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| **IN THE MATTER OF** | the Resource Management Act 1991 |
| **AND** | |
| **IN THE MATTER OF** | application by Anthony Fels Trust to Waikato District Council under section 88 of the Resource Management Act 1991 for a subdivision consent for 2 lots at 55 Wainui Road, Raglan (being Lot 15 DP 32533 in Computer Freehold Register SA856/246). |

**Decision following the hearing of an application by Anthony Fels Trust to Waikato District Council for a discretionary activity subdivision (Living Zone) resource consent under the Resource Management Act 1991**

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**Proposal**

To subdivide Lot 15 DP 32533 in Computer Freehold Register SA856/246 at 55 Wainui Road, Raglan, where Lot 1 is proposed at 517m² (413m$^2$ net site area) and Lot 2 at 404m$^2$, with a total site area of approximately 921m$^2$. Council reference SUB0104/18.

The application was heard at Ngaruawahia on 10 May 2018.

The resource consent sought is **REFUSED**. The reasons are set out below.

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| **Hearing Commissioner**: | Mr David Hill |
| **Application numbers:** | SUB0104/18 |
| **Applicant:** | Anthony Fels Trust |
| **Site addresses:** | 55 Wainui Road, Raglan |
| **Legal descriptions:** | Lot 15 DP 32533 in CFR SA856/246 |
| **Site area:** | 921m$^2$ |
| **Zoning:** | Living Zone within Waikato River Catchment Policy Area |
| **Lodgement:** | 9 October 2017 |
| **S92 Request:** | 1 November 2017 |
| **S92 information:** | 15 November 2017 |
| **Limited notification:** | 21 February 2018 |
| **Submissions closed:** | 23 March 2018 |
| **Hearing commenced:** | 10 May 2018 |

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| **Hearing closed:** | 15 May 2018 |
| **Appearances:** | The Applicant:<br>Mr Anthony Fels (Applicant).<br>Mr Peter Skilton (Planner – PRS Planning Services Ltd)<br>Submitters:<br>Nil<br>Council:<br>Ms Bridget Parham (Counsel)<br>Ms Sara Brown (consultant - Reporting Planner)<br>Mr Jason Wright (Acting Consents Team Leader)<br>Mr Malcolm Brown (Land Development Engineer)<br>Ms Lynette Wainwright (Committee Secretary)<br>Ms Wanda Wright (Committee Secretary) |

## Summary Decision:

1. Pursuant to section 104 and 104B of the Resource Management Act 1991, the discretionary activity subdivision consent application is refused.

## Introduction

2. This decision is made on behalf of the Waikato District Council (Council) by Independent Hearing Commissioner Mr David Hill appointed and acting under delegated authority under sections 34 and 34A of the Resource Management Act 1991 (the RMA).

3. This decision contains the findings from my deliberation on the application for resource consent and has been prepared in accordance with section 113 of the RMA.

4. The application was limited notified to 8 identified owners/occupiers of adjacent properties on 21 February 2018, with submissions closing on 23 March 2018. Three submissions were received in time – all in opposition. No submitter wished to be heard.

5. No late submissions and no s104(3)(a)(ii) RMA written approvals were received

6. Consent was required because of non-compliant aspects of the proposal (as lodged) relating to the required lot size, boundary setbacks, right of way width, carparking, separation distances between accesses, and manoeuvring standards.

7. The s42A RMA hearing report was prepared for Council by Ms Sara Brown, consultant planner with BCD Group Ltd, and made available to parties on or about 11 April 2018. Ms Brown's overall recommendation was to decline the subdivision consent sought as she considered (in summary) that the effect on the environment of allowing the activity was inconsistent with the minimum net site area subdivision provisions of the applicable Living Zone (and would create a localised adverse precedent effect), and would have an adverse amenity effect on adjacent persons. Her report was informed by a technical review from Mr Malcolm Brown (Land Development Engineer), who indicated conditional support for granting consent subject to a range of proposed conditions.

8. On 24 April 2018 Mr Skilton, consultant planner for the applicant, filed a statement of evidence in response to the s42A report and indicated formally that, to avoid additional cost, the applicant was willing for the matter to be determined on the papers as no submitters sought a hearing, and sought a direction on that matter.

9. Having considered the request, on 27 April 2018 I issued a Direction, under s41C of the RMA, declining that option on the ground that the difference of opinion between the respective planning professional was such that it was more appropriate to hear and question the matter. Accordingly I directed Ms Brown to prepare a supplementary statement addressing Mr Skilton's evidence opposing her recommendation.

10. Ms Brown provided her supplementary written statement as directed on 7 May 2018. Mr Skilton then filed a Rebuttal statement on 8 May 2018.

11. The matter was heard in Ngaruawahia on 10 May 2018, and closed on 15 May 2018. No submitters attended.

## Site description

12. As described in the s42A report the site is currently developed with an existing, single level dwelling located within the southern portion of the site. Access is obtained from Wainui Road, Raglan, via an existing, formed vehicle crossing located within the south-western corner of the site frontage. The site is of flat topography and contains established trees within the northern portion of the property where the remainder of the site is maintained in grass. A 1.8 metre high fence is located along the majority of the properties boundary. Access to both lots is proposed to be provided from Wainui Road via the existing vehicle entrance. A right of way easement will be provided over Lot I to provide access to Lot 2.

13. Properties adjoining the site and in the surrounding area, are similarly zoned and developed for residential use. Residential development in the area is characterised by a range of lot sizes, ranging from 403m$^2$ to 950m$^2$, which are occupied predominantly by single-storey dwellings of varying ages and styles

## Summary of proposal and activity status

14. The proposal is to subdivide this 921m$^2$ living zoned site into 2 parcels, Lot 1 being 517m$^2$ (with a net site area of 413m$^2$) and Lot 2 being 404m$^{2.}$ The existing dwelling will be retained on Lot 1. No development of rear Lot 2 is currently proposed, the objective being potential sale of the vacant lot.

15. Resource consent is required under the operative Waikato District Plan – Waikato Section 2013 as follows:

- Rule 21.16 – The proposed right of way has a width of entrance, near the entrance to the site and 3.6m between the dwelling and boundary where a minimum width of 6m is required. The right of way has a 3m wide seal where a seal of 4m is required. This is a restricted discretionary activity.

- Rule 21.50 – The dwelling within proposed Lot I is located directly adjacent the proposed right of way where a minimum setback of 1.5m is required. This is a restricted discretionary activity.

- Rule 21.63 – Lot I of 517m$^2$ (413m$^2$ net site area) and Lot 2 of 404m$^2$ cannot comply with the minimum allotment size of 450m$^2$. This is a discretionary activity.
- Rule A11 – Both proposed Lots I and 2 provide two carparking spaces respectively, however the District Plan requires one car space per bedroom, where Lot I contains a dwelling with three bedrooms. This is a restricted discretionary activity.
- Rule A12 - The District Plan states that no vehicle is required to reverse to or from a shared space access. Cars parked on Lot I will be required to reverse onto the shared right of way when leaving the site. This is a restricted discretionary activity.
- Rule Appendix A Table 5 – The existing entrance to the site cannot comply with the separation distances between accesses provided for in Table 5. This is a restricted discretionary activity.

16. The application has been reviewed for compliance with Regulation 5(5) of the Resource Management (National Environmental Standard for Assessing and Managing Contaminants in Soil to Protect Human Health) Regulations 2011 (NES). Council has no record of any HAIL activities occurring on the site and, therefore, the NES is deemed not to apply.

17. Overall the application is to be assessed as a discretionary activity. That activity status was not in dispute.

## Procedural and other matters

18. No procedural matters were raised for consideration.

## Relevant statutory provisions considered

19. In accordance with section 104 of the RMA I have had regard to the relevant statutory provisions, including the relevant sections of Part 2, sections 104 and 104B, s106, and s220 with respect to possible conditions.

## Relevant standards, policy statements and plan provisions considered

20. In accordance with section 104(1)(b)(i)-(vi) of the RMA, I have had regard to the relevant policy statement and plan provisions of the documents noted below – the relevant provisions of which are assessed, variously, in section 3.0 of the application AEE, section 7 and Appendix 4 of Mr Skilton's evidence, and section 7.0 of Ms Brown's s42A hearing report. The identification of these provisions was largely agreed – albeit Mr Skilton placed more weight on the regional provisions. Having reviewed those provisions, and particularly the objectives and policies, I confirm and adopt them. Therefore, there is no need to repeat the details in this decision. Those provisions are contained in the following statutory documents:

- Waikato Regional Policy Statement 2016;
- Waikato Regional Plan (WRP) 2007;
- Waikato District Plan – Waikato Section 2013.

21. While the National Policy Statement on Freshwater Management and Te Ture Whaimana o Te Awa o Waikato – the Vision and Strategy for the Waikato River were referred to, those documents have little material relevance to this consent application.

22. I do not consider any other matter to be relevant and reasonably necessary to determine the application in accordance with section 104(1)(c) of the RMA.

## Permitted Baseline / Existing Environment

23. Mr Skilton argued that there is a relevant, non-fanciful, permitted baseline that should be acknowledged for the site – noting[1] that not only could the proposed ROW be formed as a driveway to the rear of the existing dwelling without the need for resource consent, but a 70m$^2$ Dependent Persons Dwelling and a 56m$^2$ accessory building with associated hardstand parking for 7 vehicles was practicable within the overall 40% building coverage rule (i.e. up to 368.4m$^2$) and 70% impermeable surfaces (i.e. up to 644.7m$^2$) without resource consent. This was shown in Drawing 17094PS:S2 dated April 2018 included as Appendix 1 of his statement of evidence.

24. At the hearing Mr Skilton requested a response from Council on the above proposition and Ms Parham indicated that Council agreed there was an applicable permitted baseline.

25. Council officer's subsequently confirmed that the DPD and accessory building shown in the above drawing constituted a permitted baseline – while noting that elements of non-compliance remained with respect to those matters requiring consent as noted above.

## Summary of evidence / representations / submissions heard

26. The s42A Hearing report by Council's reporting officer, Ms Brown, was circulated prior to the hearing and taken as read.

27. The sole evidence presented at the hearing, by Mr Skilton on behalf of the applicant, responded to the particular issues and concerns identified in the s42A recommendation report and submissions. We address those matters directly.

## Principal issues in contention

28. In terms of section 104(1)(a) of the RMA, the actual and potential effects of allowing the activity on the environment, I note that Council's land development engineer, Mr Brown, accepted that infrastructural and related engineering effects were not significant and could be managed. I accept that conclusion and therefore do not discuss those matters further and refer to the relevant report contained in the s42A report at Appendix B.

29. The principal issue in contention was the effect that granting the 2 lots (both of a net site area size less than the minimum 450m$^2$ required in this zone) could have:

    (a) in terms of the perceived density (and corresponding amenity) of the specific subdivision proposed for those surrounding properties within the zone; and

[1] Skilton, Statement of evidence, section 4

(b) in terms of a potential precedent effect resulting in significant numbers of applications for subdivision below the 450m$^2$ net site area standard.

30. These issues are discussed in the following section.

**Neighbouring amenity**

31. In light of the concession regarding a permitted baseline development it is difficult to see how a subdivided fully compliant residential dwelling on Lot 2 – albeit on a slightly smaller then standard lot (noting that on this 20.1m wide lot the shortfall represents a 2.3m strip on Lot 2 and a 1.8m strip on Lot 1) - would have materially different and significant adverse effects in terms of neighbouring amenity. While there was no suggestion that such a permitted baseline development is a real prospect, that cannot, in the circumstance, be considered entirely fanciful.

32. I also note that relevant objective 13.4.1 (which deals with the amenity values of sites and localities that are to be maintained by subdivision, building and development) has the following quite general policy provisions:

*13.4.2 Subdivision, building and development should be located and designed to:*

*(a) be sympathetic to and reflect the natural and physical qualities and characteristics of the area*
*(b) ensure buildings have bulk and location that is consistent with buildings in the neighbourhood and the locality*
*(c) avoid buildings and structures dominating adjoining land or public places, the coast, or water bodies*
*(d) retain private open space and access to public open space*
*(e) encourage retention and provision of trees, vegetation and landscaping*
*(f) arrange allotments and buildings in ways that allow for view sharing, where appropriate*
*(g) provide adequate vehicle manoeuvring and parking space on site*
*(h) provide vehicle, cycling and pedestrian connection to transport networks, including roads, cycleways and walkways, and facilitate public transport*
*(i) promote security and safety of public land and buildings, and places*
*(j) mitigate foreseeable effects (including reverse sensitivity effects) on, and from, nearby land use, particularly existing lawfully established activities*
*(k) mitigate foreseeable effects on water bodies*
*(l) maintain adequate daylight and direct sunlight to buildings, outdoor living areas and public places*
*(m) maintain privacy*
*(n) avoid glare and light spill.*

33. Furthermore, the anticipated environmental results from subdivision, building and development are stated under 13.10.2 as follows:

*(a) Maintain appropriate pattern of subdivision consistent with the land uses on and around the land being subdivided and maintains development density and open space characteristics of the locality.*
*(b) Maintenance of a high degree of amenity value in living environments, including sites and neighbourhoods.*
*(c) Avoidance or mitigation of adverse effects of developments on sensitive landscapes and natural areas, including the coastal environment.*
*(d) Provision of safe and accessible residential areas that encourage people to move around.*
*(e) Encourage design and appearance of buildings that is compatible with local character.*
*(f) Avoidance of visual clutter created by signs that are incompatible with their environment.*

*(g) Development consistent with amenity values and expectations in the existing environment*

34. As the existing environment contains net site area lots of less than 450m$^2$, albeit that is now discouraged under the operative District Plan, that "fact" must be taken into consideration when evaluating those amenity policy and outcome statements. It appears that Council and the community have now effectively benchmarked those minimum amenity matters to the 450m$^2$ proxy.

**Finding**

35. While I acknowledge neighbouring concerns and accept that certain boundary treatments would be required – such as appropriate acoustic fencing – these are matters that could be mitigated by conditions, albeit that the expectations of adjacent neighbours regarding "strict" compliance with the development and planning controls might be abridged. That is not, however, a requirement for a discretionary activity application which, by definition, must fail to comply with certain controls and standards.

36. Furthermore, as Mr Brown accepted with respect to infrastructural matters, the question of on-site vehicle manoeuvring is one that can be managed internally with no off-site effects provided vehicles are not forced to reverse onto Wainui Road. One feasible way in which that could be accomplished was shown in Mr Skilton's drawing 17094PS:S1, Appendix 2 of his evidence.

37. Overall, I am not persuaded that any adverse amenity effect over and above that which might be generated as a permitted activity, or as might be conditioned, is sufficiently significant by itself to warrant declining subdivision consent.

**Draft Conditions**

38. In order to mitigate the neighbours' concerns the applicant proposed conditions which, among others, would require the erection of a 1.8m acoustic fence along the western boundary to address the noise and privacy issues raised, retain the mature trees on proposed Lot 2, and adopt an Augier consent notice condition limiting development on Lot 2 to those activities permitted by and within the development controls specified by the existing operative plan.

39. I note that those measures would go some considerable way in addressing the site-specific concerns raised in submissions.

**Precedent and zone integrity**

40. Council's main concern with this application related to the potential precedent effect that could be created for the rest of the zone if this application is granted.

41. The Court's have accepted that a precedent effect can result from a discretionary activity application – although such would not normally be the case because every application is assessed on its merits and typically has unique characteristics that are distinguishable.

42. This latter point was addressed orally at the hearing by Mr Skilton in general terms relating to the flatness of the site, the ability to screen noise and visual effects, the permitted baseline, etc - although I am not persuaded that those characteristics of the

site are sufficiently distinguishable from other sites in the Raglan Living Zone, and Mr Skilton did not adduce any evidence on the question.

43. The precedent of concern arises, I was told, because the specific zone control (minimum net site area of 450m$^2$) has been consistently applied without exception since the District Plan became operative in 2013 and is proposed to be retained in the reviewed District Plan scheduled for notification in mid-2018. The only apparent local exception being to regularise an existing situation of two flats at 16 and 16B Uenuku Avenue, Raglan in 2014 (as recorded in Ms Brown's evidence).

44. I understood Council's concern to be that there are numerous sections throughout the Raglan Living Zone that would fail to meet the net 450m$^2$ subdivision control, and that without clearly distinguishing site features, it would be difficult not to permit applications for subdivision from those lots if made should the present application be successful.

45. To test that assumption I asked Council to provide me (and the hearing subsequently) with an indication of how many existing titles in the Raglan Living Zone fell between 900m$^2$ and 1,000m$^2$ (the latter being the sum of two 450m$^2$ net lots plus a 100m$^2$ allowance for a rear lot driveway, therefore being the threshold above which compliance was highly probable) – since that was the band within which applications might sensibly be expected if the present application is granted (and Council's precedence concern manifested).

46. I was provided with the detail sought from Council's GIS database in the 4 ranges I had requested – being 900m$^2$ - 925m$^2$; 926m$^2$ – 950m$^2$; 951m$^2$ – 1,000m$^2$; and 1001m$^2$+ - as follows:

| Lot size (M$^2$) | Number | Leasehold | Fee Simple | Stratum in Freehold | |
|---|---|---|---|---|---|
| 900 - 925 | 32 | 8 | 24 | 0 | |
| 926 - 950 | 27 | 2 | 25 | 0 | |
| 951 – 1,000 | 61 | 10 | 51 | 0 | |
| **Totals <1,000** | **120** | **20** | **100** | **0** | |
| 1,001+ | 651 | 162 | 460 | 27 | |

47. In effect then, the maximum realisable precedent (from the 771 titles within the Raglan living zone that are greater than 900m$^2$ in area) would be in the order of 100 additional titles[2].

48. A number of preliminary observations follow:

    (a) An additional 100 lot potential from an existing 120 lots in the 900m$^2$ – 1,000m$^2$ lot range is a significant increase;

    (b) there are a significant number (and overall proportion) of sites larger than 1,000m$^2$ potentially capable of satisfying any demand for smaller net site area

[22] Noting that a few of the very large leasehold lots may then be subdivisible to a smaller size, but those have not been estimated in this exercise.

lots across the Raglan Living Zone – in excess of 500 given the size of some of the existing large lots;

(c) with the imminent notification of the reviewed District Plan, there is always the potential for applications to be accelerated from a concern that the rules might be tightened – the "floodgates effect"; but

(d) at the same time, Council has confirmed that it is not anticipating any change to the net site area subdivision policy – i.e. 450m$^2$ is proposed as the notified threshold. While a non-notified "draft" plan provision has absolutely no legal status, the policy indication is helpful information.

49. Mr Skilton correctly noted that lots below the minimum lot size are a discretionary activity under the Plan, not a non-complying activity. Had the Plan wished to restrict the lot size further, he suggested, it could have used that latter activity status with a further stated threshold – or proposed a prohibited activity status. While Mr Skilton is correct in the former proposition, one is not entitled to conclude that just because those latter status options are not used, reduced lots of whatever size are permissible. Clearly the objectives and policies then come into play – and these do not obviously support that proposition despite their overall generality. Having said that, it would certainly have been helpful to have some firmer policy or practice guidance on Council's "acceptable" limits to any such discretion – particularly because, as Mr Skilton also noted, there are generic regional urban growth objectives and policies that encourage more intensive residential development.

50. The question of precedent plan-effect, like that of cumulative (or, for that matter, accumulative) effect, necessarily entails more than just an hypothetical prospect. There must be a realistic "edge" to the claim. Accordingly, it does not seem sensible to contemplate such an effect in that exceptional sense of s3(f) RMA – "*any potential effect of low probability which has a high potential impact*", but rather of s3(e) – "*any potential effect of high probability"*. If the former standard was adopted as a precedent threshold for a plan-effect then any departure from a rule would likely be called into question, which would set a very high bar indeed – acknowledging the fact that the RMA definition is more relevantly considered in the context of s104(1)(a) effects than on the plan under s104(1)(b).

51. In this instance, even though the application window before a revised plan is notified, and whose objectives and policies at least will have increasing legal effect, is apparently short, the potential for precedence appears to have real prospect in the sense of being "highly probable".

**Finding**

52. I find that the matter of precedent effect is fairly and reasonably raised and that the appropriate opportunity to revisit the policy matter will shortly be put before the public through the imminent statutory district plan notification process. While I note Mr Skilton's recital, in his formal reply, of reasons why he considers the site unique from a planning point of view, as noted I am not persuaded that those are sufficiently distinctive to avoid consequential applications – which, of course, may be made at any time in any event. Accordingly I consider that there exists a reasonable risk of adverse precedence arising from a grant of consent under the present Plan provisions.

53. I acknowledge that the District Plan's rationale for the 450m$^2$ net site area metric is not apparent and was not explained to me with any confidence (other than to suggest that it was carried over from the previous plan). However, the indication that the same metric is being pursued in the soon-to-be-notified reviewed Plan suggests that both it and its s32 justification will be available for transparent testing. At this juncture it seems both prudent and appropriate to maintain the strong policy that Council appears to have adopted with some consistency under the operative District Plan.

54. I also acknowledge that there are many instances around NZ where district plans permit and/or encourage residential lots of lesser size even that the application net site area. That, however, is not the point. At this time Waikato District Council does not encourage such for the Living Zone.

## Part 2 RMA

55. No s6 RMA matters of national importance or s8 (Treaty of Waitangi principles) were identified as being directly engaged by this application.

56. Of the s7 other matters to which particular regard is to be had, I consider the following relevant:

    (b) the efficient use and development of ... physical resources;

    (c) the maintenance and enhancement of amenity values; and

    (f) maintenance and enhancement of the quality of the environment.

57. Those matters were rehearsed in the respective documentation and evidence and regard to them has been had in this decision. I note that those matters are also engaged in the precedence argument.

58. When put into the wider context of the Part 2 sustainable management purpose of the RMA and the function of territorial authorities, it is difficult to see how allowing an application that falls short of the established zone subdivision parameters, albeit by a relatively narrow margin, in the absence of clear and compelling reasons of uniqueness, would be consistent with the integrated management of the effects of the use, development or protection of land and associated natural and physical resources of the district as is required under s31 RMA.

59. In this instance the net area shortfall is in the order of 8-10%, and even though I have found the consequential amenity effects to be of marginal additional adversity, and probably amenable to satisfactory conditioning, I find nothing distinctive or unique in the site.

60. Specifically, and on balance, I find that the application is unlikely to promote the sustainable management purpose of the RMA, in particular as that is expressed through the operative District Plan provisions for the Raglan Living Zone, and therefore it cannot be granted. The application is refused per s104B(a) RMA.

## Decision

61. In exercising delegated authority under sections 34 and 34A of the RMA and having regard to the foregoing matters, sections 104, 104B and Part 2 of the RMA, the

subdivision application by Anthony Fels Trust for a 2-lot subdivision on the 921m$^2$ site at 55 Wainui Road, Raglan (Lot 15 DP 32533 in CFR SA856/246) is refused for the reasons discussed in this Decision and as summarised below.

## Summary reasons for the decision

62. After having regard to the actual and potential effects on the environment of allowing the proposed activity, and taking into account the relevant statutory and statutory plan provisions, I find that consent for the proposed activities should be refused for the reasons discussed throughout this decision and, in summary, because:

    (a) While the adverse amenity effects of the proposed activity would be likely to fall within the bounds of what might be considered a typical range for this zone, it is not consistent with a key subdivision provision of the operative District Plan, and is unlikely to avoid creating an adverse precedent effect;

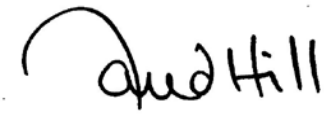
    (b) In that respect granting consent would not be consistent with the sustainable management purpose and principles of Part 2 of the RMA or Council's integrated management functions under section 31 RMA as expressed through the District Plan;

    (c) In particular, granting consent would be more likely than not to lead to other subdivision applications for lots of less than 450m$^2$ net site area, which the decision maker would have difficulty not granting since there is not sufficient uniqueness in the present application such that a credible precedent is not created;

    (d) which, in this instance, suggests that the s104(1)(a) effects consideration should yield to the s104(1)(b) suite, as refusing consent better protects this underpinning provision of the Raglan Living zone and avoids the potential to undermine those provisions more widely; and

    (e) the District Plan is currently under review (scheduled for notification in mid-2018) and, while Council advised that the policy direction for this zone is not intended to change, that is the appropriate process for determining whether it should and, if so, how and to what extent.

63. Overall, and while reasonably finely balanced, I find that refusing consent for the application is appropriate in the circumstance and at this time.



**David Hill**

**Independent Hearings Commissioner**

**Date**: 23 May 2018