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Determination

Connexa Limited and Two Degrees Networks Limited and Two Degrees Mobile Limited [2023] NZCC 10

The Commission:	Dr John Small Tristan Gilbertson Nathan Strong
Summary of application:	An application from Connexa Limited seeking clearance to acquire certain passive mobile telecommunications infrastructure assets from Two Degrees Networks Limited and Two Degrees Mobile Limited.
Determination:	Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to the proposed acquisition.
Date of determination:	4 May 2023

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

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The Application

1. On 19 December 2022, the Commerce Commission registered an application (the Application) from Connexa Limited (Connexa) seeking clearance to acquire certain passive mobile telecommunications infrastructure assets from Two Degrees Networks Limited and Two Degrees Mobile Limited (2degrees) (the Proposed Acquisition).

Our decision

2. We give clearance to the Proposed Acquisition as we are satisfied that it will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

3. The Proposed Acquisition is part of a trend in New Zealand and overseas for mobile network operators (MNOs) selling their passive mobile telecommunications infrastructure assets to specialist asset/mobile tower management companies (often referred to as TowerCos) and entering into contemporaneous long-term agreements with TowerCos to host the active equipment of MNOs on existing and new sites. In New Zealand, MNOs are in the process of rolling out 5G, or fifth generation, mobile network technology and, through the sale of their passive assets, freeing up capital to invest in 5G.

4. With the Proposed Acquisition, there would only be two large national suppliers of passive infrastructure services to MNOs: Connexa – serving two MNOs – and FortySouth, serving a third MNO. This compares with three providers if 2degrees' assets were sold to an independent third party.

5. Given this, and the fact that one MNO has a shareholding in Connexa, we had initial concerns about the impact of the Proposed Acquisition on competition for the supply of passive infrastructure services, and in downstream wholesale and retail telecommunications markets. We therefore published a Statement of Issues to test these concerns.

6. After considering submissions received in response to the Statement of Issues and other evidence gathered, we are satisfied that the acquisition is unlikely to substantially lessen competition in any market in New Zealand.

7. In passive infrastructure services markets, we consider that Connexa is likely to face sufficient competitive constraint after the Proposed Acquisition, from a range of sources. In particular, we consider it likely that:

    7.1 Connexa would face competition from the presence of a second large-scale, TowerCo;

    7.2 customers can viably use small-scale suppliers, as they have done in Australia, including by sponsoring the entry of such suppliers through contracting for new sites that are not committed under long-term contracts with TowerCos; and

    7.3 while the Proposed Acquisition would result in no MNOs providing passive infrastructure services in-house, self-supply of uncommitted site volumes will likely remain a credible option for MNOs and other customers to drive competitive outcomes.

8. We consider that the proposed agreements between Connexa and 2degrees (which include a long-term agreement by which Connexa would provide passive infrastructure services to 2degrees) are likely to be sufficiently robust to protect the interests of 2degrees and mean that competition in downstream telecommunications markets is unlikely to be materially harmed as a result of the Proposed Acquisition, including in relation to the roll out of 5G. The proposed agreement between Connexa and 2degrees contains protections relating to both the price and quality of services provided by Connexa to 2degrees under long-term contracts.

9. We also considered whether the Proposed Acquisition would increase the ability of TowerCos and/or MNOs to coordinate their behaviour in a way that could harm consumers. We are satisfied that this is unlikely to be the case.

Our framework

10. Our approach to analysing the competition effects of the Proposed Acquisition is based on the principles set out in our Mergers and Acquisition Guidelines (our guidelines).[1]

11. To clear an application, we must be satisfied that a merger will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

12. A lessening of competition does not need to be felt across an entire market for a lessening to be substantial. A lessening of competition that adversely affects a significant section of a market may be enough to amount to a substantial lessening of competition.[2]

13. We determine whether a merger is likely to substantially lessen competition in a market by comparing the likely state of competition if the merger proceeds (the scenario with the merger, often referred to as the factual), with the likely state of competition if the merger does not proceed (the scenario without the merger, often referred to as the counterfactual).[3]

14. A lessening of competition is generally the same as an increase in market power. Market power is the ability to raise prices above the price that would exist in a competitive market (the 'competitive price'),[4] or reduce non-price factors such as quality or service below competitive levels.

The parties and the Proposed Acquisition

15. Connexa is owned 70% by the Ontario Teachers' Pension Plan Board (OTPP) and 30% by Spark New Zealand Trading Limited (Spark). Following an acquisition in October

[1] Commerce Commission, *Mergers and Acquisitions Guidelines* (July 2019).
[2] *Mergers and Acquisitions Guidelines* above n1 at [2.25] and Dandy Power Equipment Pty Ltd v Mercury Marine Pty Ltd (1982) 64 FLR 238; ATPR 40-315, 43,888.
[3] *Commerce Commission v Woolworths Limited* (2008) 12 TCLR 194 (CA) at [63].
[4] Or below competitive levels in a merger between buyers.

2022, Connexa owns almost all of the passive mobile telecommunications assets previously owned by Spark. Connexa now provides passive infrastructure services to Spark under a long-term contract.[5]

16. 2degrees is a New Zealand telecommunications service provider and, along with Spark and Vodafone New Zealand Limited (now One NZ), is one of three MNOs in New Zealand. 2degrees is ultimately owned by Macquarie Asset Management and Aware Super Pty Ltd, as trustee for Aware Super.[6]

17. With the Proposed Acquisition:[7]

    17.1 Connexa would acquire assets including leases, licences and other property rights, as well as infrastructure located on 2degrees' sites such as towers, masts, poles and fences;

    17.2 Connexa and 2degrees would enter into a long-term agreement under which Connexa would provide passive infrastructure services to 2degrees;[8] and

    17.3 Spark's ownership stake in Connexa would reduce from 30% to 17% and OTPP's stake would increase to 83%.

Background

18. 'Passive' mobile telecommunications infrastructure comprises the structures capable of hosting 'active' telecommunications assets. Such assets can include underlying land interests, as well as physical structures such as towers, poles and fencing, as well as power systems and electricity connections. In contrast, 'active' infrastructure is the infrastructure on which MNOs run their mobile networks including antennae, cabinets, radio units, backhaul electronics and electricity meters.[9]

19. As noted above, the Proposed Acquisition is part of a trend in New Zealand and overseas for MNOs to sell their passive mobile telecommunications infrastructure assets to specialist TowerCos.[10] In 2022 in New Zealand:[11]

    19.1 Spark sold a majority stake in its passive infrastructure assets to OTPP (creating Connexa); and

5 The Application at [2] and [23]-[24].

6 The Application at [40].

7 The Application at [3] and [19]-[20].

8 Connexa and 2degrees would enter into this long-term infrastructure services agreement in connection with the Proposed Acquisition. In assessing the Proposed Acquisition, we have considered the likely impact of this services agreement (and any other agreements) that Connexa and 2degrees would enter into in connection with the Proposed Acquisition. However, we note that Connexa and 2degrees did not seek clearance or authorisation for this services agreement (or any other agreement entered into with the Proposed Acquisition). Clearance is given for the acquisition of the subject assets (being the passive mobile telecommunications infrastructure assets) only.

9 The Application at [55] and [57].

10 The Application at [4].

11 The Application at [4] and [91]-[92].

19.2 One NZ sold a majority stake in its passive infrastructure assets to two parties, InfraRed Capital Partners and Northleaf Capital Partners, creating Aotearoa Towers Group LP (trading as FortySouth).

20. TowerCos like Connexa and FortySouth own, manage and invest in passive mobile telecommunications infrastructure assets, providing MNOs and other parties with access to those assets.[12] In addition to Connexa and FortySouth, other organisations in New Zealand also own smaller networks of infrastructure that are, or can be used as, passive mobile telecommunications infrastructure.[13]

21. Connexa and FortySouth each have long-term agreements with MNOs to provide passive infrastructure services. Specifically:[14]

21.1 Spark and Connexa have entered into a long-term Master (or Mobile) Infrastructure Services Agreement (MISA) for an initial period of 15 years;

21.2 One NZ and FortySouth have entered into a long-term Master Services Agreement (MSA) for an initial period of 20 years; and

21.3 with the Proposed Acquisition, 2degrees and Connexa would enter into a long-term MISA for an initial period of 20 years.

22. Each MISA/MSA contains rights of renewal (or extension rights), which have the potential to extend the total term of the relevant agreement to [ ] years (as applicable). At the end of the applicable term, each MNO would need to consider whether to further extend the relevant agreement or negotiate terms for a new long-term supply agreement.

23. The agreements set the prices that MNOs will pay their respective TowerCo for services for the term of the agreement (both where they are the sole tenant on a site and where they co-locate on a site, including for sites that are yet to be built). The agreements also set out processes for how an MNO and its TowerCo will agree on details relating to the building of new sites, along with commitments on the number of new sites an MNO will have built with their TowerCo.

24. The effect of the agreements is to provide MNOs and TowerCos with a framework for pricing and to set service levels for the majority of their passive infrastructure requirements (noting that a portion of each of MNOs' passive infrastructure requirements remain uncommitted to any TowerCo) over the term of each of the agreements. The ability of MNOs to contract with third parties for a portion of their uncommitted sites is intended to discipline the TowerCos into providing high quality, competitively priced services to 'win' MNOs' uncommitted site business.

25. MNOs are in the process of rolling out 5G. The roll out of 5G, coupled with growth in fixed wireless broadband, requires densification of MNOs' existing networks and for additional sites to be built, increasing the demand for passive infrastructure services.

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[12] The Application at [48].

[13] The Application at [104].

[14] The Application at [19.1], [24] and [92].

Under the MISAs/MSAs, MNOs have committed, or propose to commit, to have their respective TowerCo build a specified number of future passive infrastructure sites (referred to as build to suit, or BTS sites). Spark's BTS commitment with Connexa is for 671 sites, One NZ's BTS commitment with FortySouth is for 390 sites and 2degrees' proposed BTS commitment with Connexa is for 450 sites.[15] Each MNO also has additional demand for future sites beyond these BTS commitments.

26. The Spark and 2degrees MISAs both contain non-discrimination clauses to ensure that Connexa does not favour one MNO over another.[16] [ ][17]

27. MNOs and TowerCos do not themselves physically construct or maintain any passive infrastructure they own. This work is done by third party contractors.[18] One contractor is Entelar Limited (Entelar), which is also a wholly owned subsidiary of Spark.

The relevant markets

28. Market definition is a tool that helps identify and assess the competitive constraints a merged firm is likely to face. Determining the relevant market requires us to judge whether, for example, two products are sufficiently close substitutes as a matter of fact and commercial common sense to fall within the same market.[19]

Connexa's submissions

29. Connexa submitted that the markets relevant to our assessment of the Proposed Acquisition are:[20]

    29.1 in terms of passive mobile telecommunications infrastructure services provided by TowerCos, wholesale markets for:

        29.1.1 the national supply of MISAs to MNOs;

        29.1.2 the local supply of sites not covered by MISAs with MNOs; and

        29.1.3 the national supply of passive mobile infrastructure services to non-MNO customers; and

    29.2 the national market for the retail supply of mobile services.

Our view

30. For the purposes of this determination, we have analysed the competitive effects of the Proposed Acquisition in relation to:

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15 The Application at Table 4 and [92].
16 MISA between Spark and Connexa at [ ] and MISA between 2degrees and Connexa at [ ].
17 [ ]
18 The Application at [106]-[108].
19 *Mergers and Acquisitions Guidelines* above n1 at [3.7]-[3.8].
20 The Application at [10] and [115]-[151].

30.1 local and national markets for the supply of passive infrastructure services to existing MNOs, new entrant MNOs and non-MNO customers;

30.2 the downstream retail and wholesale telecommunications markets; and

30.3 the supply of services by contractors relating to the physical building and maintaining of infrastructure.

31. We have not, however, needed to reach any definitive views on the precise boundaries of the relevant markets.

With and without scenarios

32. Assessing whether a substantial lessening of competition is likely requires us to:

32.1 compare the likely state of competition if the Proposed Acquisition proceeds (the scenario with the merger, often referred to as the factual) with the likely state of competition if it does not (the scenario without the merger, often referred to as the counterfactual); and

32.2 determine whether competition is likely to be substantially lessened by comparing those scenarios.

The factual

33. With the Proposed Acquisition:

33.1 Connexa would own passive infrastructure assets at approximately 2,367 sites (being 1,243 existing sites acquired from Spark and 1,124 sites of 2degrees), compared to the estimated 1,484 sites of FortySouth;[21]

33.2 2degrees and Connexa would enter into a long-term MISA for an initial period of 20 years, under which 2degrees would commit to build 450 future passive infrastructure sites with Connexa;

33.3 Spark would have a minority (17%) shareholding in Connexa and continue to have two directors on the Board of Connexa; and

33.4 pursuant to an Operational Services Agreement (OSA) entered into between Connexa and Spark regarding the use of Entelar to build and maintain passive infrastructure, [ ].[22]

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[21] The Application at Appendix 7 and NERA Report (for Connexa) at Table 3.1.

[22] The OSA is between Spark and Connexa, but for readability hereafter we refer to the OSA as being between Connexa and Entelar.

The counterfactual

34. We have considered what 2degrees would do with its passive infrastructure assets if the Proposed Acquisition did not go ahead.

35. Connexa submitted that, absent the Proposed Acquisition, there is a real chance that 2degrees would sell its passive infrastructure assets to an independent third party. In such a counterfactual, Connexa submitted that the assets of all three MNOs (Spark, One NZ and 2degrees) would be majority owned by parties with no involvement in the downstream market for the retail supply of mobile services. Connexa further submitted that that 2degrees would likely obtain similar contract terms and seek similar non-discrimination clauses in any MISA/MSA in the counterfactual to those proposed in the factual.[23]

36. 2degrees told us that [ ].[24]

37. We consider that, absent the Proposed Acquisition, 2degrees' assets are likely to be sold to a third-party who would own and operate those assets as a TowerCo in passive infrastructure services markets, in competition with Connexa and FortySouth. In this counterfactual scenario:

    37.1 there would be three large-scale, national TowerCos, compared to two in the factual;

    37.2 Spark, 2degrees and One NZ would each have a long-term MISA/MSA with a different TowerCo, compared to the factual where Connexa would have a MISA with 2degrees and Spark, and FortySouth will have an MSA with One NZ ([ ]); and

    37.3 Spark would have a 30% shareholding in Connexa, two directors on the Board of Connexa and continue to have an OSA with Connexa.

38. 2degrees submitted that the above counterfactual would lead to a materially less competitive outcome in downstream telecommunications markets than the factual, [ ].[25] It was not clear to us that this would, in fact, be the case, however this ultimately was not material to our decision on the Proposed Acquisition.

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23 The Application at [7]-[8], [10.2(b)], [111] and [113], and Connexa submission (14 April 2023) at [73.1].

24 Commerce Commission interview with 2degrees (2 February 2023), and 2degrees submission (13 April 2023) at [5] and [9].

25 2degrees submission (13 April 2023) at [4].

How the Proposed Acquisition could substantially lessen competition

39. With the Proposed Acquisition, there would only be two large national suppliers of passive infrastructure services to MNOs: Connexa – serving Spark and 2degrees – and FortySouth, serving One NZ. This compares with three providers if 2degrees' assets were sold to an independent third party.

40. Given this, and Spark's ownership interest in Connexa, we had initial concerns about the impact of the Proposed Acquisition on competition for the supply of passive infrastructure services, and in downstream wholesale and retail telecommunications markets. We therefore published a Statement of Issues to test these concerns.

41. We considered whether the Proposed Acquisition would be likely to substantially lessen competition by assessing the potential unilateral, coordinated and vertical effects of the Proposed Acquisition. In particular, we considered whether the Proposed Acquisition would be likely to substantially lessen competition due to:

    41.1 unilateral effects in passive infrastructure services markets;

    41.2 coordinated effects in passive infrastructure services markets;

    41.3 coordinated effects in downstream telecommunications markets;

    41.4 vertical effects in downstream telecommunications markets; and/or

    41.5 harm to competition between contractors involved in physically building and maintaining infrastructure.

42. After considering submissions received in response to the Statement of Issues and other evidence gathered, we are satisfied that the acquisition is unlikely to substantially lessen competition in any of these ways.

Horizontal unilateral effects in passive infrastructure services markets

43. Horizontal unilateral effects arise when a firm merges with or acquires a competitor that would otherwise provide a significant competitive constraint (particularly relative to remaining competitors, if any) such that the merged entity can exercise market power and profitably increase prices above (and/or reduce quantity, quality or innovation below) the level that would prevail without a merger.[26]

44. For the reasons set out below, we are satisfied that the Proposed Acquisition is not likely to give rise to unilateral effects in passive infrastructure services markets, compared to a counterfactual where 2degrees' assets are sold to a third-party who would own and operate them as a TowerCo.

[26] *Mergers and Acquisitions Guidelines* above n1 at [3.62].

Connexa's submissions

45. Connexa submitted that the Proposed Acquisition would not be likely to substantially lessen competition due to unilateral effects. In summary, it submitted that:[27]

45.1 FortySouth will remain an alternative available for Spark and 2degrees with the Proposed Acquisition and Connexa will remain an alternative for One NZ;

45.2 auction theory suggests that the pricing outcomes where two TowerCos compete are unlikely to be materially different from the outcomes where three TowerCos would compete in the counterfactual;

45.3 Connexa is incentivised to maximise co-location of equipment on assets, by offering competitive pricing and services to all customers;

45.4 non-discrimination clauses [ ];

45.5 customers would continue to have alternative supply options and significant countervailing power to ensure competitive terms for all sites, including from the ability to self-supply and to sponsor new entry of TowerCos (including small-scale entry);[28] and

45.6 competition to supply passive infrastructure services has no material impact on downstream competition for the retail supply of mobile services.

46. Connexa also submitted that the Proposed Acquisition is likely to be pro-competitive due to the potential for increased co-location.[29]

Our view

47. We considered the potential impact of the Proposed Acquisition on competition between TowerCos to supply MISAs/MSAs to existing MNOs, but reached a view that the Proposed Acquisition would only remove limited competition in this regard. Spark and One NZ have already long-term agreements with Connexa and FortySouth, respectively, for the supply of the majority of their passive infrastructure services and [ ].[30] This means that it is unlikely that a third TowerCo that owned 2degrees' assets in the counterfactual would have the opportunity to compete

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[27] The Application at [10.2]-[10.5], [149], [153], [155]-[157], [190.2], [218]-[220], [238] and [241], NERA Report at [76] and Connexa submission (14 April 2023) at [5] and [73.3(a)].

[28] In support of this, Connexa provided evidence of this having occurred in Australia. Connexa submission (14 April 2023) at [37]-[39] and [44]-[45]. Submissions from Spark and 2degrees supported Connexa's submissions on the ability of MNOs to self-supply. Spark submission (14 April 2023) at [3] and 2degrees submission (13 April 2023) at [7].

[29] The Application at [153].

[30] These agreements were described to us as being strategic, long-term partnerships or relationships. Commerce Commission interview with Spark (8 February 2023), Commerce Commission interview with 2degrees (2 February 2023), Commerce Commission interview with One NZ (2 February 2023), Commerce Commission interview with Connexa (17 February 2023) and Commerce Commission interview with FortySouth (21 February 2023).

to supply a MISA/MSA to Spark or One NZ (until the expiration of those long term agreements).

48. In our Statement of Issues, we tested initial concerns that the existence of only two large-scale, national suppliers of passive infrastructure services in the factual, compared to three in the counterfactual, might substantially lessen competition due to unilateral effects by reducing competition:

48.1 in local markets for uncommitted sites (of existing MNOs, new entrant MNOs and non-MNO customers); and/or

48.2 to supply passive infrastructure services to a new entrant MNO (nationally or in local markets), which could (in turn) lessen competition in downstream telecommunications markets.

49. In testing the above, we considered how competition might be impacted by clauses of MISAs/MSAs between MNOs and TowerCos, including non-discrimination clauses.

50. In passive infrastructure services markets, we consider that Connexa is likely to face sufficient competitive constraint after the Proposed Acquisition, from a range of sources. In particular, we consider it likely that:

50.1 Connexa would face competition from a large-scale competitor, FortySouth;

50.2 customers can viably use small-scale suppliers, as they have done in Australia, including by sponsoring their entry through uncommitted site volumes; and

50.3 while the Proposed Acquisition will result in no MNOs providing passive infrastructure services in-house, self-supply will likely remain a credible option for MNOs and other customers to drive competitive outcomes.

51. We consider that the above applies to existing MNOs, non-MNO customers and any new entrant MNO, were entry to occur. A new entrant MNO would have the same supply options as existing MNOs. The Proposed Acquisition is unlikely to materially raise barriers to entry in downstream telecommunications markets, and access to passive infrastructure services is unlikely to be a significant barrier to entry.

Connexa would face competition from FortySouth

52. Connexa is likely to face significant competitive constraint from FortySouth in the supply of passive infrastructure services. Like Connexa, FortySouth is a large-scale, national TowerCo with a network of passive infrastructure sites across New Zealand.

53. Both Connexa and FortySouth are majority-owned by parties that seek to invest in infrastructure assets that provide stable, long-term returns. Both Connexa and FortySouth have plans to grow by building new sites and increasing the extent of co-location on sites. Central to these plans being achieved are that they:

53.1 operate independently of MNOs from whom they have acquired assets; and

53.2 are able to compete to supply the uncommitted MNO sites of all MNOs and the future site needs of other customers.

54. The business plans and goals of Connexa and FortySouth mean that they are incentivised to offer existing and potential customers attractive price and non-price terms in order to win their business.

54.1 Connexa advised that it is incentivised to operate as a commercially driven supplier of passive infrastructure services (including to maximise co-location and new build opportunities) in order to drive revenue growth.[31] Connexa [ ].[32]

54.2 FortySouth told us that [ ].[33]

55. MNOs and other industry participants noted that there will be competition between Connexa and ForthSouth. These parties were also generally of the view that whether there were two or three large-scale, national TowerCos competing would not materially change the outcomes for customers of passive infrastructure services.[34]

56. We note that MNOs have consciously left some future site needs uncommitted in order to maintain a degree of leverage over their relationships with Connexa and FortySouth, and to maintain a degree of competitive tension.[35] To the extent that Spark and 2degrees use Connexa to supply uncommitted sites, [ ].[36]

57. Non-MNO customers (given their technical needs) do not currently procure passive infrastructure services to any material degree from Connexa or FortySouth (or from 2degrees).[37] Nonetheless, Connexa and FortySouth told us that [ ].[38]

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31 The Application at [10.2(a)].

32 Commerce Commission interview with Connexa (17 February 2023), Commerce Commission interview with Connexa (17 February 2023).

33 Commerce Commission interview with FortySouth (21 February 2023).

34 [ ]

35 Commerce Commission interview with Spark (8 February 2023), Commerce Commission interview with 2degrees (2 February 2023) and Commerce Commission interview with One NZ (2 February 2023).

36 Connexa submission (14 April 2023) at [6.2]. As noted, on the basis of auction theory Connexa and NERA submitted that pricing outcomes where two Towercos compete are unlikely to be materially different from outcomes where three TowerCos compete in the counterfactual. We agree that this may be the case under certain circumstances. However, we were not persuaded that these circumstances would necessarily apply in this case.

37 Non-MNO customers currently co-locate on a very small number of TowerCo or MNO sites.

38 Commerce Commission interview with Connexa (17 February 2023) and Commerce Commission interview with FortySouth (21 February 2023).

58. Given the above, we consider that there is likely to be significant competition between Connexa and FortySouth to supply passive infrastructure services in the factual, both to secure co-location customers on existing sites and to build/supply new passive infrastructure sites. In order to maximise revenues and returns over the useful life of these assets, TowerCos are incentivised to attract as many customers as possible via co-location. There remain strong incentives for Connexa and FortySouth to compete for uncommitted sites.

59. Non-discrimination clauses in Connexa's MISAs with Spark and 2degrees would not prevent it from offering competitive or lower prices to either MNO, to One NZ or to other customers in the future. We are satisfied that such clauses would be unlikely to negatively impact on competition between Connexa and FortySouth, or on the incentives of customers to seek competitive quotes for passive infrastructure services.

Customers can use small-scale suppliers and sponsor new entry

60. In addition to competition from FortySouth, the evidence before us suggests that additional competitive constraint on Connexa will likely come from customers having the option of using small-scale suppliers of passive infrastructure services, or sponsoring the entry of new suppliers of passive infrastructure services, to meet uncommitted site needs.

61. Beyond Connexa and FortySouth, there are other parties that already own passive infrastructure sites on a smaller scale, including networks of sites across New Zealand (for example, Chorus, Kordia and Vital, the Rural Connectivity Group (RCG)[39] and wireless internet service providers (WISPs), in specific geographic areas). Some of these infrastructure owners see themselves as competing (to varying extents) with Connexa and FortySouth, and/or are interested in opportunities to secure more co-location customers.[40] Others may also compete for uncommitted sites and to supply passive infrastructure services in the future.[41]

62. Non-MNO customers indicated that where they seek to co-locate on the sites of another party (as opposed to building their own site) they have options other than TowerCo or MNO sites, including Chorus, Vital, Kordia and other parties.[42]

63. MNOs advised that, by not committing all sites to Connexa or FortySouth, they had the option to use another party to build sites in the future, including by sponsoring small-scale entry.[43] We consider that the uncommitted site volumes of MNOs are likely of a scale that would facilitate the entry of a third large TowerCo, or could facilitate the

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39 The RCG, a joint venture between existing MNOs has approximately 350 sites. The Application at [80].

40 [ ]

41 [ ]

42 [ ]

43 Commerce Commission interview with Spark (8 February 2023), Commerce Commission interview with 2degrees (2 February 2023) and Commerce Commission interview with One NZ (2 February 2023).

entry or expansion of smaller scale suppliers. Any such entry or expansion, were it to occur, would provide additional competitive constraint on Connexa.

64. There are examples in Australia of small-scale entry in passive infrastructure services, which suggests that it could also occur in New Zealand. Stilmark entered the Australian market in 2013 and expanded to owning 75 sites, the majority in New South Wales and Victoria. Other small-scale TowerCos also operate in Australia with portfolios of 40-200 sites.[44]

Self-supply remains a credible option for customers

65. The evidence suggests that MNOs and other customers would continue to have the credible option of self-supplying passive infrastructure services. This is likely to impose further constraint on Connexa.

66. While MNOs have already sold, or are proposing to sell, their passive infrastructure assets, they have or are retaining the personnel and expertise to organise the builds of new sites for themselves in future if necessary – because the same teams continue to be required to manage their active assets. The evidence before us suggests that those teams would need to put relatively little extra time and effort into reverting to managing new passive sites. Our inquiries indicate that the costs of self-supply are unlikely to undermine MNOs' incentives to use it where required. There do not appear to be significant economies of scale in procuring land, building or maintaining of new sites. Self-supply would mean incurring capital costs of building new sites, instead of ongoing rental costs from a TowerCo, but those may not be so large as to prevent MNOs from building enough new sites if required to discipline TowerCos' pricing of large tranches of uncommitted new sites.

67. Evidence from MNOs supported the above, and MNOs further noted that in not committing all sites to Connexa and FortySouth they retain the flexibility to self-supply some sites.[45] 2degrees, in particular, told us that
[
].[46]

68. While self-supply by MNOs would be contrary to the rationale for selling their passive telecommunications infrastructure assets,
([
]),[47] the evidence (noted above) indicates that it is something that MNOs would be prepared to do in the face of an increase in the price, or reduction in the quality, of passive infrastructure services.

44 The Application at [244] and Connexa submission (14 April 2023) at [44]-[45].

45 Commerce Commission interview with Spark (8 February 2023), Commerce Commission interview with 2degrees (2 February 2023) and Commerce Commission interview with One NZ (2 February 2023).

46 Commerce Commission interview with 2degrees (2 February 2023).

47 Commerce Commission interview with Spark (8 February 2023), Commerce Commission interview with 2degrees (2 February 2023) and Commerce Commission interview with One NZ (2 February 2023).

69. Many non-MNO customers self-supply sites already. Such customers would have the ability to continue to do so. For example, [ ] co-locates on only a small number of sites owned by other parties and mainly operates and manages its own sites. It indicated that it could continue to build its own sites in the future.[48] For WISPs, the [ ].[49]

70. In Australia, there have been examples of self-supply by MNOs, which suggests that it could also occur in New Zealand. In the early 2000s, Crown Castle acquired passive infrastructure assets from each of Optus and Vodafone Hutchison Australia. After the completion of BTS commitments entered into at the time of the asset sales, both MNOs commenced self-supplying material numbers of sites themselves.[50]

71. In addition to the above, we note that the supply options available to customers may also increase in the future as a result of developments in technology.[51]

Coordinated effects in passive infrastructure services markets

72. A merger can substantially lessen competition if it increases the potential for the merged entity and all, or some, of its remaining rivals to coordinate their behaviour and collectively exercise market power such that output reduces and/or prices increase across a market or in a significant portion of a market.[52] We note that coordination requires market participants to reach at least an implicit agreement to act in a coordinated way (eg, by coordinating their pricing behaviour, or by allocating customers or geographic areas), and then to maintain that agreement by detecting and punishing any party that deviates from the agreement.[53]

73. For the reasons set out below, we are satisfied that the Proposed Acquisition is unlikely to give rise to coordinated effects in passive infrastructure services markets.

Connexa's submissions

74. Connexa submitted that there is no risk of coordination between TowerCos or in any passive infrastructure services markets. It submitted that several factors make coordination unlikely to occur or to be sustainable, and that the Proposed Acquisition would not make coordination more likely. It further submitted that non-discrimination clauses in MISAs would not make it easier for Connexa and FortySouth to coordinate.[54]

Our view

75. In our Statement of Issues, we tested initial concerns that the existence of only two large-scale, national suppliers of passive infrastructure services in the factual,

48 [ ]

49 [ ]

50 The Application at [247]-[252] and Connexa submission (14 April 2023) at [37]-[39].

51 During the course of our investigation both One NZ and 2degrees announced deals with satellite providers to improve mobile coverage (see https://www.rnz.co.nz/news/business/487246/one-nz-and-2degrees-sign-up-with-satellite-providers).

52 *Mergers and Acquisitions Guidelines* above n1 at [3.84].

53 *Mergers and Acquisitions Guidelines* above n1 at [3.85] and [3.88].

54 The Application at [270]-[271], and Connexa submission (14 April 2023) at [65] and [73.3(b)].

compared to three in the counterfactual, might substantially lessen competition due to coordinated effects by increasing the likelihood of coordination between TowerCos or by making it more easier for TowerCos to coordinate.

76. We have assessed whether:

76.1 passive infrastructure services markets are vulnerable to coordination; and

76.2 the Proposed Acquisition would change conditions in passive infrastructure services markets so that coordination is more likely, more complete and more sustainable.

Passive infrastructure services markets do not appear to be especially vulnerable to coordination

77. While TowerCos have only recently started providing passive infrastructure services in New Zealand, we consider that passive infrastructure services markets are not especially vulnerable to coordination.

78. A large proportion of the demand for passive infrastructure services is already tied up in long-term agreements (MISAs and MSAs) between TowerCos and MNOs. There appears to be little scope for TowerCos to coordinate the supply of MISAs or MSAs to existing MNOs when the current agreements expire. MNOs told us that [ ],[55] which suggests that each MNO may have to negotiate a new MISA or MSA bilaterally with its current TowerCo rather than retendering for the supply of passive infrastructure services for its existing active equipment.

79. As regards competition to supply passive infrastructure services at new sites – by co-location or by building new sites – we also consider that the relevant markets are not especially vulnerable to coordination.

79.1 Coordination over co-location offers appears unlikely because demand for co-location is unpredictable but co-location is highly profitable for TowerCos.[56] As a result, it may be impractical for even a small number of TowerCos to agree and sustain coordination.

79.2 On balance, we also consider that even a small number of TowerCos are unlikely to coordinate over the pricing or quality of new builds.

79.2.1 As regards MNOs, their demand for new builds is more predictable than their demand for co-location (since the MNOs have estimated how many new builds they will need in future) but MNOs would be able to disrupt any coordination if it emerged. This is because MNOs

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55 Commerce Commission interview with 2degrees (2 February 2023), Commerce Commission interview with One NZ (2 February 2023) and Commerce Commission interview with Spark (8 February 2023).

56 Connexa and FortySouth are incentivised to compete to win uncommitted sites and maximise the number of tenants on existing sites in order to grow their businesses and achieve a return on their investment. Commerce Commission interview with Connexa (17 February 2023) and Commerce Commission interview with FortySouth (21 February 2023).

are likely to be able to credibly self-supply (as discussed above) and have large enough requirements for new sites to be able to sponsor entry. Also, the exact number and timing of new sites that MNOs would require would be uncertain, making it difficult for TowerCos to coordinate over such demand.

79.2.2 The demand for new builds by other, smaller customers is likely to be much less predictable, and these customers are also more likely to be able to use structures other than new sites. As a result, in our view it would also be difficult for even a small number of TowerCos to agree and sustain coordination over such demand.

The Proposed Acquisition is unlikely to change conditions and make coordination more likely

80. We consider that the Proposed Acquisition is unlikely to materially change the conditions of competition between Connexa and FortySouth (and other TowerCos) and is unlikely to facilitate coordination in the provision of passive infrastructure services. Further, in our view the Proposed Acquisition is unlikely to change conditions in passive infrastructure services markets to make coordination more likely, more complete or more sustainable.

81. The main difference between the factual and counterfactual is the number of large-scale, national TowerCos that would be competing. Coordination in the factual (with two TowerCos) may be slightly easier than in the counterfactual (where there would be three TowerCos). This is because it may be theoretically easier to reach and monitor coordination with fewer competitors. However, the factors that make coordination unlikely (as set out above) are likely to continue to apply in both the factual and counterfactual, particularly the unpredictable demand and potential for MNO's to disrupt coordination. Despite a reduction in TowerCos in the factual, these factors are likely to make coordination difficult to sustain. As a result, the Proposed Acquisition is unlikely to make coordination more likely, more complete or more sustainable.

82. We further consider that non-discrimination clauses in Connexa's MISAs with Spark and 2degrees (that would be in place with the Proposed Acquisition) would not materially reduce Connexa's ability or incentive to offer competitive prices and good service to customers, or allow for any material information exchange between Connexa and FortySouth that would make it easier for them to coordinate in the factual compared to the counterfactual. The impact of non-discrimination clauses on competition between TowerCos was discussed earlier at [59]. While [ ], MNOs are not incentivised to share information about one TowerCo with another to facilitate coordination between TowerCos. MNOs are incentivised to drive competition between TowerCos to get competitive supply terms for passive infrastructure services.[57]

[57] Connexa submission (14 April 2023) at [71].

Coordinated effects in downstream telecommunications markets

83. For the reasons set out below, we are satisfied that the Proposed Acquisition is unlikely to give rise to coordinated effects in in any downstream retail or wholesale telecommunications markets.

84. Connexa submitted that the Proposed Acquisition would not increase the potential for coordination between MNOs. In summary, it submitted that:[58]

    84.1 even if non-discrimination clauses did provide Spark or 2degrees [ ] this would not enhance the conditions for coordination in any meaningful way; and

    84.2 downstream telecommunications markets are not conducive to coordination.

85. We acknowledge that there is the potential for some information exchange between Spark and 2degrees via Connexa due to Spark's ownership interest in Connexa and its ownership of Entelar and/or non-discrimination clauses in MISAs. With the Proposed Acquisition, Spark and 2degrees could learn or infer some details about each other's passive infrastructure pricing via Connexa. However, we consider that any such information exchange is unlikely to materially facilitate coordination between them and One NZ in downstream telecommunications markets. We understand that MNOs already have a reasonable degree of knowledge about each other's passive infrastructure since they have previously used the same contractors to build sites – giving them an understanding of each other's costs – and have published their plans for new site builds required by their 5G rollouts.[59] Moreover, passive infrastructure accounts for a small proportion of MNOs' costs and appears to have little bearing on the process of competition between MNOs (ie, the process of designing pricing plans, bundles and other aspects of offers to customers).

86. Downstream retail telecommunications markets also do not appear especially vulnerable to coordination. Competitors vary significantly in terms of size and business model. The prevalence of bundled deals reduces price transparency while also making rival suppliers' offers less immediately comparable in terms of quality, service and innovation. These factors would complicate the efforts of any providers attempting to coordinate on, and maintain agreements about, price or other aspects of their offers.

Vertical effects in downstream telecommunications markets

87. A merger or acquisition between parties who operate in related markets can result in a substantial lessening of competition due to vertical effects. This can occur where a merger or acquisition gives the merged entity (or a related entity) a greater ability or

[58] The Application at [10.6] and [267]-[268], Connexa response to the Commission's RFI (8 February 2013) and Connexa response to the Commission's questions (28 February 2013).

[59] https://www.spark.co.nz/5g/home/articles/spark-accelerates-5g-rollout/; https://one.nz/5g/ and https://www.2degrees.nz/media-releases/.

incentive to engage in conduct that prevents or hinders rivals from competing effectively (which we refer to as 'foreclosing rivals').[60]

88. In this case, the Proposed Acquisition raised a potential concern of vertical effects on 2degrees. Spark – which is a rival of 2degrees in downstream telecommunications markets – has two directors on Connexa's Board and a minority shareholding in Connexa. Spark also owns Entelar, which Connexa uses as a contractor to build and maintain passive infrastructure.[61] With the Proposed Acquisition, 2degrees would rely on Connexa, and to some extent on Entelar, for most of its passive infrastructure needs. Without the Proposed Acquisition, however, most of 2degrees' passive infrastructure would be managed by a third TowerCo with no connection to Spark. This raised the question of whether, with the Proposed Acquisition, 2degrees could ever be harmed by Spark influencing Connexa or Entelar to put its own interests before those of 2degrees, such that 2degrees' receives passive infrastructure services of impaired quality or that expansion by 2degrees (eg, its rollout of 5G) could be delayed – and its competitive effectiveness in downstream telecommunications markets ultimately undermined.[62]

89. For the reasons set out below, we are satisfied that the Proposed Acquisition is unlikely to give rise to vertical effects in downstream telecommunications markets.

Connexa's submissions

90. Connexa submitted that Spark would have no ability or incentive to affect how Connexa would serve 2degrees. Connexa submitted that Spark would be unable to foreclose 2degrees by diluting or overriding Connexa's commercial objectives to serve all MNOs, including 2degrees, effectively and without discrimination. Connexa also submitted that Spark could not influence Connexa or use Entelar specifically to raise the prices that 2degrees would pay for passive infrastructure services, or to reduce the quality of 2degrees' services, because [ ]. Connexa further submitted that, even if Spark could exert any influence over Connexa to harm 2degrees, it would not be commercially rational for Spark to do so.[63]

Our view

91. Our assessment of vertical effects in this case focused on whether Spark would have the ability to influence Connexa or Entelar in ways that may harm 2degrees. Notwithstanding submissions from Connexa and Spark, we consider that Spark is likely

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60 *Mergers and Acquisitions Guidelines* above n1 at [5.1]-[5.2].

61 Pursuant to an OSA, Connexa [ ].

62 Hereafter, for brevity, we refer to this ultimate question in terms of whether 2degrees could be foreclosed.

63 The Application at [162]-[173] and [190.4], Connexa response to the Commission's RFI (8 February 2013), Commerce Commission interview with Connexa (17 February 2023), Connexa response to the Commission's questions (28 February 2013) and Connexa submission (14 April 2023) at [116]. A submission from Spark supported Connexa's submissions on foreclosure and vertical effects. Spark submission (14 April 2023) at [10]-[14].

to have an incentive to try to influence Connexa or Entelar to favour its own interests over 2degrees' at least in certain circumstances. For example, if Connexa ever faced limited capacity to serve both Spark and 2degrees equally effectively at scale, Spark may seek to use its position on Connexa's Board and its ownership of Entelar to try to have its own work prioritised. It is less clear if Spark could ever have the incentive to seek to influence Connexa or Entelar to undermine 2degrees actively, but to be conservative we tested whether Spark would have any ability to influence the pricing, quality or timing of passive infrastructure services provided to 2degrees sufficiently that 2degrees could be foreclosed.

92. On balance, we consider that Spark would lack the ability to foreclose 2degrees via any influence at Connexa or Entelar. We consider that 2degrees would be sufficiently protected by its contracts with Connexa, Connexa's incentives and ability to prevent Spark from harming 2degrees, and by its own ability to use providers other than Connexa for passive infrastructure services if necessary.

93. We consider that Spark would lack the ability to foreclose 2degrees via any influence at Connexa or Entelar for the reasons summarised below.

93.1 2degrees' contractual protections (in its MISA and in Connexa's governance arrangements with Spark), on their own, are sufficient to protect it from harm that would be extensive enough to materially raise its costs, impair its current network or undermine its rollout of 5G. 2degrees' proposed MISA with Connexa – which would only be able to be changed with 2degrees' consent – [ ].[64] With such protections in place, any impacts that Spark could have on 2degrees by influencing Connexa to favour its own interests marginally or in times of capacity constraint are likely to be relatively minor.

93.2 Connexa would have no incentive to allow Spark to influence it or Entelar to harm 2degrees actively, and could not be forced to acquiesce under its governance arrangements with Spark. As a standalone TowerCo, Connexa derives no profits from any downstream telecommunications services. Instead, Connexa's incentive is to maximise its profits by providing access to passive infrastructure services on competitive terms and to as many customers as possible. Connexa will only achieve this if it is seen by rivals to Spark as an independent and neutral host.[65] We also note that [ ] We consider that such consequences could cost Connexa more than it would gain from accommodating any attempts by Spark to make it disfavour 2degrees.

64 We set out in Attachment A further detail on key contractual protections. This is based on 2degrees submission (13 April 2023) at 17-19, Connexa submission (14 April 2023) at [124], [133] and [138], the Application at [28] and [171], Connexa response to the Commission's RFI (8 February 2013) and Connexa response to the Commission's questions (28 February 2013).

65 Connexa submission (14 April 2023) at [116.2(b)] and Commerce Commission interview with Connexa (17 February 2023).

93.3 Since the Proposed Acquisition is not likely to cause unilateral effects, 2degrees should also be able to protect itself by using other TowerCos or even self-supply. Ultimately, we note that 2degrees has willingly entered into the Proposed Acquisition and MISA with Connexa. 2degrees submitted that, commercially, [ ], noting it is protected from being vertically foreclosed by provisions of the proposed MISA.[66]

Competition between contractors in building and maintaining infrastructure

94. We are satisfied that the Proposed Acquisition is unlikely to harm competition between contractors involved in physically building and maintaining infrastructure.

95. Connexa submitted that the Proposed Acquisition would not result in any aggregation in relation to the supply of contracting services for building infrastructure.[67]

96. Pursuant to an OSA between Connexa and Entelar, [ ] with the Proposed Acquisition. The OSA could lead to Entelar [ ] and mean that, with the Proposed Acquisition, competitors to [ ]. However, we have seen no evidence that this is currently case and even if this were to occur, we consider that this would be unlikely to substantially lessen competition in any markets for the supply of services by contractors relating to the physical building and maintaining of infrastructure. Connexa would be incentivised to maintain a competitive pool of contractors in order to maximise returns under its [ ] agreements with MNOs. There are several contractors of similar scale to Entelar. These and other contractors would still have the opportunity to compete for the business of other parties, including customers that seek contractors to build or maintain passive infrastructure for purposes other than mobile telecommunications.

66 2degrees submission (13 April 2023) at [11].

67 The Application at [109].

Determination on notice of clearance

98. We are satisfied that the Proposed Acquisition will not have, or would not be likely to have, the effect of substantially lessening competition in a market in New Zealand.

99. Under section 66(3)(a) of the Commerce Act 1986, the Commerce Commission determines to give clearance to Connexa Limited to acquire certain passive mobile telecommunications infrastructure assets from Two Degrees Networks Limited and Two Degrees Mobile Limited.

Dated this 4th day of May 2023

Dr John Small
Chair

Attachment A: Key contractual protections

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