

## **Bonds: Supplementary material to the report on “Introductory reading: Incentives and interventions for Biodiversity Management”**

Following discussions of the Biodiversity Collaborative Group on 20 July 2017

This paper on bonds is supplementary to the section of the report on “Financial and resource incentive programmes”. Bonds are a regulatory tool, as part of conditions of consent, but may be voluntary or required for a consent applicant to enter into.

### **Quality Planning: Bonds**

The following section is an excerpt from the Quality Planning website, Resource Consent Conditions. Note there may be other methods and financial incentives that may be of interest to the work of the Biodiversity Collaborative Group that are also on this website:

<http://www.qualityplanning.org.nz/index.php/consents/conditions>

Section 108(2)(b) allows a consent condition to require a bond to be entered into with the council. Section 108A specifies that a bond may be required to ensure the performance of any one or more conditions of a resource consent and it may continue to be in force after the expiry of the consent to secure the ongoing performance of conditions relating to long-term effects. Bonds can be registered against the Title (Computer Register) of the land to which the activity relates to act as a covenant running with the land and binding subsequent owners (s109).

If a consent holder is for some reason unable to ensure compliance with a bond requirement, such as the liquidation of a consent holder company, then a financial bond is available for the council to use to undertake those specific works. A further example is that a bond may be required for landfill activities where the effects of the landfill may still occur after it is filled and rehabilitated (for example, because of leachate problems).

For subdivisions, s222 allows bonds to be entered into as part of grant of a completion certificate and deposit of the survey plan (s224) and in doing so a council may exercise all powers conferred under s108A. This effectively allows bonds to be applied following grant of subdivision consent.

It is critical that legal advice is obtained to assist in drafting a bond condition. An example bond condition:

At least two months prior to the installation of any part of the marine farm, the consent holder shall enter into an enforceable agreement and bond with the AB Council for a sum of \$1,000.00 per hectare granted to ensure compliance with conditions (X) and (Y). The bond is required under Section 108(2)(b) of the Resource Management Act 1991. To meet the bond requirement, either:

- a. The bond shall be guaranteed by a guarantor acceptable to the AB Council who shall be bound to pay for the carrying out of any works required to meet requirements of Conditions (X) and (Y) in the event of any default by the consent holder, or
- b. The consent holder shall provide the AB Council with such security as is acceptable to the AB Council for the performance of any works required to meet the requirements of Conditions (X) and (Y) in the event of any default by the consent holder.

The value of the bond should be based on the estimate cost of the works subject to the bond.

Bonds should not be used as a penalty for non-compliance. The purpose of a bond is to ensure that an event such as restoration occurs, not to solve compliance issues.

## RMLA roadshow on conditions of consent, including bonds

In 2014, the Resource Management Law Association of New Zealand (RMLA) had a roadshow on the conditions of consent. Below is a summary of some of the perspectives on bonds from the various presenters. The full papers and presentations can be found here:

<http://www.rmla.org.nz/2014/07/02/rmla-conditions-of-consent-roadshow/>

Principal Environment Judge Newhook notes one of the problems noted in case law as including “inappropriate choice of security for performance of conditions (e.g. requiring a bond for protection of natural features on land as opposed to security for the carrying out of works)” (p. 3). He also discusses a subdivision case where invasive species had spread from one of the subdivided lots to a neighbouring property. Conditions of consent of the subdivision required mitigation planting, weed and pest control and maintenance of vegetation. Two bonds were part of these conditions of consent. One of the issues that Newhook notes about the bonds, was that the two bonds had different time periods for the actions associated with them. Additionally, the way the conditions of consent were written, including documentation of the bonds, created a lot of uncertainty and ambiguity about the obligations of the consent holder.

Martin Williams/Jennifer Caldwell/Michael Garbett/Alastair Logan presented a paper from their legal perspective at the RMLA roadshow. Their paper notes that bonds are one of the ‘securities’ that councils can use to promote or encourage compliance (rather than enforcement action), with other securities being consent notices, covenants and encumbrances. They suggest that, if, in order to comply with the conditions of the consent, the applicant would need to spend money (such as restoration planting or sealing a road) a bond is an appropriate mechanism to ensure compliance. Bonds may continue after the consent has expired, which is important where the effects of an activity may persist after the term of consent or if the consented activity does not progress as planned. They recommend that the conditions of consent need to be carefully written to be clear on what is bonded, when the bond is to be provided, how it will be reviewed, what the essential terms of the bond are, and what happens if the consent is transferred to another person.

Marie Brown also presented at the RMLA roadshow, and shared a paper she had co-authored: Marie A. Brown , Bruce D. Clarkson , Barry J. Barton & Chaitanya Joshi (2013): Ecological compensation: an evaluation of regulatory compliance in New Zealand, *Impact Assessment and Project Appraisal*, DOI:10.1080/14615517.2012.762168 <http://dx.doi.org/10.1080/14615517.2012.762168>. The findings of the study indicated that having a bond as part of a condition of consent had a positive correlation with compliance to the consent conditions, but not as strong as other measures (such as early mention of ecological compensation, or detailed planning through the project planning stages). The authors suggested one factor could be because bonds are often set too low to pay for the work needed particularly if there are unanticipated effects.