REGULATION

REASSESSING THE REGULATORS

The good, the bad and the Commerce Commission

Roger Partridge

Foreword by Murray Jack

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About the New Zealand Initiative

The New Zealand Initiative is an independent public policy think tank supported by chief executives of New Zealand businesses. We believe in evidence-based policy and are committed to developing policies that work for all New Zealanders.

Our mission is to help build a better, stronger New Zealand. We are taking the initiative to promote a prosperous, free and fair society with a competitive, open and dynamic economy. We are developing and contributing bold ideas that will have a profound, positive and long-term impact.

ABOUT THE AUTHOR

Roger is chair of The New Zealand Initiative and a senior fellow in its research team. He is a regular columnist for *The New Zealand Herald* and author of many articles and reports on a range of public policy issues. His research reports include *Who Guards the Guards? Regulatory governance in New Zealand* (2018); *Work in Progress: Why Fair Pay Agreements would be bad for labour* (2019); *The Rule of Law or the Law of Rulers* (2020), *Nothing Costs Nothing: Why unjustified dismissal laws should not apply to the highly paid* (2021).

Roger led law firm Bell Gully as executive chair from 2007 to 2014, after 16 years as a commercial litigation partner. He is a former executive director of the Legal Research Foundation, a charitable foundation associated with the University of Auckland, and is a former member of the New Zealand Law Society Council, the governing body of the legal profession. He is a member of the advisory board of the Business School at the University of Auckland, a chartered member of the Institute of Directors, a member of the Law and Economics Association of New Zealand and the Mont Pelerin Society, and is a non-practising barrister.

Roger has Bachelor of Commerce (Economics) and Law degrees from the University of Auckland, and a master's degree from the University of Cambridge.

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Foreword

Notwithstanding the liberal democracy in New Zealand, what individuals, communities and businesses can do is shaped to a significant degree by laws and regulations. Responsibility for monitoring compliance and enforcement of much of this regulation is delegated to independent bodies, the so-called "Guards."

The New Zealand Initiative's inaugural *Who Guards the Guards* report in 2018 raised important questions about the performance and oversight of our regulators. Since then, improvements have occurred in some areas – as described in this 2022 report. But challenges remain.

From my own experience there are two fundamental weaknesses, both identified in this report:

1. **Absence of external review:** There is too much marking of your own homework. The exercise of regulatory functions is complex and highly technical; effective review requires both expertise and objectivity. For several of our regulators, the capabilities to conduct such reviews do not exist in New Zealand. I endorse mandated periodic external reviews with the outcomes made publicly available and regulators held to account for their responses at Select Committee. These should not be undertaken by the monitoring agency, which inherently involves a conflict of interest.
2. **Quality of the appointment process:** Attracting the very best talent at the governance level is critical and likely to be decisive in terms of performance. An independent appointment process is much more likely to attract quality candidates. In this regard, it is noteworthy that the process for appointing the board of the Guardians of NZ Super is undertaken by an independent group.

Fixing both these issues, together with the observations in the report on separating governance from executive functions, will go a long way in bolstering the respect required of regulators. This is important, not just reputationally but also because it facilitates effective regulation. Respect generates soft power, which then enables a regulator to be more effective at patrolling the regulatory perimeter. It adds weight to guidance and intent to pursue enforcement.

It is interesting to note that each of the main economic regulators have had significant changes to their mandates over the past three years: the RBNZ has had employment added to its monetary policy remit, the Commerce Commission market studies, and the FMA insurance and banking conduct. All these changes have implications in different ways for the agency's responsibilities, skill-sets and scale of operations required, and on-going oversight.

We are right to demand a high level of performance from our regulators, but we must also understand they operate in a world where it is challenging to attract and retain talent; funding is not always commensurate with expectations; the statutory basis for regulatory mandates is not always contemporary; and legislative and government initiatives can conflict with regulatory mandates. Markets are dynamic and will always evolve more quickly than regulators can adapt. These challenges add strength to the arguments for strong governance and accountability.

The Initiative's 2022 report, *Reassessing the Regulators*, carries valuable advice for any government seeking to strengthen the nation's regulatory systems.

Murray Jack
Former chair, Financial Markets Authority

Executive Summary

Commercial regulatory agencies wield enormous power. They can take away a business's licence to operate; impose restrictions on how it operates; and take enforcement action by exercising powers of interrogation, search and seizure that the police can only dream of.

How regulators exercise their power really *matters*. A good regulator can make sense of a bad regulation. A bad regulator can make good regulation senseless.

Poor regulatory decision-making creates risk and uncertainty, stifling innovation and efficiency. Ultimately, consumers suffer through higher prices for the goods and services they consume.

Yet legislators spend much more time thinking about what powers regulatory agencies should be given than about how to *govern* regulatory agencies to make sure they exercise their powers wisely.

The New Zealand Initiative's 2017 survey of New Zealand's largest businesses revealed that many of the country's commercial regulators – including important regulators like the Reserve Bank of New Zealand (RBNZ) and the Commerce Commission – commanded neither the respect nor the confidence of many of the businesses they were tasked with regulating.[1] Conversely, we found other important regulators, including the Financial Markets Authority (FMA), which were well-respected.

Regulators should, at times, be unpopular. After all, it is their task to *regulate*. And no one wants regulators who are captured by those they are tasked with policing. But just as we expect communities to respect the police, we should also expect those policing commerce to have the respect of the businesses they regulate. Unfortunately, our survey showed that this respect cannot be taken for granted. We reported on the results of our 2017 survey and of other related research in our 2018 report, *Who Guards the Guards? Regulatory Governance in New Zealand*.[2]

Four years later, we repeated the survey between September and October 2021. As in 2017, we asked New Zealand's largest businesses to *rank* the regulatory agencies they deal with from most to least respected. And we asked them to *rate* the performance of their three most important regulators against 23 KPIs. The KPIs ranged from consistency of decision-making to commercial expertise, and from clarity of objectives to learning from mistakes.

What we found

The results of our 2021 survey once again raised serious concerns.

Among the regulators whose influence is felt across the entire economy, the deterioration in the Commerce Commission's previously poor performance is alarming. On average, only 29.9% of respondents agreed or strongly agreed that the Commission met the KPIs, while 38.5% disagreed or strongly disagreed. These results are in stark contrast to the ratings for the FMA – 58.5% of respondents agreed or strongly agreed that the FMA met the KPIs. Only 20.2% disagreed or strongly disagreed.

Though the FMA's results have also deteriorated since our 2017 survey, the lack of respect revealed by the survey respondents for the Commerce Commission is a damning indictment of one of New Zealand's most important regulatory agencies.

Conversely, the RBNZ's ratings showed marked overall improvement – though with concerns remaining for the RBNZ's accountability. As we comment later in this report, the improvements in the RBNZ's overall results may partially reflect the focus on the RBNZ's regulatory performance following the publication of *Who Guards the Guards* in 2018.

Among the other regulatory agencies for whom we obtained a significant number (more than five) of ratings, only one other improved on its 2017 result. The Inland Revenue Department (IRD) was this sole exception. Respect for all the others slid backwards, with the decline in respect for regulatory functions exercised by government departments falling comparatively more than for those regulators that are constituted as independent statutory entities.

The Ministry for Business, Innovation and Employment (MBIE) – the second-most rated regulator after the Commerce Commission – is a good example of this decline (and from a low base). On average, only 40.3% of respondents agreed or strongly agreed that MBIE met the 23 KPIs, down from an already low 44.6% in 2017.

Overall, regulatory agencies rated worst for accountability and for the robustness and transparency of the processes for appointing regulatory leadership. The survey results also raise concerns about the increasing *politicisation* of regulatory agencies and a lack of regard for their statutory objectives.

There are good reasons for believing that the overall poor ratings for accountability and appointment processes help with understanding the poor overall ratings for regulatory agencies.

As we explained in *Who Guards the Guards*, governance arrangements for regulatory agencies – including the processes for appointing their leadership – are key to regulatory performance. Better governance improves accountability, and greater accountability appears to improve regulatory performance and regulatory outcomes.

Three factors in particular are important:

- internal governance
- external monitoring, and
- appointment processes.

Yet, important as they are, across all regulatory agencies, survey respondents gave the lowest ratings for the KPIs addressing these three factors in our 2021 survey.

In *Who Guards the Guards*, we made recommendations addressing each of these three aspects of regulatory governance, including specific recommendations in relation to the Commerce Commission, RBNZ and Overseas Investment Office (OIO). Our recommendations in relation to the RBNZ have, in part, been acted upon by the Government. The other recommendations are yet to be adopted.

Internal governance

Starting with the internal arrangements for governing a regulatory agency's exercise of power, there are good reasons for concluding that the 'board governance model' for regulatory agencies' internal governance is superior to the alternative 'commission' or 'single-member decision-maker' governance models. This is because the board governance model has better internal checks and balances on regulatory decision-making than the alternatives.

Following our recommendations in relation to the RBNZ's governance in *Who Guards the Guards* in 2018, Parliament has decided that this model should be adopted for the RBNZ. We suggest it is no coincidence that in the meantime, the RBNZ's performance as measured by our 2021 survey has markedly improved.

It is also no coincidence that the Commerce Commission, with its inferior 'commission' governance model is the worst-performing major regulator in our survey.

To address these concerns, we recommend that:

1. **Parliament should reform the governance of the Commerce Commission by replacing its flawed 'commission' model with the board governance model of the FMA and RBNZ, and**
2. **the board governance model be adopted for all regulatory agencies which, by applying a principled approach, should operate independently of political control.**

The OIO is the obvious regulatory agency for such treatment – with its ratings (albeit from very small sample sizes) in both our 2021 and 2017 surveys suggesting its performance as a regulator is very poor.

External monitoring

As the Productivity Commission found in its 2014 report, *Regulatory Institutions and Practices*, external monitoring of regulatory agencies by departments, Ministers and Parliament has serious shortcomings.

In our 2021 survey, only 21.8% of respondents agreed or strongly agreed that regulators are readily held to account for the quality of their work by responsible government departments, Ministers or some other effective external accountability mechanism. This was the lowest rating across the 23 KPIs.

Effective external monitoring is most important for the regulatory agencies that have an economy-wide impact. The three most significant regulators in this regard are the Commerce Commission, FMA and RBNZ.

The Australian Parliament has strengthened the external monitoring of its equivalents of the FMA and RBNZ by creating a new agency, the Financial Regulator Assessment Authority (FRAA).

To address the shortcoming in external monitoring of agencies in New Zealand, we recommend that:

3. **for the three economy regulators, the Commerce Commission, FMA and RBNZ, Parliament should create a new "Regulator Assessment Authority" tasked with reporting three-yearly reviews on the regulatory performance of each regulator.**

Appointment processes

Good governance structures will count for nothing if those responsible for governing are not up to the task. Yet in our 2021 survey, the robustness and transparency of the processes for appointing regulatory agencies' leadership received the second-worst overall rating from respondents.

The United Kingdom and Canada have addressed concerns about appointments to government-controlled agencies by establishing independent appointment agencies.

We recommend that:

4. **Parliament should create an independent agency to ensure all appointments to regulatory agencies are subject to robust, independent scrutiny and a standardised process, including the evaluation of candidates against a published skills-matrix.**

More robust and transparent appointment processes should also address concerns about the increased politicisation of regulatory agencies since our 2017 survey.

Introduction

Respect is a characteristic of a well-performing regulator.

A good regulator can make sense of a bad regulation. A bad regulator can make good regulation senseless.

Poor regulatory decision-making in turn creates risk and uncertainty, stifling innovation and efficiency. Ultimately, consumers suffer through higher prices for the goods and services they consume.

The New Zealand Initiative's 2017 survey of New Zealand's largest businesses revealed that many of the country's commercial regulators – including important regulators like the Reserve Bank of New Zealand and Commerce Commission – commanded neither the respect nor the confidence of many of the businesses they regulate.[3] Conversely, we found that other important regulators, including the Financial Markets Authority (FMA), were well-respected. The Initiative reported on the results of our 2017 survey and of other related research in *Who Guards the Guards? Regulatory Governance in New Zealand*.[4]

Four years on, the Initiative has repeated the survey. As in 2017, we asked New Zealand's largest businesses to *rank* the regulatory agencies they deal with from most to least respected. We also asked them to *rate* the performance of their three most important regulators against 23 KPIs. The KPIs range from consistency of decision-making to commercial expertise, and from clarity of objectives to learning from mistakes.

As we acknowledged in *Who Guards the Guards*,[5] regulators should, at times, be unpopular. Afterall, it is their task to *regulate*. And no one wants regulators to be "captured" by those they are tasked with policing.

But just as we expect communities to respect the police, we should also expect those policing commerce to have the respect of the companies they regulate. Unfortunately, our 2017 survey showed this respect cannot be taken for granted.

The results of our 2021 survey once again raise serious concerns. Most notable among the results is the abject lack of respect for one of the country's most important regulatory agencies, the Commerce Commission. And the survey results show concerning problems with the accountability of regulatory agencies generally and with both the processes for appointing the leadership of regulatory agencies and the agencies' political independence.

In *Who Guards the Guards*, we made four principal recommendations to improve the governance and performance of regulatory agencies:

1. To improve internal governance, Parliament should adopt the 'board governance model' of the Financial Markets Authority for all independent regulatory agencies, including the Commerce Commission and RBNZ.
2. To improve external monitoring and accountability of the three big "all of economy" regulators – the Commerce Commission, FMA and RBNZ – Parliament should task an expert agency with investigating and reporting to Parliament periodically on their performance.
3. To improve the expertise of regulatory agencies, Parliament should form an independent agency to ensure all appointments to the governing bodies of regulatory agencies are subject to independent scrutiny and standardised processes.

4. Because institutional form matters, Parliament should apply a principled approach to determining whether regulatory powers are housed within government departments or conferred on separate statutory Crown entities.

The Government is in the process of implementing our first recommendation, but only in relation to the governance of the RBNZ. Unfortunately, the Commerce Commission has so far escaped a governance 'make-over.' No progress has been made on our other recommendations.

Our second survey, conducted between September and October 2021, provides an opportunity to reassess the case for further reform.

This report will:

- Recap our findings in *Who Guards the Guards* and provide an update on developments in regulatory governance around the world. Those developments include reforms in Australia creating an independent authority to monitor the performance of the Australian equivalents of the FMA and RBNZ (as proposed in our second recommendation).
- Analyse the results of our second survey of regulatory performance.
- Reassess the implications of our research for the governance of the Commerce Commission, FMA and RBNZ.
- Set out our further recommendations.

CHAPTER 1

A recap of Who Guards the Guards and subsequent developments

In its 2014 report, *Regulatory Institutions and Practices*, the Productivity Commission found a litany of shortcomings with New Zealand's regulatory agencies.[6] Some agencies, it said, placed significant weight on managing risks to themselves over efficiently managing social harm.[7] Others had poor internal communications, with employees feeling unable to challenge flawed practices, contributing to a perception that regulators are unable to learn from their mistakes.[8]

More generally, the Productivity Commission concluded that the governance structures of regulators were *ad hoc* rather than based on sound governance principles, with appointment processes for governance roles lacking robust procedures.[9]

Unfortunately, the Productivity Commission's terms of reference tasked it with identifying *system-wide improvements*, rather than commenting on *individual regulators*. In *Who Guards the Guards*, the Initiative picked up where the Productivity Commission left off to evaluate the performance of individual regulatory agencies. As well as surveying New Zealand's largest businesses, we met with major consumer groups, and conducted interviews, both with the regulators themselves and with those charged with monitoring their performance. We also reviewed the international literature on regulatory governance and regulatory performance.

We found that New Zealand has an incoherent regulatory landscape. There is little evidence of any principled approach guiding whether regulators are housed within government departments or in separate statutory entities, or the form of their governance arrangements. However, research suggests that the institutional form and governance arrangements of regulatory agencies, both internal and external, have an important bearing on both the *performance* of regulatory agencies and in the *confidence* market participants have in them.

Internal governance

For regulators constituted as independent statutory entities, three governance models are common:

1. The 'board governance model' used in the corporate world and, increasingly, for regulatory agencies. The FMA and WorkSafe are two well-known examples.
2. The 'multi-member commission model' of the Commerce Commission (and the former Securities Commission). Under this model, commissioners perform both the regulator's governance function and exercise executive power.
3. The 'single-member decision-maker model,' where regulatory power is conferred by statute directly on one person. This is the model adopted for prudential regulation under the *Reserve Bank of New Zealand Act 1989*. The Act confers regulatory powers directly on the RBNZ Governor.

Academic studies, our 2017 survey, and related research published in *Who Guards the Guards* showed that the board governance model creates better checks and balances on regulatory decision-making than the other two models.[10] Insights from our survey results comparing the FMA with its predecessor, the Securities Commission, were particularly helpful.

In our 2017 survey, 81.1% of respondents agreed or strongly agreed that the FMA was performing better than the former Securities Commission.[11] Two factors appeared to explain the FMA's high ratings compared with the former Securities Commission:

1. By separating governance and executive decision-making, the FMA had strong internal checks and balances that strengthen its regulatory performance.
2. The FMA's part-time board governance role appeared attractive to a wider range of board candidates, including candidates with current expertise, than the more full-time commission or single-member decision-maker models.

We concluded that these two factors worked in tandem.[12] Separating governance and executive responsibilities enables greater accountability. It also assists the appointment process by attracting more expert candidates for board positions. Such individuals are, in turn, able to assist the regulator achieve higher levels of performance.

Our detailed reviews in *Who Guards the Guards* of the Commerce Commission and RBNZ suggested both would benefit from improved internal governance. In relation to the Commerce Commission, we recommended the Government change the Commission's multi-member commission governance model to a hybrid board governance model. In relation to the RBNZ, we recommended changing its poorly respected single-member decision-maker model. In its place, we recommended making the RBNZ Governor accountable to the RBNZ board for the exercise of prudential regulatory power.

In the intervening four years since the publication of *Who Guards the Guards*, the Government has undertaken its own review of the RBNZ's governance. This review has led to Parliament enacting the *Reserve Bank of New Zealand Act 2021*. In accordance with our recommendations, the Act changes the RBNZ's former single-member decision-maker model in favour of the board governance model. Rather than conferring regulatory decision-making responsibilities directly on the Governor, the Act confers all prudential regulatory powers on a new statutory governance board. In the usual way, the board can then delegate executive responsibilities to the RBNZ's Governor and other executive staff. The Governor and other staff will then be accountable to the board for the exercise of the delegated powers.

The new board's governance responsibilities will not start until mid-2022. However, since the findings in *Who Guard the Guards* in 2018, the RBNZ appears to have been operating under a *de facto* board governance model.[13]

Regrettably, no equivalent review has been undertaken of the governance of the Commerce Commission. The results of our second survey, detailed in Chapter 2, suggest a review is overdue.

External monitoring

In the corporate world, the primary external monitoring role is performed by shareholders and analysts. For regulatory agencies, it is done by a mix of government departments, Ministers and Parliament.[14] The public sector has its own extensive accountability mechanisms. Yet in its 2014 report, *Regulatory Institutions and Practices*, the Productivity Commission found that external monitoring of regulatory agencies has serious shortcomings.[15] In particular, the Productivity Commission found that monitoring was too focused on procedural compliance, with too little focus on strategic performance.[16]

As we observed in *Who Guards the Guards*, this should not be surprising. Many regulatory regimes are complex, and specialist expertise is needed to evaluate them. Government departments cannot expect to replicate the expertise of a specialist regulatory agency. This means government departments have only limited means to monitor the effectiveness of the strategic approach in relation to enforcement of, say, New Zealand's competition laws by the Commerce Commission.

To address concerns about the quality of external monitoring, the Productivity Commission recommended the government establish a peer review process through which panels of senior regulatory leaders would review the practices and performance of other regulatory agencies.[17] The government did not accept this recommendation. In *Who Guards the Guards*, we doubted its effectiveness in any event.[18] To evaluate the substantive performance of, say, the Commerce Commission, specialist expertise in competition policy and economics is required. This is a scarce skill-set in the civil service.

To address this issue, Germany has created a specialist agency to monitor its competition regulator's performance.[19] And prior to the publication of our report, there had been calls in other jurisdictions for a 'super regulator' to monitor financial regulators in the wake of the GFC.[20]

Because of the difficulties of justifying a new specialist agency to monitor a single regulator's performance – even one as important as the Commerce Commission – in *Who Guards the Guards* we suggested that the Productivity Commission itself could be tasked with undertaking, say, three-yearly reviews of the strategies and substantive performance of the RBNZ, FMA and Commerce Commission, and report to Parliament on its findings.[21] This would create an effective external mechanism to monitor and hold to account our three most important commercial regulatory agencies.

Parliament has taken no steps to advance this recommendation. However, the Australian federal Parliament has recently taken steps to strengthen the external monitoring of that country's equivalent of the FMA and RBNZ (as prudential regulator). The *Financial Regulator Assessment Authority Act 2021* created and tasked the Financial Regulator Assessment Authority (FRAA) with biannual assessments of the effectiveness and capability of the Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA). The Authority is also required to undertake ad hoc assessments on any matter relating to APRA's or ASIC's effectiveness and capability when requested by the Minister.

Appointment processes

Governance arrangements count for little if those tasked with governing are not up to the job. Yet both the Productivity Commission and our 2017 survey found real shortcomings in the quality of appointment processes and the expertise of regulatory leadership.[22] We concluded in *Who Guards the Guards* that "[i]t appears too often, that appointment processes are not informed by high-quality analysis."[23]

The United Kingdom and Canada have addressed similar problems by establishing independent agencies that must first recommend a candidate before a Minister makes a board appointment to a regulatory agency. The Productivity Commission did not favour the United Kingdom's or Canada's approach, fearing that introducing an independent appointment agency would weaken ministerial accountability for entity performance.[24] Instead, it recommended creating a "centre for expertise" within either the State Services Commission (now the Public Service Commission) or Treasury to support departments to manage appointments and reappointments to regulatory Crown entities.[25] The Government did not support this recommendation.

In *Who Guards the Guards,* we differed from the Productivity Commission's assessment that adopting the United Kingdom's or Canada's approach would dilute ministerial accountability.[26] As Ministers in the United Kingdom retain ultimate responsibility for appointments, they remain accountable. In any event, we concluded that doubts about diluting accountability were likely to be more theoretical than real. And we doubted any potential dilution of ministerial accountability would lead to practical differences in the extent to which a regulator is accountable to Parliament. We concluded there were greater gains to be made from strengthening procedures at the top of the cliff than enduring the losses caused by weak accountability mechanisms at its bottom.

Consequently, we recommended Parliament create an independent agency modelled on the United Kingdom's Commissioner for Public Appointments to ensure all appointments to regulatory agencies are subject to independent scrutiny and a standardised process. Unfortunately, Parliament has taken no steps to implement this recommendation, either.

Institutional form

As well as having a variety of governance arrangements, New Zealand's regulatory agencies come with a hotchpotch of forms. Some are government departments. Some are Crown agents. Some are autonomous or independent Crown entities. And some have a unique institutional form.[27]

Institutional form has a direct bearing on a regulator's independence. As the Productivity Commission observed, "Independent regulators are free from the direct control of politicians and regulated parties. Independence prevents a regulator being used for partisan purposes and promotes public confidence in the decisions of the regulator."[28] However, independence is not a binary matter. Regulators can be more or less independent. As the Productivity Commission observed, legislators should decide the institutional form *after* appraising the arguments for or against independence.[29]

Yet, as we concluded in *Who Guards the Guards*, this principled approach is often neglected.[30] The 2005 decision to place the Overseas Investment Office (OIO) within Land Information New Zealand is a good example of this neglect.[31] Like the FMA, the OIO has quasi-judicial functions. Yet the two quasi-judicial regulators have entirely different institutional forms. Given the OIO's functions, a principled approach would suggest it should be established at arm's length from political influence as an independent agency. The OIO's poor ratings in our 2017 survey (albeit from a small survey sample size) also suggested a change of governance arrangements was required.[32]

More generally, we recommended Parliament adopt a principled approach to the institutional form of regulatory agencies to ensure those regulators who would benefit from independence are constituted at arm's length from political control.

CHAPTER 2

What business thinks of its regulators: a comparative view

When businesses lack confidence in regulatory decision-making, both risk and costs increase. This impedes efficiency and ends up costing consumers.

To see how well New Zealand's regulators are respected, between September and October 2021 we repeated our 2017 survey of New Zealand's 200 largest businesses by revenue, together with those members of The New Zealand Initiative not otherwise included in the 'top 200.' In practical terms, the extension to include Initiative members added a sample of New Zealand's leading professional services firms – accountants, lawyers, investment bankers, and other professional advisers – into the pool of businesses covered by our survey.

What we asked

We asked survey respondents to *rank* the regulators they interact with based on their overall respect for them and to *rate* the performance of the three regulators most important to their respective businesses against 23 key performance indicators (KPIs). As in 2017, the KPIs covered eight categories and included 23 questions (see Table 1).

Table 1: KPIs used in the NZI survey

Category	KPI number	Question
Objectives and actions	1	The relevant people in your business are readily able to understand the regulator's objectives
	2	The regulator's objectives and actions make sense to you having regard to the regulator's statutory purpose
	3	The regulator's actions are motivated by the goal of efficiently achieving its statutory objectives and not for ancillary or arbitrary objectives (such as self-protection of the regulator, its leaders or other staff, or for other political or personal goals)
Communications	4	The regulator communicates its objectives and reasons for its actions clearly to businesses in your industry
	5	Staff within the regulator appear to understand the regulator's overall statutory objectives and act consistently with them
Expertise and respect	6	The leaders of the regulator are skilled, knowledgeable and well-respected by businesses in your industry
	7	Staff within the regulator are skilled, knowledgeable and well-respected by businesses in your industry
	8	The processes for appointing the leaders of the regulator are transparent and robust
Commerciality	9	The regulator understands the commercial realities facing your industry
	10	Your interactions with the regulator are generally constructive
	11	The regulator is willing to listen to the views of your business and take them into account
Predictability and transparency	12	The regulator's compliance and monitoring approaches are streamlined and coordinated
	13	The regulator's actions are consistent and predictable
	14	The regulator clearly articulates the justification and reasons for its actions
	15	You are not hindered or deterred from taking action to improve the profitability of your business by any lack of predictability in the regulator's decision-making

Table 1 (continued)

Category	KPI number	Question
Fairness and proportionality	16	Businesses across your industry are treated fairly and consistently by the regulator
	17	Action taken by the regulator is proportionate to the regulatory risk being managed
Consultation and engagement	18	The regulator effectively consults and engages with you and businesses in your industry to ensure that good regulatory processes are being followed
	19	The regulator effectively consults and engages with other important stakeholders to ensure that good regulatory processes are being followed
Accountability	20	The regulator learns from its mistakes
	21	There are effective accountability mechanisms within the regulator to enable participants in your industry to voice concerns about mistakes
	22	There are effective appeal and judicial review rights to challenge the decisions of the regulator in the courts
	23	The regulator is readily held to account for the quality of its work (including any mistakes) by its responsible government department, minister or some other effective external accountability mechanism

We asked survey participants whether they 'strongly agreed,' 'agreed,' 'disagreed,' or 'strongly disagreed' that the regulator met the KPIs – or whether they were 'neutral'. Recipients were also given a 'don't know/not applicable' option.

As we explained in *Who Guards the Guards*, the KPIs were based on a combination of best practice principles applicable to regulatory agencies.[33]

Overview of results

As in 2017, our 2021 survey attracted a good level of response, with 56 complete and 60 partially complete responses evaluating 23 regulators. The results are summarised in **Appendix 1**, with the responses ranked from highest to lowest by reference to the average of the percentage of respondents who either agreed or strongly agreed that the regulator met the 23 KPIs.

As in 2017, results showed a wide disparity in ratings. Because the sample size of ratings for some regulators was very small, our discussion here will focus on those regulators rated most frequently by survey participants.

The regulators rated by survey participants had differing institutional forms and governance models, including:

- six government departments,
- eleven with a board governance model,
- four with a single-member decision-maker model, and
- two with a commission structure.

The ratings of survey respondents agreeing or strongly agreeing that the regulators meet the 23 KPIs are set out in **Appendix 2**. Overall, across all 23 KPIs, the average score for all regulators *increased* marginally, with 45.5% of respondents agreeing or strongly agreeing that the regulatory agencies met the KPIs. That compared with 44% in 2017.

Across the 23 KPIs, on average, the regulators *rated* best on the KPIs relating to:

- **Clarity of objectives (KPI 1),** with 69.9% of respondents either agreeing or strongly agreeing they could readily understand the regulators' objectives. This rating was also the highest in 2017 at 68.6%.

- **Communicates clearly (KPI 4),** with 60.5% of respondents either agreeing or strongly agreeing the regulators communicated their objectives and reasons for acting clearly (compared with 47.9% in 2017).
- **Staff act in accordance with objectives (KPI 5),** with 64.4% of respondents either agreeing or strongly agreeing that the regulators' staff understood and acted consistently with the regulators' objectives (compared with 48.8% in 2017).

Some regulators, nevertheless, performed very poorly even on these KPIs. The Overseas Investment Office was the standout poor performer (albeit from a very small sample size). Just 33.3% of respondents agreed or strongly agreed that the OIO's objectives were clear (KPI 1) or that staff understood and acted in accordance with these objectives (KPI 5), and *no respondents* agreed or strongly agreed that the OIO communicated the reasons for its actions clearly (KPI 4).

Turning to the ratings where the regulators performed worst, these mainly relate to accountability, external monitoring, and appointment processes. It is no coincidence that these are the three areas in which we argued in

Figure 1

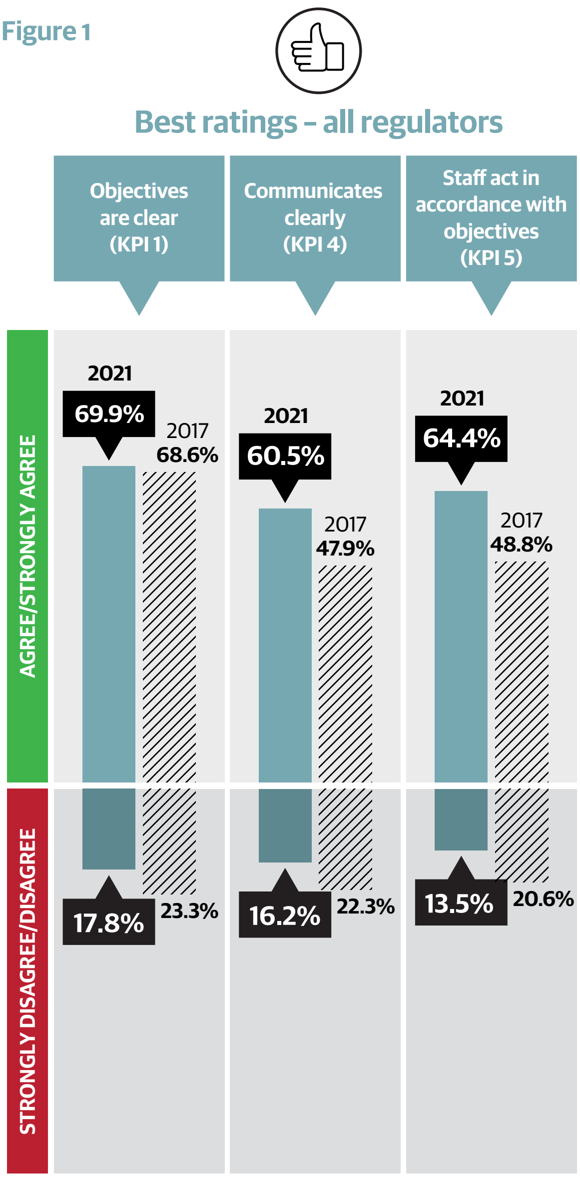
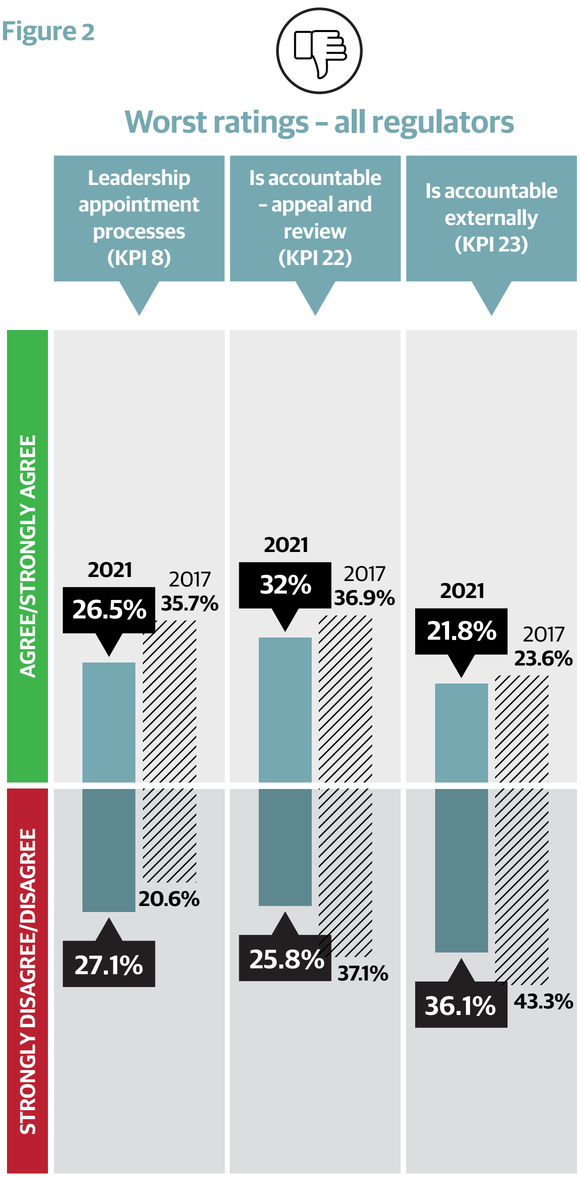


Figure 2



Who Guards the Guards that reform was needed.[34] And the latter two are key areas where the Productivity Commission had identified weaknesses in regulatory practice.[35] Unfortunately, in these two areas, both our recommendations and those of the Productivity Commission have fallen on deaf ears.

The three worst overall ratings were for:

- **Appointment processes (KPI 8),** where only 26.5% of respondents either agreed or strongly agreed that "the processes for appointing the leaders of the regulator are transparent and robust" (down from 35.7% in 2017).
- **Accountability – appeal and review rights (KPI 22),** where only 32% of respondents either agreed or strongly agreed that "there are effective appeal and judicial review rights to challenge the decisions of the regulator in the courts" (down from 36.9% in 2017).
- **External accountability – monitoring (KPI 23),** where only 21.8% of respondents either agreed or strongly agreed that "the regulator is readily held to account for the quality of its work (including any mistakes) by its responsible government department, minister or some other effective external accountability mechanism." This rating was further down from 2017's poor score of 23.6%.

The poor ratings for external accountability and appointment processes are concerning. It is doubly concerning that the fall in KPI 8 relating to appointment process is the biggest percentage fall across the 23 KPIs. This result reaffirms that work is needed to improve the transparency and robustness of the processes for appointing the leaders of regulatory agencies.

The 2021 survey responses are also notable for the concerns expressed about the increasing politicisation of regulatory agencies. As one respondent said:

> Overall we see the current weaken[ing] of regulators across the board driven by a government that is progressing its own policy agenda without regard or respect for independent advice or regulatory objectives. Regulators are increasingly having to align with this agenda rather to preserve their own organisations rather than provide independent advice.

The concerns about increasing politicisation are aligned with a fall in survey respondents' average ratings on KPI 3: "The regulator's actions are motivated by the goal of efficiently achieving its statutory objectives and not for ancillary or arbitrary objectives (such as self-protection of the regulator, its leaders or other staff, or for other political or personal goals." Just 49% of survey respondents agreed or strongly agreed that the regulatory agencies met this KPI, down from 55.8% in 2017.[36]

Turning to the *rankings*, **Appendix 3** ranks the regulators identified by the survey participants from most to least respected. It also shows the number of times they were ranked in total, and the number and percentage of times they were ranked either most or least respected regulator.

Zeroing in on some key regulatory agencies

As in 2017, space constraints and the survey's small sample size restricts us from analysing the results for each regulator in detail. And because considerations of alternative governance arrangements are largely relevant for statutory Crown entities, we will focus primarily on them in the balance of this report. We do nevertheless make observations on some regulatory functions performed by government departments.

Table 2 sets out a summary of results for the six independent regulatory agencies rated five or more times in the survey.

Table 2: Comparative average percentage scores for independent regulatory agencies across 23 KPIs (sorted by 2021 sum 'agree' and 'strongly agree')

Regulator	No. of times rated 2021	No. of times rated 2017	Sum Agree and Strongly Agree 2021	Sum Agree and Strongly Agree 2017	Sum Disagree and Strongly Disagree 2021	Sum Disagree and Strongly Disagree 2017
Reserve Bank of New Zealand	17	8	**60.6%**	28.6%	20.3%	36%
Financial Markets Authority	20	17	**58.3%**	60.8%	20.2%	10.3%
Worksafe	16	18	**46.2%**	48%	17.9%	23%
New Zealand Transport Agency	7	5	**36.7%**	44.8%	34.9%	35.7%
Electricity Authority	11	9	**35.6%**	41.5%	40.8%	30.6%
Commerce Commission	36	38	**29.9%**	39.9%	38.5%	25.8%
Average			**44.6%**	43.9%	28.8%	26.9%

The results show the *average* percentage scores for six regulatory agencies – the Commerce Commission, Electricity Authority, Financial Markets Authority, RBNZ, Waka Kotahi/New Zealand Transport Agency (NZTA), and WorkSafe. The table is sorted from the highest to lowest based on the average percentage of respondents agreeing or strongly agreeing that the regulators met the 23 KPIs.

Several observations are immediately obvious from Table 2:

1. The reversal in the RBNZ's ratings – from last place in 2017 to first place among these "big six" regulatory agencies.
2. The Commerce Commission's decline from bad to worst.
3. The slide in the performance of five of the six regulatory agencies compared with the 2017 survey results. The RBNZ is the only exception to this downwards trend.
4. The strongly polarised views in relation to both NZTA and the Electricity Authority, with almost equal scores from survey recipients who agree or strongly agree that they meet the 23 KPIs as from survey recipients who have the opposite view (though with slightly more disagreeing in the case of the Electricity Authority).

In *Who Guards the Guards*, we undertook case studies on three of these six regulators: the Commerce Commission, FMA and RBNZ. As these three regulators are also the three most rated independent regulators in our 2021 survey, we comment in more detail on their results in Chapter 3.

As in 2017, the survey results cover six government departments with regulatory powers. Table 3 summarises the average percentage scores for these departments.

Table 3: Comparative average percentage scores for government departmental regulatory agencies across 23 KPIs (sorted by 2021 sum 'agree' and 'strongly agree')

Regulator	No. of times rated 2021	No. of times rated 2017	Sum Agree and Strongly Agree 2021	Sum Agree and Strongly Agree 2017	Sum Disagree and Strongly Disagree 2021	Sum Disagree and Strongly Disagree 2017
Inland Revenue Department	15	8	**78.8%**	75.6%	1.8%	5.6%
Ministry for Primary Industries	9	8	**57.8%**	59.6%	18.8%	12.8%
Ministry of Business, Innovation and Employment	28	27	**40.3%**	44.6%	29%	15.2%
Ministry of Transport	6	5	**40%**	55.9%	40%	18.8%
Department of Conservation	4	1	**7.8%**	33.3%	87.5%	16.7%
Overseas Investment Office	2	2	**6.5%**	0%	46.8%	76.1%
Average			**38.5%**	44.8%	37.3%	24.3%

The following observations are worth making:

1. The Inland Revenue Department (IRD) is the standout regulator, with 78.8% or respondents agreeing or strongly agreeing that the IRD complies with the 23 KPIs and almost none disagreeing. These results are an improvement of the IRD's strong showing in our 2017 survey and are testimony to the IRD's performance – especially as its objective is not naturally one business might be expected to feel well-disposed towards.[37]
2. Though based on small sample sizes, something appears to be amiss at both the Overseas Investment Office (OIO) and the Department of Conservation.
3. The most ranked government department – the Ministry of Business, Innovation and Employment (MBIE) – which is responsible for a wide range of regulatory regimes – is generally poorly regarded, and its scores have deteriorated significantly since our 2017 survey. Narrative responses from survey respondents suggest that increasing levels of political interference in the performance of MBIE's regulatory functions may be partially to blame. One respondent said:
   "MBIE sometimes appears to be 'pretending' to listen whilst engineering [pre-determined outcomes at Ministerial behest and appears somewhat hamstrung in its ability to carry out and deliver truly objective analysis."
   Another said:
   "Whilst [MBIE officials] are generally willing to engage and listen we sense a frustration and a realisation on their part that the outcome is to an extent a fait accompli and they have a challenge in influencing the Minister to the right outcome rather than the politically desired outcome."
4. The significant decline in the performance of the Ministry of Transport, with 40% of respondents agreeing or strongly agreeing that the Ministry complies with the 23 KPIs (down from 55.9% in 2017) and 40% disagreeing (up from 18.8% in 2017).
5. The overall decline in the average percentage ratings of government departments exercising regulatory powers. In 2017, 44.8% of respondents agreed or strongly agreed that these six government departments met the 23 KPIS. In our 2021 survey, this average was down to 38.5%. Consequently, unlike the position in 2017, government-department-as-regulators are, on average, now less well-regarded than regulatory agencies set up as separate statutory Crown entities. The principled approach to the institutional form of regulatory agencies discussed in *Who Guards the Guards* suggests Parliament should consider whether regulatory functions currently exercised from within government departments and subject to more direct political influence would benefit from greater regulatory independence.[38]

CHAPTER 3

Analysing the results for the Commerce Commission, FMA and RBNZ

The Commerce Commission, FMA and RBNZ are three of New Zealand's most important regulators. Their influence stretches across the entire economy and affects businesses large and small. Given the breadth of this influence, it is critical that their governance arrangements reflect best practice.

In this chapter, we will analyse our survey results in the context of the governance arrangements for each of these three regulators and with regard to our conclusions and recommendations in *Who Guards the Guards*. We will then make recommendations in the concluding chapter.

The Commerce Commission

As New Zealand's primary trade practices regulator, the Commerce Commission has immense powers, including its relatively new, high-profile power to conduct market studies.

The Commerce Commission is an independent Crown entity with a 'multi-member commission model' governance structure. This means its 'governors' (the 'commissioners,' including the Commission chair) also have executive responsibilities, working full- or part-time. This governance model is almost identical to that of the former Securities Commission – before it was dis-established and replaced by the FMA, with a modern 'board governance model.'

The Commission's regulatory powers are vested in its commissioners. But while the Commission has a CEO, no regulatory powers are delegated by the Commission to the CEO. Consequently, unlike the FMA's CEO, the CEO of the Commerce Commission is more of a 'chief operating officer' than a true 'chief executive.'

Instead of delegating regulatory power to its CEO, the Commission delegates its powers to subcommittees of commissioners called 'Divisions' who, in turn, work with regulatory staff. A Division of the Commission may delegate regulatory power to regulatory staff members but, in practice, delegation of power from the Commission to its staff is limited.

As we said in *Who Guards the Guards*, this governance model means the role of the Commission's commissioners is more *executive* than *governance* – or, at the very least, the role is *both* executive and governance.[39] Either way, this concertina-ing of executive and governance functions is one of the key weaknesses of the multi-member commission model of regulatory governance. The weakness arises because the internal accountability mechanism that comes from a board delegating power to the executive and then holding the executive accountable for the exercise of power is missing.

While the multi-member commission model is not unusual for competition authorities around the world, it is not the only model. Indeed, the governance model for the United Kingdom's Competition Market Authority (CMA) bears most resemblance to the board governance model.[40]

Regulatory performance

As outlined both in the Introduction and in Chapter 2, the Commerce Commission fared poorly in our 2017 survey. And its already poor performance *deteriorated* significantly in our second survey last year. To recap, in 2017, on average just 39.9% of respondents agreed or strongly agreed that the Commission met the 23 KPIs, That compared with 60.8% for the FMA, with whom the Commission has some shared regulatory responsibilities.

In the 2021 survey, just 29.9% of respondents agreed or strongly agreed that the Commission met the 23 KPIs, a fall of more than 25% (see Figure 3). Meanwhile, the percentage of respondents disagreeing or strongly disagreeing that the Commission met the KPIs increased from 25.8% to 38.5% – an increase of nearly 50%.

While the FMA also suffered a fall in its approval rating in our 2021 survey compared with the Commerce Commission, the fall was only slight – down from 60.8% to 57.5%. And as in our 2017 survey, the FMA outperformed the Commission on all 23 KPIs in our 2021 survey.

The Commission's best ratings were for 'clarity of objectives' (KPI 1) and 'objectives make sense' (KPI 2), where (in each case) 56.3% of respondents agreed or strongly agreed the Commission met the KPI. However, these results compare unfavourably with the Commission's ratings in our 2017 survey and with the equivalent ratings for the FMA of 88.2% (in each case).

On none of the other KPIs did the percentage of respondents agreeing or strongly agreeing that the Commission met the KPIs exceed 50%, and on many of the KPIs, the Commission's score on this metric was below 20%.

Figure 3

Average % of respondents who agree/disagree that Commerce Commission complies with KPIs (2017–21)

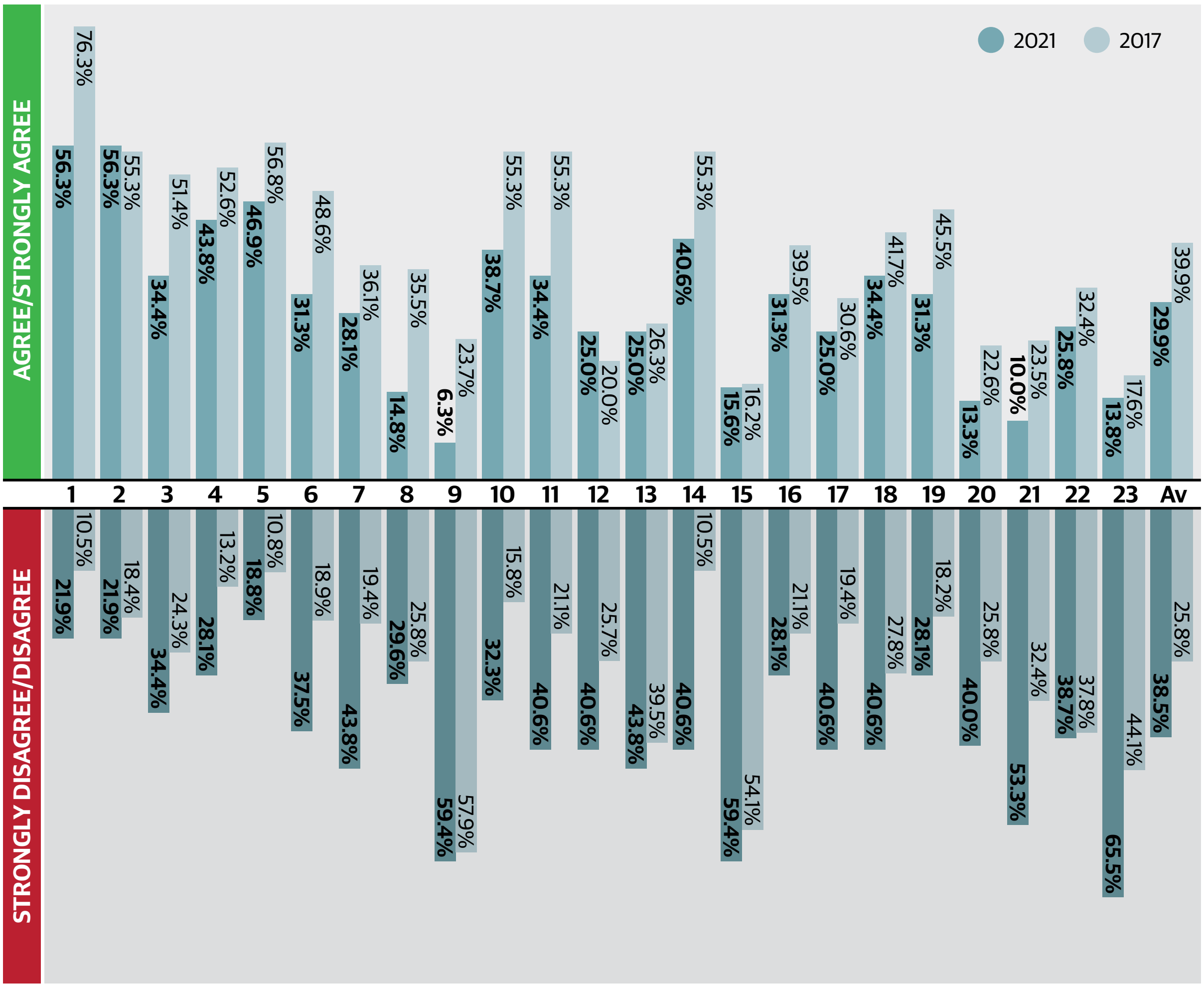


Figure 4

Commerce Commission's worst ratings

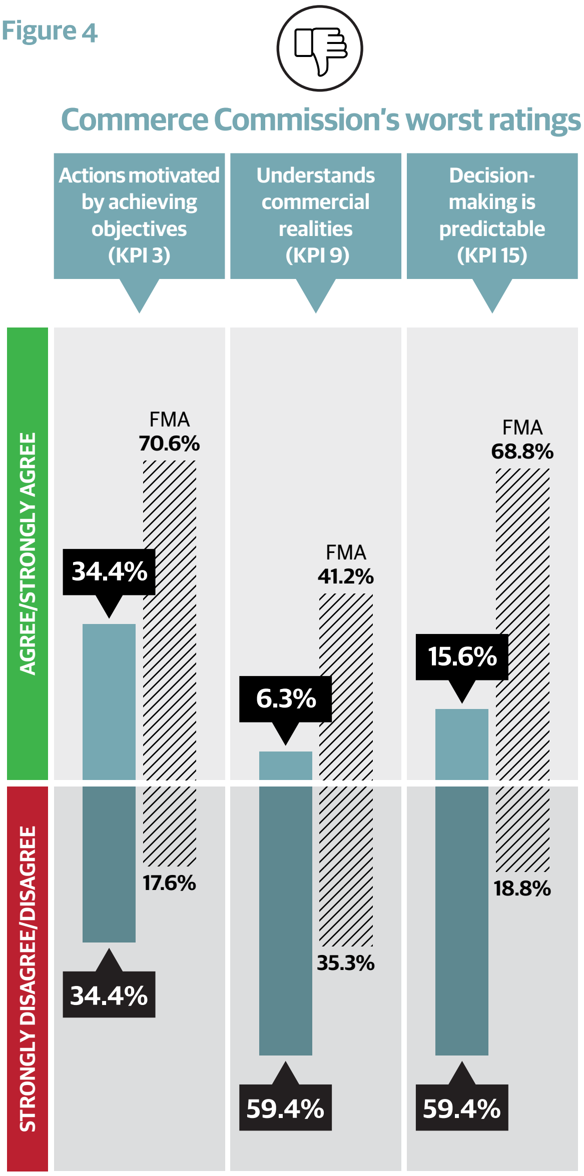
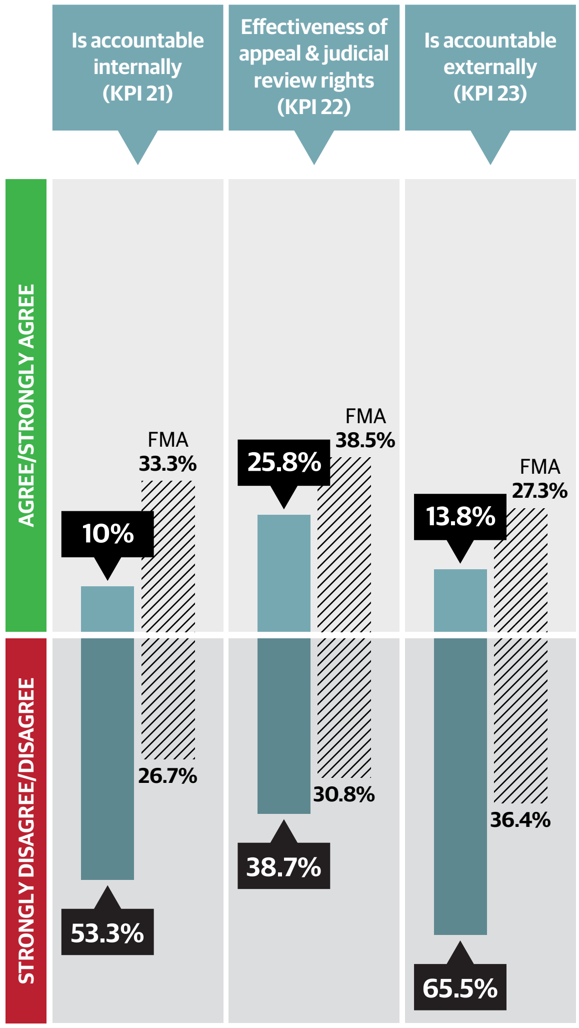


Figure 5

Commerce Commission's ratings on the accountability KPIs



The Commission's worst ratings compared with the FMA were those relating to bona fides (KPI 3), commerciality (KPI 9), and predictability (KPI 15) (see Figure 4).

- In response to question 3, "The Commission's actions are motivated by the goal of efficiently achieving its statutory objectives and not for ancillary or arbitrary objectives (such as self-protection of the regulator, its leaders or staff, or for other political or personal goals)," only 34.4% of respondents agreed or strongly agreed, with the same number disagreeing or strongly disagreeing. The comparative figures for the FMA were 70.6% and 17.6%.
- In response to question 9, "The Commission understands the commercial realities facing your industry," only 6.3% of respondents agreed or strongly agreed, and 59.4% disagreed or strongly disagreed. The comparative figures for the FMA were 41.2% and 35.3%.
- In response to question 15, "You are not hindered or deterred from taking action to improve the performance of your business by any lack of predictability about the Commission's decision-making," only 15.6% of respondents agreed or strongly agreed, and 59.4% disagreed or strongly disagreed. The comparative figures for the FMA were 68.8% and 18.8%.

In response to the accountability KPIs (questions 21–23), the differences were similarly stark (see Figure 5):

- In response to question 21, "There are effective accountability mechanisms within the regulator to enable participants in your industry to voice concerns about mistakes," only 10% of respondents agreed or strongly agreed, and 53.3% disagreed or strongly disagreed. The comparative figures for the FMA were well down from 2017 at 33.3% and 26.7%, respectively, but were still well ahead of the Commission's.
- In response to question 22, "There are effective appeal and judicial review rights to challenge the decisions of the regulator in the courts," only 25.8% of respondents agreed or strongly agreed, and 38.7% disagreed or strongly disagreed. The comparative figures for the FMA were 38.5% and 30.8%, respectively.
- In response to question 23, "The Commerce Commission is readily held to account for the quality of their work (including any mistakes) by its responsible government department, Minister or some other effective external accountability mechanism," only 13.8% of respondents agreed or strongly agreed, and an astonishing 65.5% disagreed or strongly disagreed. The comparative figures for the FMA were 27.3% and 36.4%, respectively.

The Commission's ratings were supported by narrative comments from survey respondents. With 29.9% of respondents agreeing that, on average, the Commission met the KPIs, not all the comments were negative. Examples of positive comments include the following:

> "Real uplift in engagement with new senior management team."

> "Moving away from one size fits all approach… but still a way to go."

Nevertheless, overwhelmingly, the comments were negative, with comments including the following:

> "[A]ctivities [are] driven by funding increments and political objectives."

> "They have no sense whatsoever about commercial reality – and more importantly don't care."

> "[The Commerce Commission] has no desire whatever to engage with industry or to learn about an industry which they know nothing about."

> "Decision making is a triumph of theory and emotion over practical reality… [with] no consistent core of principle in regulatory decisions."

> "[N]o accountability at all – and difficult to question them because they have the public purse behind them and will hold it against you for all time. In this regard they are bullies and no-one can keep them in check."

> "In theory MBIE and David Clark (Minister of Commerce) are responsible for ComCom, In practice neither has any interest… Occasionally we have sought out relevant people in MBIE to find out if they have any interest in the impact of ComCom. Usually the first problem is that the person in MBIE will be new to the job. As for 'interest in the ComCom?', not really."

> "The Commission lacks the oversight, performance measures and leadership to direct the organisation to take meaningful action for the long-term benefit of markets and consumers… instead, [it] measures its success by prosecutions and fines… merger process is chaotic and erratic… The Commission's positional behaviour generates acrimony in

> matters which could be resolved through transparency and dialogue… [Its] approach to [penalties] is at least unprincipled and arguably vindictive."

Observations and recommendations

The survey results support the view we reached in *Who Guards the Guards* that the Commission suffers from poor governance.[41] We concluded:[42]

> Respondents do not have a strong sense that the Commission's actions align with its stated objectives. Its expertise and commercial acumen are not well-respected. Respondents think the Commission's decision-making lacks predictability. And the internal and external mechanisms for holding the Commission accountable are not regarded as effective.

With the Commission's ratings having deteriorated in the latest survey, these conclusions appear even more true today than they were four years ago.

What can be done to address these shortcomings? Our research suggests at least part of the answer to this question rests on two features of the Commission's governance that stand out as shortcomings.

The first is the weak internal accountability mechanism inherent in the Commission's multi-member commission governance model. Because commissioners exercise both governance *and* executive regulatory decision-making responsibilities, the Commission lacks a key internal accountability mechanism that is a feature of the FMA's board governance model. This is the accountability of a regulatory decision-making executive to the board. Instead, within the organisation, the commissioners must hold themselves to account. For obvious reasons, this is a poor mechanism.

The second shortcoming relates to the Commission's external governance. As we noted in *Who Guards the Guards*,[43] external monitoring of the Commission has clear shortcomings. While the Commission is accountable to MBIE, the Minister of Commerce, and Parliament's Commerce Select Committee, none of them have in-depth experience of competition law. Each can monitor the Commission's performance against budget – or take notice of any significant Commission losses before the courts. But none has the expertise to evaluate the Commission's strategic direction.

Our research suggests the Commerce Commission's performance would be improved by strengthening both its internal and external governance in three ways.

1. Strengthening the Commission's internal governance by introducing a substantial degree of separation between the principal regulatory decision-makers – whether preliminary or final – and those exercising governance oversight.
2. Broadening the Commission's skill-set by recruiting more commissioners/board members with industry expertise to address the concerns about the Commission's lack of commercial expertise and business acumen.
3. Creating an effective external mechanism to monitor the Commission's discharge of its regulatory powers.

In *Who Guards the Guards*, we outlined how these objectives might be achieved.[44] In relation to the first and second objectives, the Commission's internal governance could be strengthened either by:

- restructuring the Commission to introduce a hybrid board governance model – like that of the FMA or the more complex hybrid model of the United Kingdom's CMA, or
- encouraging the Commissioners under the existing Commission model to delegate substantial power to a suitably qualified CEO (for onwards delegation to staff

as appropriate). This would turn the commissioner's role into one more akin to a governance role than an executive one.

In either case, the precise allocation of decision-making responsibilities between board members/commissioners and the executive might not need to be prescribed. Instead, this could be achieved through remuneration arrangements for the Commission's governance role. Limiting remuneration for board mmbers/commissioners would encourage the delegation of sufficient decision-making power to staff to ensure the board members/commissioners performed the governance oversight role of contesting and challenging the Commission's regulatory strategies and the exercise of regulatory decision-making power.[45]

If the commissioner's role is scaled back to one of governance, the FMA's experience suggests this would widen the pool of potential governance candidates to include those with relevant commerical expertise.

In relation to the external monitoring recommendation, this could be achieved by tasking an agency equipped with relevant expertise to review the Commission's regulatory performance and report to Parliament periodically on its findings.[46]

Financial Markets Authority

The FMA is New Zealand's primary financial markets conduct regulator and has extensive regulatory powers. It arose from the ashes of the discredited Securities Commission. The Securities Commission's demise was preceded by the 2011 parliamentary inquiry into the collapse of New Zealand's finance company sector[47] and the Ministry-initiated review of the Securities Commission's effectiveness.[48] The latter review recommended reforming the Securities Commission's governance in two key respects: separating governance from executive decision-making[49] and improving the regulator's commercial expertise.[50]

The new FMA was established as a separate Crown entity with a board governance model. It operates with a board of up to nine members, led by a chair. From the outset, the FMA board delegated extensive decision-making powers to its CEO. Rather than having primary regulatory decision-making responsibilities, the FMA board's primary role is to approve regulatory strategy and hold the FMA's executive to account for implementing it.

As we noted in *Who Guards the Guards*, this modus operandi was a break both from those of the former Securities Commission and the FMA's closest peer financial markets regulator, the Australian Securities and Investment Commission (ASIC).[51] It also contrasts with the FMA's domestic peer, the Commerce Commission, with its multi-member commission governance model.

In *Who Guards the Guards*, we asked businesses regulated by the FMA *that had also been regulated by the former Securities Commission* to evaluate the FMA against its predecessor. On average, 81.1% of survey respondents agreed or strongly agreed that the FMA performed better than the Securities Commission across all 23 KPIs. This was a very strong endorsement of the governance changes introduced in 2011 for New Zealand's primary financial markets regulator.

The FMA's own ratings, that is, where it was rated in its own right – rather than compared with the Securities Commission – were also very strong. Overall, 60.8% of respondents agreed or strongly agreed that the FMA met the KPIs. This compared with ratings in 2017 of just 39.9% for the Commerce Commission and 28.6% for the RBNZ.

Regulatory performance

So how does the FMA fare four years later? As Figure 6 shows, the FMA's results have deteriorated slightly overall.

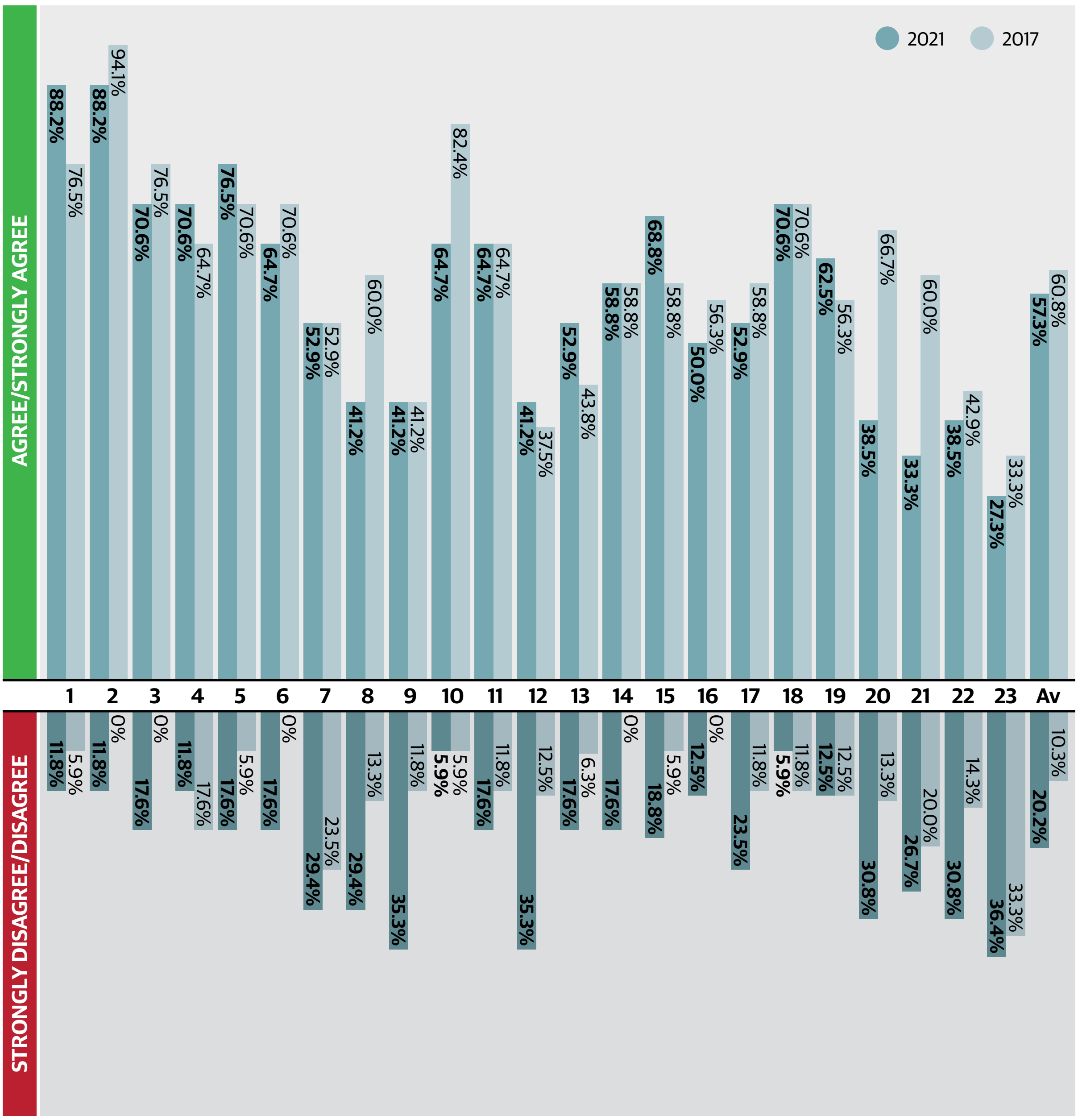
Overall, 57.3% of respondents agreed or strongly agreed that the FMA met all the 23 KPIs. This was down from 60.8% in our 2017 survey. Meanwhile, the number of survey respondents disagreeing or strongly disagreeing doubled from 10.3% to 20.2%.

Digging into the individual responses, the FMA's ratings improved compared with our earlier survey for several KPIs. These include those dealing with clarity of objectives (KPI 1), predictability (KPIs 13 and 15), and consultation (KPI 19).

However, the FMA's ratings deteriorated for most KPIs and, in many cases materially. As shown in Figure 7, material falls include the following ratings:

Figure 6

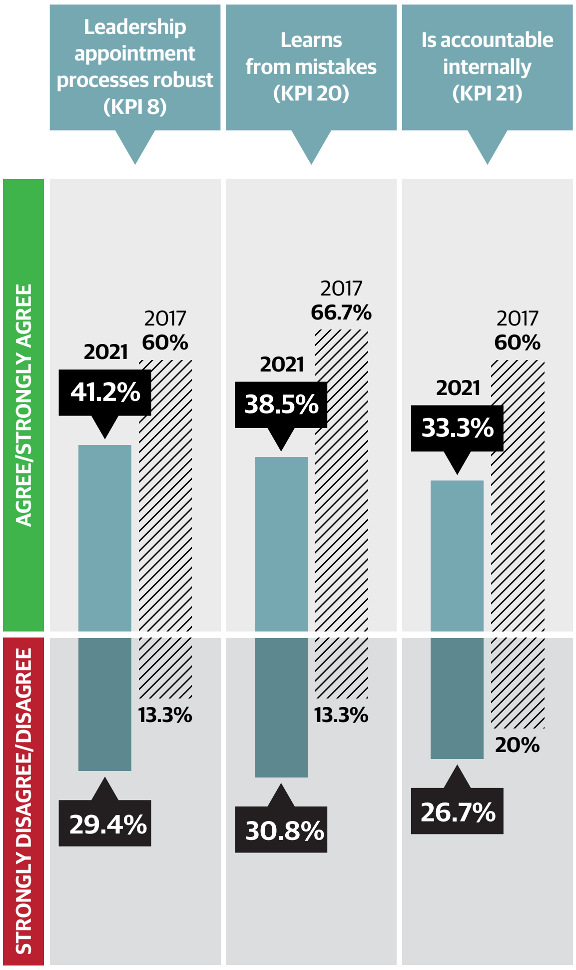
Average % of respondents who agree/disagree that FMA complies with KPIs (2017–21)



- **Leadership appointment processes:** In response to question 8, "The processes for appointing the leaders of the regulator are transparent and robust," only 41.2% of respondents agreed or strongly agreed, down from 60% in our earlier survey.
- **Learning from mistakes:** In response to question 20, "The FMA learns from its mistakes," only 38.5% of respondents agreed or strongly agreed, down from 66.7% in 2017.
- **Accountability:** In response to question 21, "There are effective accountability mechanisms within the FMA to enable participants in your industry to voice concerns about mistakes," only 33.3% of respondents agreed or strongly agreed, compared with 60% in our earlier survey.

Figure 7

The FMA's most significant declines compared (2017–21)



Comments from survey respondents add some colour to the numerical results – both good and bad.

Only two respondents provided unambiguously positive comments, with one providing very high praise, stating,

> "FMA's focus on fair efficient and transparent markets seems to be reflected in its approach as a standout regulator,"

and the other stating,

> "Engagements with the FMA are generally highly constructive in my experience."

All other comments were critical. A sample of them is presented below:

> "The FMA has become a political lobbying group… rather than work with the industry to help explain and support their longer term objectives."

> "Since the conduct and culture push there is scant regard to the objective of promoting the financial markets."

> "The FMA appears to have lost sight of materiality in achieving its objectives."

> "FMA's investigation arm is a black box – no ability to understand what it is doing, what it is seeking to achieve or what decision making points there are. Needs a fundamental rethink."

> "Dealing with the various departments within the FMA feels like dealing with two completely different entities. They are not joined up nor provide a common position on stakeholder engagement."

> "There is absolutely no accountability."

> "There seem to be no avenues for accountability and this means the FMA is able to act with impunity."

> "Seem to prize public shaming no matter the scale of the error or indiscretion."

Observations and recommendations

The FMA received more favourable ratings on every one of the KPIs than the Commerce Commission. Yet the deterioration in the FMA's overall results, coupled with the significant falls on some of its ratings, should concern its board, responsible Minister, and Parliament.

Though the FMA has a "best practice" internal governance model, governance structures on their own are not a cure-all.[52] And as the Productivity Commission concluded, the best governance systems will count for little if an organisation does not have a capable leadership with the right mix of skills.[53]

For this, appointment processes must be robust. Yet Parliament has done nothing to follow up on the recommendations that both we and the Productivity Commission had made to strengthen the robustness of appointment processes to New Zealand's regulatory agencies. The deterioration in the FMA's ratings for leadership suggests the time has come for these recommendations to be implemented.

External monitoring processes help Ministers and Parliament ensure regulators achieve their statutory objectives. Our survey results suggest the FMA's external monitoring processes are not working as well as they should be. The Productivity Commission's findings suggest systemic shortcoming in external monitoring processes for regulatory agencies generally.[54] Given the critical role the FMA plays in regulating New Zealand's financial markets, it is all the more important that the FMA's external monitoring and accountability mechanisms work well.

In *Who Guards the Guards*, we recommended that Parliament task an independent entity with monitoring the performance of the three 'all of economy' regulators: The Commerce Commission, FMA and RBNZ.[55] As we noted earlier in this report, the Australian Federal Parliament has taken this step to monitor the performance of the Australian peers of the FMA and RBNZ.[56] New Zealand's Parliament should do likewise.

The Reserve Bank of New Zealand

The RBNZ's most high-profile role is managing monetary policy. But, since its formation in 1989, the RBNZ has also performed extensive regulatory responsibilities. Chief among these is prudential regulation of banks, non-bank deposit takers, and insurance companies.

Our 2017 survey revealed serious shortcomings with the RBNZ's regulatory role. Whereas, on average, 60.8% of respondents agreed or strongly agreed that the FMA met the 23 KPIs in our survey, only 28.6% of respondents agreed that the RBNZ complied with them. The RBNZ's results were so bad they eclipsed the dismal performance of the Commerce Commission.

Our analysis in *Who Guards the Guards* identified the RBNZ's single member decision-maker governance model as a key part of the RBNZ's problems. Under this model, regulatory decision-making power was conferred by the *Reserve Bank of New Zealand Act 1989* directly on the RBNZ governor. This model is unusual among agencies with significant regulatory power. It is doubly unusual in the RBNZ's case because the RBNZ has a governance board. Yet, Parliament by-passed the board when it came to the exercise of regulatory power.

We concluded that there were good reasons to believe that the RBNZ's poor regulatory performance could be explained by its governance framework lacking many of the usual safeguards.[57] First, its single-member decision-maker model lacked the safeguard of a second set of eyes – or of multiple sets of eyes. Second, because the Governor's regulatory policymaking and decision-making powers did not derive from the board, the board had only limited means of holding the Governor accountable for exercising those powers. And third, the RBNZ was not subject to the same independent departmental or parliamentary review as other regulators.

We recommended that the following reforms should be introduced:

1. Change the RBNZ's single-member decision-making model to the FMA's board governance model. In making that change, we had said Parliament should confer regulatory powers on the board and permit the board to delegate those powers to the Governor and hold the Governor accountable for their exercise.
2. Broaden the skill-set of the RBNZ board to increase the level of banking and insurance industry expertise.
3. Create an effective mechanism to monitor how well the board and Governor discharged their prudential regulatory powers.

As we noted in Chapter 1, since 2018 the Government has reviewed both the RBNZ's governance and other aspects of its operations.[58] The review was completed in 2021. It led to Parliament passing the *Reserve Bank of New Zealand Act 2021*. The Act addresses all three of our recommendations. It introduced the 'board governance model' for the RBNZ's regulatory functions.[59] It will bring about changes to the make-up of the RBNZ board.[60] And it seeks improved monitoring – though by departmental oversight, rather than from an independent monitoring agency as we had recommended.[61]

The changes the Act introduced will not be fully implemented until June this year. However, at least in relation to the change of governance, formal implementation was preceded by the Governor publicly acknowledging both the findings in *Who Guards the Guards* and that the Bank's approach needed to change.[62] Subsequently, in 2019, Cabinet made an in-principle decision to change the RBNZ's internal accountability mechanisms to the board governance model.[63] The RBNZ Governor "welcomed" the changes.[64] In combination, these developments have meant the RBNZ has been acting with a *de facto* board governance model pending the enactment and implementation of the Act.

Hand-in-hand with the RBNZ's governance reforms, improvements in the RBNZ's willingness to consult – and with its agility – are evident. An example of this more proactive response occurred at the onset of the Covid-19 pandemic, when the RBNZ relaxed bank capital restrictions to enable banks to provide customers with mortgage repayment deferrals.

Regulatory performance

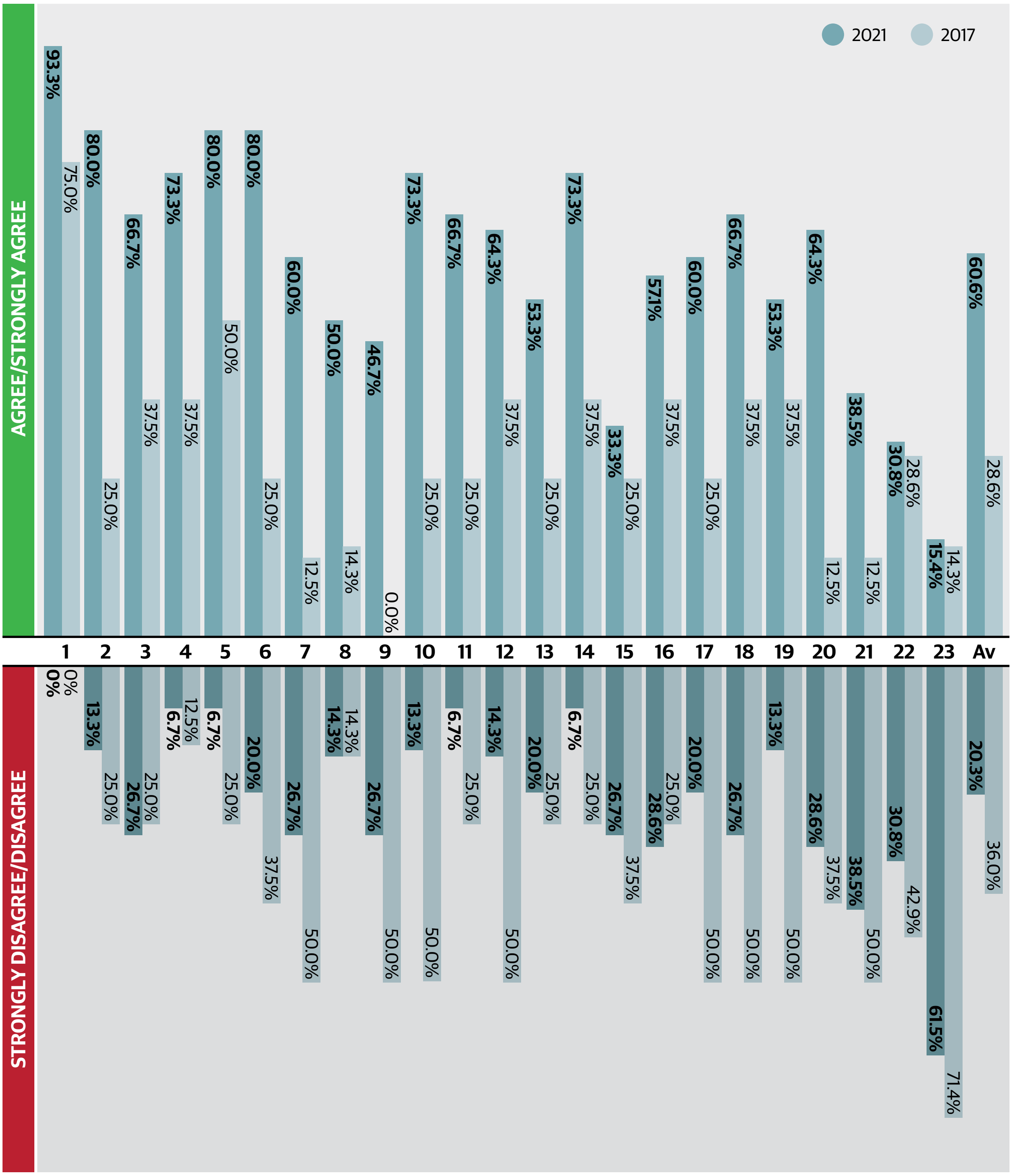
Four years after *Who Guards the Guards*, the RBNZ's ratings in our second survey show a remarkable improvement. In the 2021 survey, 60.6% of respondents agreed or strongly agreed that the RBNZ met the 23 KPIs, more than double the rating in 2017 of just 28.6% (see Figure 8). Meanwhile, the percentage of respondents disagreeing or strongly disagreeing that the RBNZ met the KPIs almost halved, from 36% to 20.3%.

The RBNZ's approval ratings increased across all 23 KPIs. However, as Figure 8 shows, the improvements were only marginal on two KPIs. Both relate to external accountability.

The fact that the RBNZ barely improved on some indicators, but showed dramatic improvements on almost all others, is both interesting and informative. Helpfully, it "anchors" the RBNZ's 2021 results to the 2017 survey. At the same time, it sheds light on the areas where the RBNZ has improved, as well as the areas where there remains room for improvement.

Figure 8

Average % of respondents who agree/disagree that RBNZ complies with KPIs (2017–21)



Measured by the percentage of respondents agreeing or strongly agreeing, the RBNZ's biggest gains were for coherency of objectives (KPI 2), leadership (KPI 6), and learning from mistakes (KPI 20). In each case, the jump in average ratings from survey respondents agreeing or strongly agreeing that the RBNZ met the KPI was more than 50%. Others with big improvements included knowledgeable staff (KPI 7), constructiveness (KPI 10), and willingness to listen (KPI 11).

Aside from this notable improvement in performance, perhaps the most interesting feature of the RBNZ's results is in the three accountability KPIs: KPI 21, dealing with internal accountability, and KPIs 22 and 23 dealing with external monitoring and accountability (see Figure 8).

Starting first with *internal accountability*, KPI 21 asked whether there are "effective accountability mechanisms within the regulator to enable participants in your industry to voice concerns about mistakes." Only 38.5% of respondents agreed or strongly agreed this was the case with the RBNZ. Though significantly below 50% (and below the RBNZ's average rating across the 23 KPIs of 60.6%), this rating was strongly up on our 2017 survey's dire rating of only 12.5%. Even then, the same number, 38.5%, disagreed or strongly disagreed that the RBNZ met this KPI.

The RBNZ showed less improvement on the two *external accountability* KPIs.

KPI 22 relates to the effectiveness of appeal and review rights. Only 30.8% of respondents either agreed or strongly agreed that "there are effective appeal and judicial review rights to challenge the decisions of the RBNZ in the courts." This rating was only very slightly up from 2017's poor score of 28.6%.

Appeal and review rights against the RBNZ will be strengthened when the *Reserve Bank Act 2021* comes into force. These results confirm the need for this.

KPI 23 is the second external accountability KPI. It asked respondents whether "the RBNZ is readily held to account for the quality of their work (including any mistakes) by its responsible government department, minister or some other effective external accountability mechanism." Only 15.4% of respondents agreed or strongly agreed. Though again up slightly on 2017's 14.3%, a concerning 61.5% of respondents disagreed or strongly disagreed that the RBNZ met this KPI.

As with the FMA, the narrative comments from survey respondents provide some insights into the survey's quantitative results. In 2017, narrative comments focused on the RBNZ's lack of consistency, inexperienced staff, unwillingness to engage or consult, the lack of proportionality in its approach, and lack of accountability.[65]

In our 2021 survey, some of the old criticisms come through, but there is a clear change of view, with more comments along the following lines:

> "RBNZ has a complex portfolio of regulatory accountabilities and does a good job of communicating its purposes and objectives… Communications are good and have improved in clarity and simplicity in the last couple of years… Compliance monitoring and reporting has improved under the revised breach reporting regime and issues tend to be dealt with in a proportionate manner…"

> "Communicational aspect has improved over recent years. There is still sometimes inconsistency and predictability… Consultation has improved but can be variable…"

> "Have gotten better at [understanding commercial realities] but still some work to be done."

At the same time, several comments suggest that the old concerns remain:

> "I agree that the RBNZ has made great strides in the consultation it does. But consultation is often not effective or listened to."

> "Competency of leaders and staff fall significantly short of equivalent regulators overseas."

> "RB has decided it wants to be more muscular in its behaviour. Sadly, that encourages capricious and bullying behaviour."

> "The decision to successfully challenge a decision of a prudential regulator is notoriously difficult – they are not subject to any real form of Parliamentary oversight (for prudential decisions rather than MPC) and judicial review is too high a bar in technical areas."

> "There is a clear politicisation of regulators in the last 4 years, particularly the Reserve Bank."

Observations and recommendations

The most notable aspect of the RBNZ's results in our 2021 survey is the overall improvement in performance. The RBNZ's ratings have improved from being dismal to being the best overall results among New Zealand's most important independent regulatory agencies. Based on these ratings, the RBNZ is to be commended.

It is no coincidence that the RBNZ's worst ratings were for external accountability. These were also two of the lowest ratings for all the regulators covered by our survey. However, even though the RBNZ's overall ratings were among the best, its external accountability ratings were worse than the average for all regulators.

These ratings may improve once the external monitoring provisions of the *Reserve Bank of New Zealand Act 2021* come into force. These are likely to see Treasury designated by the Minister of Finance as the department with oversight responsibilities for the RBNZ's regulatory functions.

However, as canvassed in detail both in *Who Guards the Guards* and in the Productivity Commission's 2014 report, there are good reasons to doubt the efficacy of departmental monitoring.[66] For these reasons, we continue to recommend that Parliament create an independent monitoring agency to evaluate the performance of the three large, 'all of economy' regulators, including the RBNZ.

Conclusion and recommendations

Our research suggests the governance arrangements for regulatory agencies are key to their performance. Better governance improves accountability, and greater accountability appears to improve regulatory performance and regulatory outcomes.

Three factors in particular are important:[67]

- internal governance
- external monitoring, and
- appointment processes.

Yet, important as they are, across all regulatory agencies, survey respondents gave the lowest ratings for the KPIs addressing these three factors in our 2021 survey.[68]

Internal governance

There are good reasons for concluding that the board governance model for regulatory agencies' internal governance is superior to the alternative 'commission' or 'single-member decision-maker' models. This is because the board governance model has better internal checks and balances on regulatory decision-making than the alternatives.

Fortunately, the board governance model is the most common structure for regulatory agencies constituted as separate Crown entities. Following our recommendations in relation to the RBNZ's governance in *Who Guards the Guards* in 2018, Parliament has decided that this model should be adopted for the RBNZ.[69] We suggest it is no coincidence that in the meantime, the RBNZ's performance as measured by our 2021 survey, has markedly improved.[70] Consequently, the board governance model is now the governance structure for both the FMA and RBNZ.

We also suggest that it is no coincidence that the Commerce Commission has continued to perform poorly in our survey of regulatory performance. Indeed, as we discussed in Chapters 2 and 3, the Commission is the worst performing major regulator in our survey.[71] And its performance in our 2021 survey is markedly worse than its already poor showing in our 2017 survey.

To address these concerns, we recommend Parliament reform the governance of the Commerce Commission by replacing its flawed 'commission' model with the 'board governance' model of the FMA and RBNZ.

As we said in *Who Guards the Guards*, this could be achieved by:

a. Reshaping the commissioner role so that it becomes largely a governance (or board member) role, with substantial decision-making power delegated to the Commission's CEO and regulatory staff (following the model of the FMA), and
b. Broadening the skill-set of the commissioners to include more members with commercial expertise.[72]

We also recommend the board governance model be adopted for all regulatory agencies which, applying the principled approach outlined by the Productivity Commission,[73] **should operate independently of political control.**

The OIO is the obvious regulatory agency for such treatment – with its ratings (albeit from very small sample sizes) in both our 2021 and 2017 surveys suggesting its performance as a regulator is very poor.

External monitoring

The Productivity Commission found that external monitoring of regulatory agencies by departments, Ministers and Parliament has serious shortcomings.[74] Our surveys in both 2017 and 2021 support this finding. In our 2021 survey, only 21.8% of respondents agreed or strongly agreed that regulators are readily held to account for the quality of their work by responsible government departments, Ministers, or some other effective external accountability mechanism.[75] This was the lowest rating across the 23 KPIs.

Effective external monitoring is most important for the regulatory agencies that have an economy-wide impact. The three most significant regulators in this regard are the Commerce Commission, FMA and RBNZ.

The Australian Parliament has strengthened the external monitoring of ASIC and APRA (Australia's equivalent of the FMA and RBNZ) by creating a new agency, the Financial Regulator Assessment Authority.[76]

To address the shortcoming in external monitoring, we recommend that for the three all of economy regulators, the Commerce Commission, FMA and RBNZ, Parliament create a new "Regulator Assessment Authority" tasked with producing three-yearly reviews on the regulatory performance of each regulator.

Appointment processes

Robust and transparent appointment processes are the third critical factor for regulatory governance and performance. Good governance structures will count for nothing if those responsible for governing are not up to the task. Yet both the Productivity Commission's report and our survey results reveal shortcomings in the processes for appointing the leaders of New Zealand's regulatory agencies.[77] In our 2021 survey, the robustness and transparency of the processes for appointing regulatory agencies' leadership received the second-worst overall rating from respondents.[78]

The United Kingdom and Canada have addressed concerns about appointments to government-controlled agencies by establishing independent appointment agencies.[79]

We recommend Parliament create an independent agency to ensure all appointments to regulatory agencies are subject to robust, independent scrutiny and a standardised process, including the evaluation of candidates against a published skills-matrix.

Appendices

Appendix 1: Results (%) for all regulators across all KPIs (arranged from highest to lowest based on sum of 'agree' and 'strongly agree')

Regulator	Number of times rated	Strongly Agree	Agree	Neutral	Disagree	Strongly Disagree	Sum Agree and Strongly Agree	Sum Disagree and Strongly Disagree
Human Rights Commission	2	4.3%	82.6%	13.0%	0.0%	0.0%	87.0%	0.0%
Privacy Commissioner	3	5.4%	78.6%	12.5%	3.6%	0.0%	83.9%	3.6%
Health and Disability Commissioner	2	6.5%	76.1%	15.2%	2.2%	0.0%	82.6%	2.2%
Inland Revenue Department	15	14.2%	64.6%	19.5%	1.8%	0.0%	78.8%	1.8%
Civil Aviation Authority of New Zealand	1	0.0%	66.7%	33.3%	0.0%	0.0%	66.7%	0.0%
Reserve Bank of New Zealand	17	14.6%	46.0%	19.1%	11.3%	9.0%	60.6%	20.3%
Financial Markets Authority	20	11.3%	47.0%	21.5%	14.0%	6.2%	58.3%	20.2%
Ministry for Primary Industries	9	13.0%	44.8%	23.4%	14.6%	4.2%	57.8%	18.8%
Energy Efficiency and Conservation Authority	1	0.0%	50.0%	50.0%	0.0%	0.0%	50.0%	0.0%
Fire and Emergency New Zealand	1	0.0%	47.8%	47.8%	4.3%	0.0%	47.8%	4.3%
External Reporting Board	1	0.0%	47.6%	52.4%	0.0%	0.0%	47.6%	0.0%
WorkSafe New Zealand	16	2.1%	44.1%	35.9%	14.3%	3.6%	46.2%	17.9%
Ministry of Business, Innovation, and Employment	28	5.7%	34.7%	30.7%	17.4%	11.6%	40.3%	29.0%
Ministry of Transport	6	2.5%	37.5%	20.0%	36.3%	3.8%	40.0%	40.0%
New Zealand Transport Agency	7	6.4%	30.3%	28.4%	28.4%	6.4%	36.7%	34.9%
Electricity Authority	11	4.4%	31.2%	23.6%	27.2%	13.6%	35.6%	40.8%
Accident Compensation Corporation	3	30.9%	1.5%	30.9%	29.4%	7.4%	32.4%	36.8%
Takeovers Panel	1	0.0%	30.4%	21.7%	47.8%	0.0%	30.4%	47.8%
Commerce Commission	36	5.8%	24.1%	31.6%	24.4%	14.1%	29.9%	38.5%
Maritime New Zealand	2	0.0%	13.0%	67.4%	17.4%	2.2%	13.0%	19.6%
Department of Conservation	3	3.1%	4.7%	4.7%	46.9%	40.6%	7.8%	87.5%
Land Information New Zealand (including the Overseas Investment Office)	4	0.0%	6.5%	46.8%	21.0%	25.8%	6.5%	46.8%
Environmental Protection Authority	2	0.0%	6.3%	56.3%	31.3%	6.3%	6.3%	37.5%
Average		**5.7%**	**39.8%**	**30.7%**	**17.1%**	**6.7%**	**45.5%**	**23.8%**

Appendix 2: Percentages of survey respondents 'agreeing' or 'strongly agreeing' that the regulators meet the 23 KPIs

Regulator	1	2	3	4	5	6	7	8	9
Accident Compensation Corporation	33.3	33.3	33.3	33.3	33.3	33.3	66.7	33.3	33.3
Civil Aviation Authority of New Zealand	100.0	100.0	100.0	0.0	100.0	0.0	0.0	0.0	0.0
Commerce Commission – Overall	56.3	56.3	34.4	43.8	46.9	31.3	28.1	14.8	6.3
Department of Conservation	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0
Electricity Authority	63.6	45.5	36.4	45.5	45.5	36.4	45.5	11.1	27.3
Energy Efficiency and Conservation Authority	100.0	100.0	100.0	100.0	100.0	100.0	0.0	0.0	100.0
Environmental Protection Authority	0.0	0.0	0.0		100.0	0.0	0.0		0.0
External Reporting Board	100.0	0.0	0.0	100.0	0.0	0.0	0.0		100.0
Financial Markets Authority	88.2	88.2	70.6	70.6	76.5	64.7	52.9	41.2	41.2
Fire and Emergency New Zealand	100.0	100.0	100.0	100.0	100.0	100.0	0.0	0.0	0.0
Health and Disability Commissioner	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	0.0
Human Rights Commission	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0
Inland Revenue Department	90.9	100.0	90.0	90.9	90.9	88.9	55.6	50.0	60.0
Land Information New Zealand (including the Overseas Investment Office)	66.7	33.3	0.0	33.3	0.0	0.0	0.0	0.0	0.0
Maritime New Zealand	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	50.0
Ministry for Primary Industries	77.8	66.7	44.4	55.6	66.7	66.7	33.3	25.0	55.6
Ministry of Business, Innovation, and Employment	54.2	37.5	33.3	45.8	54.2	36.4	50.0	31.6	37.5
Ministry of Transport	50.0	25.0	25.0	75.0	75.0	66.7	33.3	0.0	25.0
New Zealand Transport Agency	60.0	40.0	20.0	40.0	40.0	60.0	20.0	25.0	40.0
Privacy Commissioner	100.0	100.0	100.0	66.7	100.0	100.0	100.0	50.0	0.0
Reserve Bank of New Zealand	93.3	80.0	66.7	73.3	80.0	80.0	60.0	50.0	46.7
Takeovers Panel	100.0	100.0	0.0	100.0	100.0	0.0	0.0	0.0	0.0
WorkSafe New Zealand	73.3	66.7	73.3	57.1	73.3	53.3	46.7	25.0	26.7
Average	**69.9**	**59.7**	**49.0**	**60.5**	**64.4**	**48.6**	**34.4**	**26.5**	**32.6**

Appendix 2 (continued)

10	11	12	13	14	15	16	17	18	19	20	21	22	23	Average
33.3	33.3	33.3	33.3	33.3	33.3	33.3	0.0	33.3	33.3	33.3	33.3	0.0	33.3	**32.4**
100.0	100.0	100.0	100.0	100.0	100.0	0.0	100.0	100.0	100.0		100.0		0.0	**66.7**
38.7	34.4	25.0	25.0	40.6	15.6	31.3	25.0	34.4	31.3	13.3	10.0	25.8	13.8	**29.9**
0.0	33.3	0.0	33.3	0.0	33.3	0.0	0.0	33.3	33.3	0.0	0.0	0.0	0.0	**7.8**
45.5	45.5	54.5	27.3	54.5	9.1	27.3	18.2	54.5	50.0	9.1	9.1	45.5	9.1	**35.6**
100.0	100.0	0.0	0.0	0.0	0.0	0.0		100.0	100.0	0.0	0.0	0.0	0.0	**50.0**
0.0	0.0	0.0	0.0	0.0	0.0			0.0	0.0			0.0		**6.3**
100.0	0.0	100.0	100.0	100.0	0.0	100.0	100.0	0.0	0.0	100.0	0.0		0.0	**47.6**
64.7	64.7	41.2	52.9	58.8	68.8	50.0	52.9	70.6	62.5	38.5	33.3	38.5	27.3	**58.3**
100.0	100.0	100.0	100.0	100.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	**47.8**
50.0	50.0	100.0	100.0	100.0	100.0	100.0	100.0	50.0	100.0	50.0	100.0	50.0	50.0	**82.6**
100.0	0.0	0.0	100.0	0.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	100.0	**87.0**
81.8	81.8	80.0	90.9	63.6	90.0	88.9	81.8	70.0	77.8	71.4	66.7	66.7	60.0	**78.8**
0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	**6.5**
0.0	100.0	50.0	50.0	50.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	0.0	**13.0**
66.7	66.7	44.4	55.6	66.7	66.7	77.8	55.6	44.4	57.1	62.5	55.6	66.7	20.0	**57.8**
62.5	52.2	26.1	29.2	37.5	52.2	39.1	47.8	45.8	43.5	23.8	30.4	27.3	21.1	**40.3**
50.0	25.0	33.3	33.3	33.3	25.0	66.7	66.7	50.0	33.3	33.3	25.0	33.3	25.0	**40.0**
60.0	60.0	0.0	20.0	20.0	20.0	75.0	40.0	40.0	50.0	25.0	40.0	25.0	25.0	**36.7**
100.0	100.0	100.0	100.0	100.0	66.7	100.0	100.0	50.0	50.0	100.0	100.0	100.0	50.0	**83.9**
73.3	66.7	64.3	53.3	73.3	33.3	57.1	60.0	66.7	53.3	64.3	38.5	30.8	15.4	**60.6**
0.0	0.0	0.0	0.0	100.0	0.0	100.0	100.0	0.0	0.0	0.0	0.0	0.0	0.0	**30.4**
53.3	46.7	20.0	26.7	66.7	46.7	46.2	40.0	26.7	33.3	36.4	23.1	61.5	30.8	**46.2**
55.6	**50.4**	**42.3**	**49.2**	**52.1**	**37.4**	**49.7**	**51.8**	**42.2**	**43.9**	**36.2**	**34.8**	**32.0**	**21.8**	**45.5**

Appendix 3: Regulators ranked from most to least respected

Regulator	Number Times Ranked	Number Times Ranked Worst	Percent of Time Ranked Worst	Number Times Ranked Best	Percent of Time Ranked Best	Mean Score Best to Worst
Takeovers Panel	9	0	0.0%	4	44.4%	2.39
Civil Aviation Authority of New Zealand	7	0	0.0%	1	14.3%	1.43
Inland Revenue Department	48	7	14.6%	14	29.2%	1.21
Health and Disability Commissioner	5	0	0.0%	1	20.0%	1.20
Accident Compensation Corporation	26	1	3.8%	3	11.5%	0.96
Privacy Commissioner	27	1	3.7%	11	40.7%	0.93
Ministry for Primary Industries	19	1	5.3%	5	26.3%	0.82
External Reporting Board	12	0	0.0%	0	0.0%	0.75
WorkSafe New Zealand	42	4	9.5%	8	19.0%	0.68
Fire and Emergency New Zealand	15	1	6.7%	1	6.7%	0.57
Maritime New Zealand	4	0	0.0%	0	0.0%	0.50
Financial Markets Authority	46	6	13.0%	7	15.2%	0.37
Reserve Bank of New Zealand	26	7	26.9%	5	19.2%	0.29
Commerce Commission – Telecommunications Commissioner	8	1	12.5%	1	12.5%	0.00
Energy Efficiency and Conservation Authority	15	2	13.3%	2	13.3%	-0.17
Commerce Commission – Price Regulation Branch	20	3	15.0%	1	5.0%	-0.30
Commerce Commission – Competition and Consumer Branch	56	11	19.6%	7	12.5%	-0.35
Office of Film and Literature Classification	1	0	0.0%	0	0.0%	-0.50
Ministry of Business, Innovation, and Employment	54	13	24.1%	1	1.9%	-0.54
Heritage New Zealand Pouhere Taonga	3	1	33.3%	0	0.0%	-0.83
Human Rights Commission	5	2	40.0%	1	20.0%	-0.90
Ministry of Transport	14	2	14.3%	1	7.1%	-0.93
Transport Accident Investigation Commission	3	0	0.0%	1	33.3%	-1.00
Electricity Authority	14	3	21.4%	3	21.4%	-1.14
Environmental Protection Authority	14	3	21.4%	0	0.0%	-1.21
Earthquake Commission	4	1	25.0%	0	0.0%	-1.50
New Zealand Transport Agency	21	1	4.8%	1	4.8%	-1.52
Department of Conservation	14	4	28.6%	0	0.0%	-1.71
Land Information New Zealand (including the Overseas Investment Office)	17	1	5.9%	1	5.9%	-1.74
Broadcasting Standards Authority	7	3	42.9%	0	0.0%	-2.14
New Zealand Walking Access Commission	2	0	0.0%	0	0.0%	-2.50
Serious Fraud Office	3	1	33.3%	0	0.0%	-2.83

Endnotes

1 Roger Partridge and Amy Thomasson, "Who Guards the Guards? Regulatory Governance in New Zealand" (Wellington: The New Zealand Initiative, 2018).

2 Ibid.

3 Ibid.

4 Ibid.

5 Ibid. 6.

6 Productivity Commission, "Regulatory Institutions and Practices" (Wellington: New Zealand Government, 2014), 5 and 94–102.

7 Ibid.

8 Ibid. 94.

9 Ibid. 9 and 257.

10 Ibid. 11–16 and 47–48.

11 Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. 45.

12 Ibid. 48.

13 See below.

14 Productivity Commission, "Regulatory Institutions and Practices," op. cit. 17.

15 Ibid. 353.

16 Ibid.

17 Ibid. 366.

18 Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. 77.

19 Monopolkommission, "Mission," Website.

20 Gerard Caprio, James Barth, and Ross Levine, *Guardians of Finance: Making Regulators Work for Us* (Cambridge: MIT Press, 2012), 230.

21 Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. 77.

22 Productivity Commission, "Regulatory Institutions and Practices," op. cit. 257 and Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. 35–37, 55, 66, 77.

23 Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. 77.

24 Productivity Commission, "Regulatory Institutions and Practices," op. cit. 263.

25 Ibid. 265.

26 Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. 78.

27 For example, the RBNZ.

28 Productivity Commission, "Regulatory Institutions and Practices," op. cit. 216.

29 Ibid. 8. For an informative discussion about an appropriate framework for delegating policymaking power to unelected agencies, see Paul Tucker, *Unelected Power: The Quest for Legitimacy in Central Banking and the Regulatory State* (United States: Princeton University Press, 2018).

30 Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. 25.

31 Ibid.

32 Ibid. 76 and 79.

33 Ibid. 33.

34 Ibid. 76–79.

35 Productivity Commission, "Regulatory Institutions and Practices," op. cit. 257 and 353.

36 Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. Appendix 2.

37 The IRD's good showing likely results from the strong incentives it faces to make taxpaying as easy as possible. If it does not, the costs of collection (from an objecting taxpayer) can exceed the tax raised. Unfortunately, it is unlikely to be feasible to replicate these incentives across other regulatory agencies.

38 Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. 16–17 and 79.

39 Ibid. 53.

40 David Currie, Alex Chisholm and Tim Jarvis, "Institutional Design and Decision-Making in the Competition and Markets Authority," *CPI Journal* 10 (2014), 13.

41 Roger Partridge and Amy Thomasson, "Who Guards the Guards?" op. cit. 57.

42 Ibid.

43 Ibid. 58.

44 Ibid. 75–78.

45 Ibid.

46 Ibid. 76–77.

47 Commerce Committee, “Inquiry into Finance Company Failures” (Wellington: New Zealand Parliament, 2011).

48 Michel Prada and Neil Walter, “Report on the Effectiveness of New Zealand’s Securities Commission” (Wellington: KPMG, 2009), 3.

49 Ibid. 24.

50 Ibid. 25.

51 Roger Partridge and Amy Thomasson, “Who Guards the Guards?” op. cit. 43–44.

52 Ibid. 19.

53 Productivity Commission, “Regulatory Institutions and Practices,” op. cit. 265.

54 Ibid. 353.

55 Roger Partridge and Amy Thomasson, “Who Guards the Guards?” op. cit. 7677.

56 See page 7.

57 Ibid. 70.

58 Treasury, “Review of the Reserve Bank Act 2017–2021,” Website.

59 *Reserve Bank of New Zealand Act 2021,* section 24.

60 RBNZ, “New foundations to strengthen and modernise the Reserve Bank,” Website (11 August 2021).

61 *Reserve Bank of New Zealand Act 2021,* section 80.

62 Hamish Rutherford, “New Reserve Bank governor Adrian Orr tells New Zealand's banks: ‘We hear you’,” *Stuff* (Wellington: 19 April 2019).

63 Grant Robertson, “Keeping banks safe and holding executives accountable,” Press release (Wellington: New Zealand Parliament, 18 December 2019).

64 RBNZ, “Reserve Bank welcomes Government decision on Bank’s future objectives,” Website (18 December 2019).

65 Roger Partridge and Amy Thomasson, “Who Guards the Guards?” op. cit. 67–69.

66 Ibid. 76–77 and Productivity Commission, “Regulatory Institutions and Practices,” op. cit. 353.

67 Because internal governance is strongly linked to institutional form, in our recommendations we treat it as a corollary of internal governance.

68 Above, page 18.

69 See section 24, *Reserve Bank of New Zealand Act 2021.*

70 See pages 31-34.

71 See Table 2.

72 Roger Partridge and Amy Thomasson, “Who Guards the Guards?” op. cit. 57–60, 75–76 and 79.

73 Ibid. 76 and Productivity Commission, “Regulatory Institutions and Practices,” op. cit. 220.

74 Productivity Commission, “Regulatory Institutions and Practices,” op. cit. 353.

75 See above, page 36 and Appendix 2.

76 See above, page 9.

77 Productivity Commission, “Regulatory Institutions and Practices,” op. cit. 257.

78 See above page 36.

79 Above, page 9 and Roger Partridge and Amy Thomasson, “Who Guards the Guards?” op. cit. 30–31 and 78.

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The performance of commercial regulatory agencies affects everyone. Poor regulatory decision-making creates risk and uncertainty for business and impairs innovation and efficiency. The outcome is poorer productivity, which affects wages, and higher prices for consumers.

Our 2018 report, *Who Guards the Guards? Regulatory governance in New Zealand* used survey evidence to identify a litany of shortcomings with the performance of critical regulatory agencies, including the Reserve Bank of New Zealand and Commerce Commission. Conversely, it found that the Financial Markets Authority was performing very well. Based on international research, the report identified three critical factors affecting regulatory performance: internal governance, external monitoring, and leadership appointment processes. And it made recommendations for reform.

Four years later, this report reassesses the performance of New Zealand's commercial regulatory agencies.

Using survey evidence once again, it finds continued deficiencies in the performance of regulatory agencies generally. And it makes damning findings in relation to one of New Zealand's most important regulatory agencies: the Commerce Commission.

The report concludes by drawing lessons from the findings and recommends important reforms to New Zealand's regulatory governance structures.

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