⁶ Application at [3.8] and [3.9].

⁵⁷ At [3.12] - Anytime NZ refers to being aware of some members who have joined a non-local club at a promotional rate with the intention of immediately transferring to their preferred local, more expensive club.

⁵⁸ At [3.10].

⁵⁹ At [3.11].

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

⁶¹ At [41].

⁶² At [38].

⁶³ Anytime NZ: Schedule responding to miscellaneous points in response to Statement of Unresolved Issues.

⁶⁴ Ibid.

59. Anytime NZ submitted that existing mechanisms, such as the 30-day cooldown period⁶⁵ and automatic transfer rules have not been effective in dealing with these issues.⁶⁶
60. Anytime NZ submitted that the [.⁶⁷
].⁶⁸
61. We acknowledge that some franchisees may be frustrated by these issues and feel that some members are trying to ‘game’ the system. However, overall, the evidence we have obtained indicates that these issues appear to be confined to particular areas in Auckland and Christchurch, and Anytime NZ’s submissions and related evidence are not sufficient to justify the cartel provisions being reasonably necessary. We explain further below.
62. We consider there are often genuine reasons for members to access multiple clubs within the network. In our engagement with franchisees, most did not see the Reciprocity Policy as having a negative impact on the operation of their club/clubs, and said that it was simply part of belonging to a franchise network. Further, there is a view among the majority of Anytime Fitness franchisees we spoke to that:
- 62.1 the benefits of the Reciprocity Policy are a selling point for the Anytime Fitness brand, and this benefit outweighs any drawback; and
- 62.2 the issue of clubs not receiving fees from ‘non-home club’ members would likely even out over time, as there are probably relatively similar numbers of their own members who are making use of the Reciprocity Policy and using other Anytime Fitness clubs.
63. Several franchisees did suggest that on occasion members (or potential members) do try and ‘game’ the system by joining at a lower-priced club and then using the Reciprocity Policy to access their preferred higher-priced club. To the extent that this happens, which appears to be confined to parts of Auckland and Christchurch, we consider there are adequate ways for franchisees to deal with this (which will likely also signal to lower-quality clubs that in order to attract new members, the club needs to improve the quality of its offering, as discussed further below), such as informing the member when they are signing up that:
- 63.1 there is a 30-day cooldown period where they will only be able to access their home club (ie, the club they sign their membership agreement with);

⁶⁵ During the first 30 days of a new membership members can only access their home club (ie, the membership key fob only works at their home club).

⁶⁶ Application at [6.8] and [6.9].

⁶⁷ Anytime NZ: Response to Statement of Issues dated 15 February 2022 at [46].

⁶⁸ Ibid.

- 63.2 under the Reciprocity Policy, when a member uses a club above a certain percentage over a 60-day period, the transfer mechanism is triggered, and the member's membership (and their fees) will switch to the club that the member is using the majority of the time;⁶⁹ and
- 63.3 if such a transfer is triggered, the new club operator will have the discretion to discuss with the transferring member the potential for them to be charged the new club's membership rates, which may be higher 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 terminate their membership or revert to using their home club []⁷⁰
64. If such matters are adequately explained to members at the outset, we consider there is a higher likelihood that:
- 64.1 members will choose the club that they predominantly intend to use, albeit they might use a lower-priced Anytime Fitness club nearby to leverage the membership price down in negotiation with their preferred club of choice; and
- 64.2 there is less risk of a poor reaction from a member when the Reciprocity Policy and transfer rules are enforced. We consider this is comparable to, for example, explaining to members that different tiers of membership entitle them to different levels of access to a club's facilities.⁷¹
65. 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.⁷² Anytime NZ further submitted that it could also risk franchisees inadvertently breaching s 80 of the Act for aiding/abetting a s 30 breach.⁷³
66. We are not persuaded by this submission. It is not clear to us that Anytime NZ and franchisees explaining 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.

⁶⁹ Application at [3.8].

⁷⁰ At [6.9]

⁷¹ See for example, <https://www.cityfitness.co.nz/memberships> and <https://www.jetts.co.nz/memberships/>.

⁷² Anytime NZ: Response to Statement of Issues dated 15 February 2022 at [64].

⁷³ At [65].

67. With respect to difficulties monitoring which members have already been advised that they are only permitted to access their home club during the initial 30-day cooldown period but continue to seek access to other clubs, we consider that:
- 67.1 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 as set out above members are more likely to sign up to the club they intend to use regularly);
- 67.2 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. We note Anytime NZ's submission that this is not a system that they would want to introduce as 'policing' use of clubs by members goes against the Anytime Fitness ethos.⁷⁴ We do not agree that introducing such a system equates to 'policing' of visits. We consider that these systems can be implemented in a member-focused manner which helps ensure that members are not gaming the Reciprocity Policy; and
- 67.3 it is only an issue for the first 30 days of a new member's membership, and after 30 days these visits start to count toward a transfer so the 'non-home club' that is being used predominantly may eventually see the benefit from that member.
68. As set out above, 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 network.⁷⁵ ⁷⁶ Feedback from franchisees has been that they either take the approach of:
- 68.1 predominantly, choosing to leave members on their existing prices as they would rather have a new member (even at a comparatively lower rate) than risk them walking away from their club. Essentially, it is a new member for a club which they have not had to put in any resources (eg, marketing, advertising) to attract; and/or

⁷⁴ Anytime NZ: Schedule responding to miscellaneous points in response to Statement of Unresolved Issues.

⁷⁵ Application at [6.9].

⁷⁶ Appendix B of Application,
[

]

- 68.2 discussing with the member moving them to a higher rate which is in line with the new club's current membership fees. Once an explanation is given as to why (eg, higher quality facilities, location etc), most members are usually happy with the new higher membership fee (although some do choose to leave).
69. Further, we consider that a requirement to be clearer with prospective members upfront about how membership transfers work, for example, through signage or membership forms, is likely to send a signal to lower-quality clubs that in order to attract new members, the club needs to improve the quality of its offering.
- 69.1 Currently, it appears that lower cost/quality clubs may not be incentivised to give a fulsome explanation to members, as they will get some monetary benefit from the new member once they join the club and before they are transferred.
- 69.2 However, if it is made clear that clubs need to give this explanation to prospective members, in our view it is likely that there will be less free-riding by new members, as they will be more likely to join the club they intend to use on a long-term basis. Consequently, in order to attract new members, a club will be incentivised to place a stronger emphasis on maintaining quality.
70. We consider that these reasons for not being satisfied that the Proposed Agreement is reasonably necessary to improve the allocation of membership fees between franchisees apply, even taking into account the potential for the issue to become more widespread as the Anytime Fitness network grows.

High quality facilities and services and need to achieve consistent brand image and quality standards

71. Anytime NZ submitted that without standardised pricing, there is no incentive for franchisees to compete based on quality, and that franchisees are instead incentivised to reduce membership prices, in the 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.⁷⁷
72. Anytime NZ further submitted that the Proposed Agreement will:
- 72.1 add substantially to the economic incentives on franchisees to maintain high quality services and facilities,⁷⁸ which will be significantly more effective than "begrudging" and delayed compliance.⁷⁹ Anytime NZ submitted that with the Proposed Agreement the main way clubs can differentiate themselves will be through the quality of their services and facilities;⁸⁰ and

⁷⁷ Application at [6.4].

⁷⁸ Anytime NZ: Response to Statement of Unresolved Issues dated 2 May 2022 at [17(a)].

⁷⁹ At [7].

⁸⁰ At [17(a)].

- 72.2 enable a number of franchisees to earn sufficient returns to be able to afford the capital outlay required to renovate their clubs and maintain quality services, when they otherwise would not have had the willingness or financial ability to do so.⁸¹
73. First, in respect of [72.1], Anytime NZ submitted that:
- 73.1 it is important that there are ongoing incentives on all franchisees to keep quality standards high. The Proposed Agreement, by putting a band on the level of prices charged by franchisees, will provide a greater incentive on franchisees to compete through higher standards of service and facilities;⁸²
- 73.2 where quality standards drop so low as to be unacceptable, Anytime NZ can step in and use enforcement mechanisms under the standard franchise agreement, such as ordering cleaning, and if necessary, terminating a franchise agreement.⁸³ However, these mechanisms may force action by some franchisees [] to do the minimum required to comply with enforced standards, and franchisees will not have the incentives to raise standards to higher levels;⁸⁴ and
- 73.3 the Proposed Agreement will ensure an earlier addressing of quality issues than the contractual requirements for renovation (which for some franchisees may not require any action for some years).⁸⁵
74. Secondly, in respect to [72.2], Anytime NZ submitted that:
- 74.1 the impact of COVID-19 on many franchisees has been extreme, particularly in Auckland, which has meant that
[

];⁸⁶
- 74.2 [] where they are pricing within the bands suggested in the Proposed Agreement. Those pricing bands have been pitched at a level that Anytime NZ considers is appropriate having regard to:⁸⁷
- 74.2.1 the preferred market positioning of Anytime NZ as a quality gym operator providing excellent facilities and services to members (rather than as a budget low-quality operator); and

⁸¹ At [17(b)].

⁸² Anytime NZ: Response to Statement of Unresolved Issues dated 2 May 2022 at [9].

⁸³ At [10].

⁸⁴ At [11].

⁸⁵ At [12].

⁸⁶ At [13].

⁸⁷ At [14].

74.2.2 the need for [] to invest in excellent facilities and services necessary for Anytime Fitness to maintain a market reputation consistent with Anytime NZ's preferred market positioning.

75. Anytime NZ also submitted that there are only incentives for franchisees to fully invest in and maximise the provision of quality services if the club doing so gets the benefit (which will not be the case if the clubs that are investing less on quality have the ability to free ride).⁸⁸

76. Anytime NZ provided information about the mechanisms contained within the franchise agreement which can address quality issues. These include:

76.1 [

],⁸⁹

76.2 [];⁹⁰

76.3 [];⁹¹ and

76.4 undertaking regular visits to clubs to ensure compliance with required standards and procedures.⁹²

77. [

].⁹³

78. [

].⁹⁴

79. In respect of refurbishments required under the standard franchise agreement, Anytime NZ

⁸⁸ At [5(b)] – meaning, lower-priced clubs free-riding on the services of higher-quality clubs within the Anytime Fitness network.

⁸⁹ At [21] to [23].

⁹⁰ At [24] to [26].

⁹¹ At [27] to [31].

⁹² At [32] to [35].

⁹³ At [24] to [26] and Attachment 1.

⁹⁴ At [27] to [31].

[
].⁹⁵

80. [
].⁹⁶

80.1 [].
This is due to the staggered nature of entry into the franchise agreements,
and in turn the different times when refurbishment obligations arise under
the respective franchise agreements. Therefore,
[].

80.2 Secondly,
[].

81. Anytime NZ provided details of [] clubs in the Anytime Fitness network that have
outdated facilities and the steps Anytime NZ has taken with these franchisees to try
and address these inadequacies.⁹⁷

82. Anytime NZ commented that
[].⁹⁸

83. We acknowledge Anytime NZ’s submission (above at [72.1] and [73]) that with the
Proposed Agreement some franchisees may be more incentivised to compete on the
basis of quality, and this could assist in improving quality standards across the whole
network.

84. We can also recognise that with the Proposed Agreement Anytime NZ will be able to
pitch the pricing band at a level which is consistent with the preferred Anytime
Fitness offering and market positioning.⁹⁹ Further, we acknowledge that consistent
pricing will assist with presenting a consistent brand image across the network
(which is one of the benefits of being part of a franchise).

⁹⁵ At [37].

⁹⁶ At [38].

⁹⁷ At [43] to [85]. []

⁹⁸ At [25].

⁹⁹ Anytime NZ: Schedule responding to miscellaneous points in response to Statement of Unresolved Issues.

85. However, we consider there are a number of reasons that weigh against the Proposed Agreement being reasonably necessary to achieve a consistent brand image and quality standards. We set these out below.
- 85.1 Anytime NZ has identified [] clubs as having poor quality issues (of varying degrees). This is a relatively small proportion (approximately []) of all the existing Anytime Fitness clubs.
- 85.2 The standard Anytime Fitness franchise agreement allows Anytime NZ to []. We consider that Anytime NZ's primary means of maintaining high quality facilities and services and achieving consistent brand image and quality standards is through the [].
- 85.3 If the Proposed Agreement is implemented, there can be no certainty that it will increase the incentives for all Anytime Fitness franchisees to improve the quality of their clubs (as Anytime NZ has submitted).
- 85.4 If an Anytime Fitness franchisee is [], the Proposed Agreement is unlikely to resolve the issues identified.
- 85.5 There may be less money to invest if franchisees are made to increase membership prices before addressing quality standards. If new membership prices (for potential members) are not reflective of the quality of the club, then members may be less likely to sign up to an Anytime Fitness club and instead sign up to another gym where the price is more aligned with the perceived quality.
- 85.6 Relatedly, putting membership prices up to ensure a consistent Anytime Fitness brand may deter new members in local areas where Anytime Fitness clubs are competing with the likes of lower-priced chains such as Snap, Jetts, City Fitness etc.
- 85.7 While we have not done a detailed financial assessment, it seems possible that some of the clubs which are [], may not be able to recoup enough through membership price increases (via the Proposed Agreement), particularly if they are constrained by competition, to channel that money into investment.¹⁰⁰
- 85.8 Some of the problems identified in the club audits/inspections which relate to the consistency of the Anytime Fitness brand do not appear to be necessarily related to the price a club charges and its earnings, such

¹⁰⁰ Anytime NZ: Response to Statement of Unresolved Issues dated 2 May 2022 at [29] and [66].
[]
].

[]¹⁰¹

85.9 The Proposed Agreement will []¹⁰² There will still be many existing members on membership prices below the Proposed Agreement and this will continue to impact on clubs’ revenue/profitability.

85.10 Anytime NZ’s submissions that clubs are []¹⁰³ cuts across Anytime NZ’s other submissions (at [53] and [56] above) that lower priced clubs are free-riding on higher priced clubs and are getting relatively more membership fees.

85.11 There is no evidence to indicate that the overall Anytime Fitness brand is damaged. In fact, the [] proposed expansion plans and Anytime Fitness’s [] since removal of the previous pricing arrangements in 2017 tends to indicate the opposite. As outlined above, it is possible that the Proposed Agreement itself could be damaging to the brand, as members may resent different clubs having the same or similar pricing when there is different levels of service and quality throughout the network. It also may result in pricing which makes some of the clubs uncompetitive with other gyms in their local areas.

85.12 Anytime NZ refers to []¹⁰⁴ We consider that if members are switching within the brand (rather than outside of the brand), then this also indicates that the brand is not damaged.

85.13 []¹⁰⁵ Once the impact of the COVID-19 pandemic subsides these issues may alleviate, as may the need for the Proposed Agreement, however, if clearance was granted the Proposed Agreement would remain in place.

85.14 To the extent the issues identified are resulting from a franchisee seeking to compete by operating a lower priced, lower quality club under the Anytime Fitness brand, it is for Anytime NZ as the master franchisee to decide to what degree it will allow that, having regard to its desire to preserve the consistent

¹⁰¹ Anytime NZ: Response to Statement of Unresolved Issues dated 2 May 2022 at Attachment 3, 6, 7 and 9.

¹⁰² Anytime NZ: 15 November RFI response.

¹⁰³ Anytime NZ: Response to Statement of Unresolved Issues dated 2 May 2022 at [90] to [91].

¹⁰⁴ At [66] to [69].

[]

¹⁰⁵ At [38(b)].

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

- 92. The third part of the test is assessing whether the Proposed Agreement is likely to substantially lessen competition in any market. The Commission can only give clearance to an application if all three limbs of the statutory test are met. As the Commission is not satisfied that the Proposed Agreement is reasonably necessary for the purpose of the collaborative activity, then we do not need to consider this part of the test for the purposes of deciding whether or not to give clearance. However, for completeness, we include a short summary of our preliminary view expressed in the Statement of Issues as to whether we consider the Proposed Agreement is likely to lead to a substantial lessening of competition.
- 93. We assessed whether the loss of competition between Anytime 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.
- 94. In our Statement of Issues¹⁰⁹ we expressed the preliminary view that competition is unlikely to be substantially lessened by the Proposed Agreement. However, given our conclusions on the reasonably necessary part of the statutory test we did not need to reach a final conclusion on this.

Determination on notice of clearance

- 95. The Commission is not satisfied that the Proposed Agreement is reasonably necessary for the purpose of the collaborative activity.
- 96. Under s 65A of the Commerce Act 1986 the Commerce Commission determines to decline to give collaborative activity clearance to Anytime NZ Limited to enter into the Proposed Agreements.

Dated this 27th day of May 2022

.....

Anna Rawlings
Chair

¹⁰⁹ [Statement of Issues](#).