

## DISTRACTING THE MASSES: CORPORATE CONVICTIONS AND THE LEGITIMISATION OF NEO-LIBERALISM

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*The public enforcement of corporate obligations appears to be inconsistent with the neo-liberal values of market freedom and deregulation otherwise privileged within corporations law. However, if neo-liberal discourse is viewed as a regime of truth, high profile corporate convictions – such as those following the mismanagement and catastrophic collapse of HIH Insurance – can be understood as a reinforcement mechanism legitimising the dominance of neo-liberalism not only by restoring public faith in the regulatory system but also by distracting the community's attention away from the harmful consequences of the ongoing privileging of neo-liberal values.*

Exec #1: Item six on the agenda: 'the meaning of life'. Now, uh, Harry, you've had some thoughts on this.

Exec #2: Yeah, I've had a team working on this over the past few weeks, and what we've come up with can be reduced to two fundamental concepts. One: People aren't wearing enough hats. Two: Matter is energy. In the universe there are many energy fields which we cannot normally perceive. Some energies have a spiritual source which act upon a person's soul. However, this 'soul' does not exist *ab initio* as orthodox Christianity teaches; it has to be brought into existence by a process of guided self-observation. However, this is rarely achieved owing to man's unique ability to be distracted from spiritual matters by everyday trivia.

Exec #3: What was that about hats again?

Exec #2: Oh, uh ... people aren't wearing enough.

Exec #1: Is this true?

Exec #4: Certainly. Hat sales have increased but not *pari passu*, as our research ...

Exec #3: [Interrupting] 'Not wearing enough'? Enough for what purpose?

Exec #5: Can I just ask, with reference to your second point, when you say souls don't develop because people become distracted ... [looking out window] ... Has anyone noticed that building there before?<sup>1</sup>

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<sup>1</sup> [Monty Python's] *The Meaning of Life*, Celandine Films (1983).

## I INTRODUCTION

The Australian Securities and Investments Commission (ASIC) is Australia's corporate and financial services regulator. Inter alia, it enforces compliance by corporations and directors with the *Corporations Act 2001* (Cth) and related legislation. According to its annual report,<sup>2</sup> ASIC in 2005–2006 spent \$102 million on enforcement activities<sup>3</sup> and concluded enforcement proceedings against 352 people and companies, 94 per cent of those successfully.<sup>4</sup> Legal proceedings by ASIC resulted in 230 civil orders and 27 criminal convictions, including the jailing of 17 individuals.<sup>5</sup> They also led to the banning of 44 people from being directors and 27 people from engaging in financial services.<sup>6</sup>

In 2005–2006, ASIC conducted an 'exceptional' number of high profile investigations. A high profile investigation is one that attracts significant mainstream media attention. In 2005–2006, these included the investigations into HIH Insurance, the NAB currency traders, Westpoint, One.Tel, James Hardie, Offset Alpine Printing, Sons of Gwalia and Project Wickenby.<sup>7</sup>

Under Australian law, the legal duties and obligations of corporations and directors are subject to both public enforcement (by ASIC) and private enforcement (by investors, employees and other stakeholders). Public enforcement of corporate obligations is far more common in Australia than elsewhere. This comprehensive public enforcement regime is justified as providing necessary protection against market failure, as acknowledging the fact that private parties are often unwilling to take action as a result of inequalities of information or bargaining power, and as encouraging stability and public confidence in the legal and financial regulatory system. This third justification is the starting point for the analysis conducted in this paper.

Corporate regulation is a disciplinary mechanism. It is – rather obviously – concerned explicitly with the regulation of corporations and directors. But given that the actions of corporate regulators such as ASIC are often reported in the media, and, more importantly, that most members of the community interact with corporations on a regular basis, corporate regulation also has significant disciplinary consequences for the wider community. Corporate regulation at least influences and

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<sup>2</sup> ASIC's 2005–2006 Annual Report was tabled in the Australian Federal Parliament on 31 October 2006: Australian Securities and Investments Commission (ASIC), 'Working for Australia: ASIC Annual Report 2005–06' (Press Release 06-378, 31 October 2006) <[http://www.asic.gov.au/asic/asic\\_pub.nsf/byheadline/06-378+Working+for+Australia%3A+ASIC+Annual+Report+2005-06?openDocument](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/06-378+Working+for+Australia%3A+ASIC+Annual+Report+2005-06?openDocument)> at 11 March 2007.

<sup>3</sup> Australian Securities and Investments Commission (ASIC), *ASIC Annual Report 2005–2006: Working for Australia: Consumers, Investors, Business and Markets* (2006), 14.

<sup>4</sup> ASIC, 'Working for Australia' press release, above n 2.

<sup>5</sup> ASIC, *Working for Australia: Consumers, Investors, Business and Markets*, above n 3, 13.

<sup>6</sup> *Ibid* 17.

<sup>7</sup> ASIC, 'Working for Australia' press release, above n 2.

often determines the community's perceptions, decisions and actions as far as they relate to corporations, corporate conduct and the regulatory system.

This disciplinary effect is neither politically nor ideologically neutral. Rather, the present regime of corporations law privileges and legitimates a particular discourse: *neo-liberalism*. The core values of neo-liberalism include individualism, market freedom and deregulation. Neo-liberalism is associated with the notion of a minimalist, or at least non-interventionist, government. A comprehensive regime of public enforcement of corporate obligations thus appears to be at odds with neo-liberal discourse. How can this apparent inconsistency be explained? One such explanation is as follows: To the extent that neo-liberal discourse encourages trust in individuals and the market to do the right thing, corporate misconduct represents a failure by or a defect within neo-liberalism. The investigation, prosecution and conviction of individuals who have engaged in corporate misconduct represents a justified intervention by the state into the operation of the free market in order to correct that failure or defect. In other words, the public enforcement of corporate obligations is a mechanism by which a neutral state balances neo-liberal individualism with a communitarian ethic of justice and fair play.

This paper offers an alternative explanation. It analyses neo-liberalism as a regime of truth seeking legitimation and propagation. It argues that corporate misconduct is a necessary and inevitable consequence of the privileging of neo-liberal values, and that the public enforcement of corporate obligations is a mechanism by which neo-liberalism's ideological dominance of the discursive field of corporate regulation is reinforced. The paper is not a criticism of neo-liberalism per se or of its dominance; it is an examination of one of the ways in which that dominance is perpetuated despite neo-liberalism's harmful consequences.

The first part of this paper is a reminder of the harmful consequences of corporate misconduct. The balance of the paper is a presentation of the following argument:

- (1) Legal regulation is an ideologically biased disciplinary mechanism.
- (2) Corporate regulation is a disciplinary mechanism dominated by neo-liberalism.
- (3) The dominance of neo-liberalism has both positive and negative consequences.
- (4) Resistance could undermine the dominance of neo-liberalism, but the community is distracted and appeased.

This argument is constructed within a primarily Foucauldian theoretical framework, and applies Foucault's notions of discourse, truth, power and subjectivity to corporate regulation.<sup>8</sup>

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<sup>8</sup> For other examples of the application of Foucauldian theory to an analysis of law, see Alan Hunt, 'Foucault's Expulsion of Law: Towards a Retrieval' (1992) 17 *Law and Social Inquiry* 1; Alan Hunt and Gary Wickham, *Foucault and Law: Towards a Sociology of Law as Governance* (1994); Hugh Baxter, 'Bringing Foucault into Law and Law into Foucault' (1995)

## II CASE STUDY

In March 2001, HIH Insurance Ltd, Australia's second largest insurance company, declared itself insolvent and went into provisional liquidation with debts of \$5.3 billion.<sup>9</sup> In a period of catastrophic corporate collapses in Australia,<sup>10</sup> the collapse of HIH is usually acknowledged as the worst.<sup>11</sup>

The consequences of the HIH collapse were widespread and devastating. Those directly affected included: the many seriously ill and disabled Australians who no longer received payments under their income protection or medical insurance policies; the holders of insurance policies who suddenly found themselves uninsured for claims made by or against them; the retirees who had invested their superannuation or their life savings in HIH shares; and, of course, the numerous employees of HIH who lost their jobs because of the collapse. Many non-profit organisations, including charities and sporting clubs, were forced to shut down because they were unable to find or afford alternative public liability insurance. HIH was one of Australia's biggest home-building market insurers and its collapse left home owners without compulsory home warranty insurance, the owners of residential dwellings without cover for defective building work, and builders unable to operate because they could not obtain builders' warranty insurance. The cost to the building and construction industry was so substantial that state governments were forced to spend millions of dollars of public money to prevent further damage to the industry. The failure of HIH also contributed to what became known in Australia as the 'public liability insurance crisis', which in turn led to comprehensive and controversial legislative reform of Australian tort law: caps on damages awards were introduced, limitation periods were contracted, and greater proportionate liability by victims was implemented. And the HIH collapse shook

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48 *Stanford Law Review* 449; Douglas Litowitz, 'Foucault on Law: Modernity as Negative Utopia' (1995) 21 *Queens Law Journal* 1; Anthony Beck, 'Foucault and Law: The Collapse of Law's Empire' (1996) 16 *Oxford Journal of Legal Studies* 489; Victor Tadros, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) 18 *Oxford Journal of Legal Studies* 75; Christine Bateup, 'Power v the State: Some Cultural Foucauldian Reflections on Administrative Law, Corporatisation and Privatisation' (1999) 3 *Southern Cross University Law Review*; Gary Wickham and George Pavlich (eds), *Rethinking Law, Society and Governance: Foucault's Bequest* (1999).

<sup>9</sup> Regarding the HIH collapse generally, see CCH, *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (2001), HIH Royal Commission, *The Failure of HIH Insurance – vol 1 – a Corporate Collapse and Its Lessons* (2003), Mark Westfield, *HIH: The Inside Story of Australia's Biggest Corporate Collapse* (2003).

<sup>10</sup> Other Australian corporate collapses which occurred in the same period include Harris Scarfe, One.Tel, Pasmenco, Centaur and Ansett.

<sup>11</sup> Jean J Du Plessis, 'Reverberations after the HIH and Other Recent Australian Corporate Collapses' (2003) 15 *Australian Journal of Corporate Law* 225, 225. See also T Harris, 'The Everyday Family Left out in the Cold', *The Weekend Australian*, 19–20 April 2003, J Sexton and D Brearly, 'Real Obscenity in the Fate of Victims', *The Australian*, 17 April 2003, Trevor Sykes, 'Cocktail of Greed, Folly and Incompetence', *The Australian Financial Review*, 14 January 2003.

public confidence in the insurance industry and in the integrity of the market system itself.<sup>12</sup>

In June 2001, the Prime Minister announced that a Royal Commission would be appointed to investigate the HIH collapse. The Royal Commission was directed to focus specifically on how the actions of HIH's directors and officers contributed to the failure of HIH or involved undesirable corporate governance practices.<sup>13</sup> The Royal Commission found that there were 56 breaches of the *Corporations Act 2001* (Cth) and other legislation that should be referred to ASIC for further investigation.<sup>14</sup> There was considerable public expectation that some of the HIH directors would go to jail.<sup>15</sup>

Following its investigation, ASIC commenced proceedings against a number of HIH directors. In March 2002, the court found that one of the directors, Rodney Adler, had contravened a number of civil penalty provisions of the *Corporations Act*.<sup>16</sup> In May 2002, the court ordered that Adler be disqualified from being a director for a period of 20 years and that he and his own company Adler Corporation each pay pecuniary penalties of \$450 000. Adler and his fellow director and former CEO Ray Williams were also ordered to pay aggregate compensation of approximately \$8 million to HIH.<sup>17</sup>

In February 2005, Adler pleaded guilty to four criminal charges: two counts of disseminating information knowing it was false in a material particular and which was likely to induce the purchase by other persons of shares in HIH,<sup>18</sup> one count of obtaining money by false or misleading statements,<sup>19</sup> and one count of being intentionally dishonest and failing to discharge his duties as a director of HIH in good faith and in the best interests of that company.<sup>20</sup> In April 2005, Adler was

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<sup>12</sup> HIH Royal Commission, *The Failure of HIH Insurance*, above n 9, xiii-lxv. See also Andrew White, 'Flow on Effects of Recent Collapses' in CCH (ed), *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (2001).

<sup>13</sup> Du Plessis, above n 11, 239.

<sup>14</sup> HIH Royal Commission, *The Failure of HIH Insurance*, above n 9.

<sup>15</sup> Monica Videnieks, 'Howard Condemns 'Corporate Excess'', *The Australian*, 7 August 2002, J Durie, 'Key Lessons to Explore', *Australian Financial Review*, 5 February 2003, T Harris and A White, 'Threat of Criminal Charges Increases', *The Australian*, 15 January 2003, J Morrow, 'Let Big-End Punters Take the Fall', *The Australian*, 15 January 2003, M Priest, 'Long Hard Road before Any Charges Will Be Laid', *Australian Financial Review*, 14 January 2003, Andrew White, 'Paying for Inexperience', *The Weekend Australian*, 18–19 January 2003.

<sup>16</sup> *ASIC v Adler* (2002) 41 ACSR 72. The court found that Adler had engaged in prohibited related party transactions (ss 208, 209, 1317E(1)(b)), directed the company to provide financial assistance to buy its own shares (ss 260A, 260D, 1317E(1)(c)), breached his duty of care and diligence (ss 180, 1317E(1)(a)), breached his duty of good faith (ss 181, 1317E(1)(a)), misused his position to gain advantage for himself or another or to cause detriment to the corporation (ss 182, 1317E(1)(a)), and improperly used information (ss 183, 1317E(1)(a)).

<sup>17</sup> *ASIC v Adler* (2002) 42 ACSR 80.

<sup>18</sup> Contrary to s 999 of the *Corporations Act 2001* (Cth).

<sup>19</sup> Contrary to s 178BB of the *Crimes Act 1900* (NSW).

<sup>20</sup> Contrary to s 184(1) of the *Corporations Act 2001* (Cth).

sentenced to four and a half years jail, with a non-parole period of two and a half years.<sup>21</sup>

Rodney Adler was only the first HIH director to be convicted. Ray Williams received a similar sentence after pleading guilty to three criminal charges:<sup>22</sup> recklessly failing to exercise his powers and discharge his director's duties for a proper purpose,<sup>23</sup> misleading investors in an annual report by overstating the HIH profit,<sup>24</sup> and omitting an important piece of information about the company in an attempt to raise money from the public.<sup>25</sup> Terry Cassidy, former Managing Director, was sentenced in April 2005 to fifteen months imprisonment in relation to three criminal charges.<sup>26</sup> In October 2005 Sydney businessman Bradley Cooper was found guilty of six charges of corruptly giving a cash benefit to influence an agent of HIH<sup>27</sup> and seven charges of publishing false or misleading statements with intent to obtain a financial advantage.<sup>28</sup> He was sentenced in June 2006 to eight years jail.<sup>29</sup> In August 2006 charges were laid against Chief Financial Officer Dominic Fodera and in September 2006 against Company Secretary Frederick Lo.<sup>30</sup> In November 2006 Assistant Company Secretary Robert Kelly was sentenced to 500 hours community service.<sup>31</sup>

The high profile prosecution and conviction of the HIH directors and officers has been widely praised within the Australian media.<sup>32</sup> In media coverage of the HIH collapse, Rodney Adler, for example, was often portrayed as a con-man and a corporate criminal. According to one journalist:

As thugs go, the junkie who sticks up a service station with a knife is a marginally less offensive character. Unlike your white collar criminals, what you see is what you get and, by and large, fewer people get hurt.<sup>33</sup>

The successful prosecution of the HIH directors and officers – typically rich, privileged and powerful businessmen – appears, at first glance, to be a victory by the state acting on behalf of an outraged community in relation to a particularly

<sup>21</sup> *R v Adler* [2005] NSWSC 274.

<sup>22</sup> *R v Williams* [2005] NSWSC 315.

<sup>23</sup> Contrary to s 184(1) of the *Corporations Act 2001* (Cth).

<sup>24</sup> Contrary to s 1308(2) of the *Corporations Act 2001* (Cth).

<sup>25</sup> Contrary to s 996(1) of the *Corporations Act 2001* (Cth).

<sup>26</sup> *R v Cassidy* [2005] NSWSC 410.

<sup>27</sup> Contrary to s 249B of the *Crimes Act 1900* (NSW).

<sup>28</sup> Contrary to s 178BB of the *Crimes Act 1900* (NSW).

<sup>29</sup> *R v Cooper* [2006] NSWSC 609.

<sup>30</sup> ASIC, *Working for Australia: Consumers, Investors, Business and Markets*, above n 3, 18.

<sup>31</sup> *R v Kelly* [2006] NSWSC 1142.

<sup>32</sup> See, for example, Australian Associated Press (AAP), 'The Brilliant Burnout of Rocket Rodney', *Sydney Morning Herald*, 19 February 2005; Mike Carlton, 'Demeaning the Meaning', *Sydney Morning Herald*, 19 February 2005. Some journalist were more sympathetic: Annette Sharp and Alex Mitchell, 'The Terrible Toll on My Family: Adler', *Sydney Morning Herald*, 20 February 2005.

<sup>33</sup> Mike Carlton, 'Demeaning the Meaning', above n 32.

destructive instance of corporate misconduct. It appears to reaffirm the rule of law: all are equal before the law and, whether rich or poor, those who break the law will be punished. This paper offers an alternative, somewhat less optimistic, reading of the events. Rather than an instance of corporate regulation restraining greed and punishing dishonesty, the successful prosecution of corporate criminals in fact serves to reinforce neo-liberalism's dominance of the regulatory system by restoring public faith in that system and, more insidiously, by distracting public attention away from the failings of neo-liberalism and from neo-liberalism's alternatives.

### III ARGUMENT

*Legal regulation is an ideologically biased disciplinary mechanism.*

Postmodern jurisprudence is characterised by profound scepticism about the existence of 'the Law' as an abstract, monolithic and apolitical system of legal regulation. Rather than an abstract system, it prefers to view law in terms of particular events and relationships in particular social contexts.<sup>34</sup> Rather than monolithic, it prefers to view law as pluralistic and fragmented: not as a vertically autonomous source of authority which arbitrates down among human beings, but as a horizontal collage of disjointed agencies of regulation.<sup>35</sup> And rather than apolitical, law and legal regulation are viewed as inescapably political. Legal regulation is a strategy of power, a disciplinary mechanism. Social life is pluralist, radically particular and potentially chaotic, and legal regulation, when viewed as a collective social phenomenon, is an attempt to impose order upon this chaos. It is one of the means by which the community regulates or disciplines itself. (It is certainly not the only means; law forms only one part of a continuum of disciplinary mechanisms which also includes education, bureaucracy and the media.)<sup>36</sup> Looking more closely at the form of order imposed by legal regulation, it is seen to be neither ideologically neutral nor uniform. Rather, legal regulation is an 'ideologically empty' mechanism awaiting deployment, and numerous discourses compete to deploy the strategy of law in order to be recognised and accepted as a framework for the establishment of truth.

The word 'discourse' is being used here in a Foucauldian sense. Discourses are frameworks for perceiving reality, stories for making sense of experience, narratives that offer both the means for comprehending the world and the principles guiding decisions and actions. Discourses do not distort truth, they are the

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<sup>34</sup> Gary Wickham, 'Cautious Postmodernism and Legal Truths' (1989) 7 *Law in Context* 2.

<sup>35</sup> Anthony Carty and Jane Mair, 'Some Post-Modern Perspectives on Law and Society' (1990) 17 *Journal of Law and Society* 395.

<sup>36</sup> See Hunt and Wickham, above n 8, 57. As Foucault insisted: 'I do not mean to say that law fades into the background or that institutions of justice tend to disappear, but rather that the law operates more and more as a norm, and the judicial institution is increasingly incorporated into a continuum of apparatuses (medical, administrative, and so on) whose functions are for the most part regulatory.' Michel Foucault, *The History of Sexuality vol 1: The Will to Knowledge* ((Robert Hurley trans, first published 1976, 1998 ed), 144.

frameworks within which truth is constructed and practices are legitimated. Examples of discourses include religious discourses, moral and ethical discourses, discourses of justice, logical positivism, environmentalism, socialism, feminism, capitalism, liberalism, and so on. These discourses are sometimes discrete, and sometimes overlap; sometimes they cooperate and sometimes they compete for acceptance. Some speak directly to the nature of law and governance, others do so indirectly. Postmodernists are sceptical of claims made about the objectivity or universality of any discourse: they demonstrate an 'incredulity towards meta-narratives'.<sup>37</sup> They recognise that there is no discourse that is objectively true and ideologically neutral, and prefer to describe their experiences in terms of whatever discourse is considered appropriate at the time.

The multiplicity of discourses at play within social life compete for legitimation. They jostle for dominance, some, such as scientific reasoning or economic rationalism, consistently successful, many others less so. Human experience is characterised by a perpetual competition between conflicting discourses. All discourses posit themselves as true and competing discourses as false. All discourses function by favouring a particular perspective on the world at the expense of others, and by privileging some members of the community at the expense of others. All discourses are, in that sense, governmental.

Those discourses capable of informing legal regulation achieve an advantage in this perpetual competition. Association with legal regulation is a way to encourage compliance with the discourse, to respect it, and to accept it. Legal regulation is not, then, ideologically neutral. It is intimately connected to, and largely shaped by, the ideological. Legal regulation is not an apolitical reflection of universal truths, and the rule of law does not free the community from what Hobbes called the constant 'war of all against all'. Rather, the 'war of all against all' continues today, and legal regulation is a strategy – one of many – deployed in the endless battle of competing discourses and the perpetual contest for power and dominance between various social groups. As Foucault put it:

Humanity does not gradually progress from combat to combat until it arrives at universal reciprocity, where the rule of law finally replaces warfare; humanity installs each of its violences in a system of rules and thus proceeds from domination to domination.<sup>38</sup>

By this account it is senseless to talk about whether a particular form of legal regulation is right or wrong, or just or unjust. The relevant questions are how the regulatory scheme operates as an ideologically biased disciplinary mechanism, and in whose interests.

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<sup>37</sup> Jean-François Lyotard, *The Postmodern Condition: A Report on Knowledge* (Geoff Bennington and Brian Massumi trans, first published 1979, 1984 ed).

<sup>38</sup> Michel Foucault, 'Nietzsche, Genealogy, History' in Paul Rabinow (ed), *The Foucault Reader* (1984), 85.

There are three further points to be made about this theoretical framework. Firstly, legal regulation, in a general sense, can be categorised as both partisan and non-partisan. It is non-partisan in that no single discourse has an automatic entitlement to deployment of law as a strategy of power. In the past, religious discourses have been legitimated and propagated through an association with the law and legal regulation. Today advocates of consumerism, environmentalism and even feminism can take advantage of the strategy of legal regulation in order to achieve legitimation and propagation. On the other hand, legal regulation is partisan in the sense that some discourses are better suited to the deployment of law as a strategy of power than others. Discourses that already occupy a position of dominance within the community as a result of historical and environmental contingencies – capitalism, patriotism, Christianity – are better able to take advantage of the strategy. Other discourses, historically marginalised – such as Marxism and Islam – are less likely to be able to successfully deploy legal regulation directly.<sup>39</sup>

Secondly, discourses are both the subject and the object of legal regulation. They are the subject of legal regulation to the extent that a particular form of legal regulation legitimates and propagates that discourse. They are the object of legal regulation to the extent that a particular form of legal regulation is imposed upon the discourse and its advocates.

Finally, the notion of discourse adopted in this paper is a non-subjective one. Discourses are not deliberately created and manipulated by individuals, although ‘self interest’ is certainly a relevant contingency in assessing both the imposition and the effect of legal regulation. A discourse may privilege or favour certain individuals, and those individuals may appear to advocate a discourse and to cooperate willingly in the achievement of ideological objectives, but the discourse is not an exercise of power *by* those individuals. As Foucault insisted,<sup>40</sup> the individual is not the point of origin of power.<sup>41</sup> The success or otherwise of particular discourses may appear to be the result of the decisions and actions of certain individuals but those decisions and actions are themselves the result of the operation of discourse within the subjectivity of the individual. Even the nature and existence of free will is itself a discursive formation: it is a notion that is created by and only valid within certain discursive frameworks such as liberalism, and within the context of other discourses it is either non-existent or meaningless. This is not a *denial* of the existence of free will: while what most of the time are taken to be free

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<sup>39</sup> Although they may be able to take advantage of the ability of liberal discourse to access the law in their efforts to achieve legitimacy within the community.

<sup>40</sup> At least in the earlier part of his career, Eric Paras, *Foucault 2.0: Beyond Power and Knowledge* (2006).

<sup>41</sup> Foucault wrote: ‘If there is one approach that I do reject [it is the one] which gives absolute priority to the observing subject, which attributes a constituent role to an act, which places its own point of view at the origin of all historicity – which, in short, leads to a transcendental consciousness. It seems to me that the historical analysis of ... discourse, in the last resort, be subject, not to a theory of the knowing subject, but rather to a theory of discursive practice.’ Michel Foucault, *The Birth of the Clinic: An Archaeology of Medical Perception* (A M Sheridan Smith trans, first published 1963, 1973 ed), 172.

choices are not really free at all, free will can arise in relatively particular circumstances. Those circumstances include the opportunity to reject one discourse in favour of another. In that space between discourses, freedom is possible. This point is addressed in more detail below.

*Corporate regulation is a disciplinary mechanism dominated by neo-liberalism.*

Corporate regulation, as with any form of legal regulation, is a disciplinary mechanism which legitimates and propagates discourse. Corporate laws, such as the *Corporations Act 2001* (Cth), are made by the legislature, and applied and enforced by the executive, but the executive and the legislature do not act with an apolitical agenda. Members of the executive and of the legislature are pressured by various lobby groups, media representations and perceived public opinion, and create law and implement change in response to those pressures. All lobby groups wield power and exercise influence to a greater or lesser degree, but some wield more power than others, and in an age when power frequently manifests as access to financial and economic resources, it is those who favour, and are favoured by, neo-liberal discourse that seem to have the greatest influence.<sup>42</sup>

Neo-liberalism, also known as ‘market liberalism’, is a discourse concerned primarily with the nature of the governance of those engaged in commerce. It emphasises the primacy of the individual and favours a minimal role for government. It recommends reliance on market forces to allocate resources. It is a capitalist discourse in that it is characterised by the framing of perception and experience and the making of judgements in terms of financial cost and financial benefits, of profit and loss. One must not, however, imagine neo-liberalism to be a monolithic enterprise, a singular conspiracy. Neo-liberalism is a coincidence of ambitions and strategies. It consists of a vast array of specific Acts, Regulations, policies, institutions, institutional practices, lobby groups, media representations, business decisions and social conversations, united by common advocacy of neo-liberal values: individualism, market freedom, deregulation, wealth maximisation and investor protection.

The privileging of neo-liberal values by Australian corporations law is readily apparent.<sup>43</sup> *Individualism* is an emphasis upon the importance of individual freedom and self-interest. In relation to corporate regulation the privileging of individualism is apparent, for example, in the separate legal personality doctrine. A corporation is an artificial legal person separate from its investors, directors and employees.<sup>44</sup> The company’s property belongs to it and its rights and liabilities are its own. A

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<sup>42</sup> Does the overall economic success of neo-liberalism’s advocates establish the superiority of the neo-liberal discourse? No, because success is being measured using neo-liberalism’s own criteria: financial abundance.

<sup>43</sup> John Orr, ‘Constraining Fatcats in Corporate Cathedrals: Neo-Liberalism, Corporate Law and Unreasonable Remuneration for Directors’ (2002) 6 *Southern Cross University Law Review* 204, 216–217.

<sup>44</sup> *Salomon v Salomon & Co Ltd* [1897] AC 22.

corporation can own property in its own name, enter into contracts in its own name, and sue and be sued in its own name; it is accorded by the law a capacity similar to that of an individual.<sup>45</sup> Even when a corporation is a member of a corporate group, it is treated by the law as first and foremost a separate individual.<sup>46</sup>

The privileging of self-interest is apparent in the legal obligation upon directors to act in the best interests of the corporation,<sup>47</sup> which has been interpreted as an obligation to act in the best interests of the corporation as a commercial entity.<sup>48</sup> Since the directors are the directing mind and will of the corporation, the law effectively obliges the corporation to act in its own best commercial interests.

*Market freedom* is the notion that an absence of regulations, tariffs and other artificial restrictions upon trade is desirable because an unregulated market is more efficient than a regulated one. An efficient market encourages a greater number of transactions, and this is desirable because trade is itself inherently desirable: the more transactions that take place, the better. Trade is most likely to be encouraged when the market is left to its own devices and governments refrain from interfering in private transactions. Corporations law includes a number of rules that in practice encourage transactions by allowing individuals to trade with relatively few or no restrictions. The provisions relating to limited liability,<sup>49</sup> for example, encourage investors to engage in trade through the corporation with little financial risk or responsibility. The provisions relating to perpetual succession<sup>50</sup> facilitate the buying and selling of businesses. The indoor management rule<sup>51</sup> – the rule that those trading with a corporation are permitted to assume that internal procedural requirements of the corporation have been complied with – encourages individuals to trade *with* corporations. The notion of corporate agency<sup>52</sup> facilitates trade *by* corporations.

*Deregulation* is closely related to the notion of market freedom: trade is more likely to be encouraged if the existing rules regulating traders are progressively relaxed or abolished. Again, this would permit the market to better regulate itself, which, according to advocates of the notion, would be more efficient and ultimately beneficial for all. Deregulation informed, for example, the introduction of the statutory business judgement rule in March 2000: the *Corporations Act* now provides that in certain circumstances a director will be taken to have complied with their statutory duty of care, even if they have made a poor decision which has impacted the corporation negatively.<sup>53</sup> According to the Explanatory Memorandum which accompanied the introduction of the statutory rule:

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<sup>45</sup> See *Corporations Act 2001* (Cth) s 124(1).

<sup>46</sup> Pamela Hanrahan et al., *Commercial Applications of Company Law* (2004), 72.

<sup>47</sup> *Corporations Act 2001* (Cth) s 181(1).

<sup>48</sup> *Darvall v North Sydney Brick and Tile Co Ltd* (1987) 6 ACLC 154.

<sup>49</sup> *Corporations Act 2001* (Cth) ss 9, 112, 148(2), 149, 156.

<sup>50</sup> *Corporations Act 2001* (Cth), Part 1.5 Small Business Guide.

<sup>51</sup> *Corporations Act 2001* (Cth) ss 128-130.

<sup>52</sup> *Corporations Act 2001* (Cth) ss 126-127.

<sup>53</sup> *Corporations Act 2001* (Cth) s180(2).

While it is accepted that directors should be subject to a high level of accountability, a failure to expressly acknowledge that directors should not be liable for decisions made in good faith and with due care, may lead to failure by the company and its directors to take advantage of opportunities that involve responsible risk taking.<sup>54</sup>

Deregulation is also embodied in the provisions deeming the corporate constitution to be a statutory contract between the corporation, the directors and the investors.<sup>55</sup> This statutory contract privileges the directors;<sup>56</sup> it is 'designed to prevent outside interference in most forms of substantive decision making by corporate boards of directors'.<sup>57</sup> The stock market crash of 1987 prompted the enactment of a range of regulations designed to restrict director discretion, but since the mid-1990s many of these regulations have been removed in corporate law simplification programs.<sup>58</sup>

*Wealth maximisation* is the central focus of corporations law. The modern corporation is, and always has been, a profit making machine. The 'corporations aggregate', which emerged in England during the middle ages, were created to facilitate the holding of and dealing with property by groups of people for financial gain. Incorporated trade guilds and merchant associations were usually the beneficiaries of some special right or entitlement conferred by the Crown, such as a monopoly or the right to control the operation of a particular trade. In the seventeenth century incorporation was granted by Royal Charter to merchant venturers, conferring upon them the right to conduct trade in a particular region.<sup>59</sup> The corporation has always been a way for an individual or group of individuals to protect and increase their personal wealth.

*Investor protection* is one of the explicit justifications for corporate regulation and the public enforcement of corporate obligations in the first place. Investors need protection because they are obliged to trust directors to act in their best interests, even though there are many instances where the interests of directors and of investors diverge. The duty to act in the best interests of the corporation has been interpreted as a responsibility to act in the best interest of investors.<sup>60</sup> Directors are legally obliged to place the interests – the financial interests – of investors ahead of the interests of employees, customers and the community.<sup>61</sup>

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<sup>54</sup> Explanatory Memorandum, Corporate Law Economic Reform Program Bill 1998 (Cth), para 6.3.

<sup>55</sup> *Corporations Act 2001* (Cth) ss 136, 140.

<sup>56</sup> See *Corporations Act 2001* (Cth) ss 134, 198A.

<sup>57</sup> Charles M Yablon, 'Overcompensating: The Corporate Lawyer and Executive Pay' (1992) 92 *Columbia Law Review* 1867, 1882.

<sup>58</sup> Henry Bosch, 'Introduction' in CCH (ed), *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (2001), 2.

<sup>59</sup> Pamela Hanrahan et al., above n 46, 13.

<sup>60</sup> See, for example, *Greenhalgh v Arderne Cinemas Ltd* [1951] ch 286.

<sup>61</sup> *Parke v Daily News Ltd* [1962] ch 927. In some circumstances the *Corporations Act* requires directors to consider the interests of employees. Part 5.8A, for example, prohibits directors from entering into an agreement or transaction with the intention of preventing employees receiving their entitlements, s 596AB.

This dominance of corporate regulation by neo-liberalism is a consequence of persistent pressure upon the legislature and the executive from powerful business groups, groups which benefit from the freedom from regulatory intervention accorded by neo-liberal policies.<sup>62</sup> Neo-liberalism's dominance is not unique to corporate regulation. In recent years governments in Australia and elsewhere have embraced neo-liberalism at the expense of social welfare policies in a wide range of contexts.<sup>63</sup>

Neo-liberal discourse has become normalised. After decades of dominance, neo-liberalism now determines what can and cannot be said about corporate regulation. It has become difficult if not impossible to talk about corporations and their governance other than in terms of profit and loss, deregulation and investor protection. Nearly all of the literature on Australian corporate law theory, for example, is framed within a neo-liberal worldview.<sup>64</sup> Attempts to communicate insights and perspectives upon corporate regulation formed within the context of alternative discourses fall upon deaf ears unless translated into neo-liberal language. Claims about the environment, about obligations to consumers and employees, and about corporate social responsibility generally have to be reframed into neo-liberal language before they can be even considered let alone taken seriously by corporate players.

Neo-liberalism's dominance is not, however, a monopoly. Ideological dominance is inevitably contested. And the discursive field of corporate regulation does not consist of a simple competition between a dominant discourse – neo-liberalism – and a resistant discourse – 'anti-neo-liberalism'. As Foucault insisted:

[W]e must not imagine a world of discourse divided between the accepted discourse and excluded discourse, or between the dominant discourse and the dominated one; but as a multiplicity of discursive elements that can come into play in various strategies.<sup>65</sup>

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<sup>62</sup> Margaret Thornton, 'Neo-Liberalism, Discrimination and the Politics of Resentment' (1999) *Law in Context* 8, 9–11; David Wishart, 'The Absent Discussion in Australian Corporations Law' (1997) 15 *Law in Context* 142.

<sup>63</sup> Orr, above n 43, 214.

<sup>64</sup> Stephen Bottomley, 'Taking Corporations Seriously: Some Considerations for Corporate Regulation' (1990) 19 *Federal Law Review* 203, 204. Critical theory 'rarely "intrudes" into legal writing about company law ... The effect is that modernism lingers on and the ideas of normative legal thought still prevail': Neil Andrews, 'What Would Sir Samuel Griffith Have Said? Postmodernism in the 1990s Company Law Classroom' (1998) 5 *E-Law: Murdoch University Electronic Journal of Law*, para 35. See also Neil Andrews, 'Wormes in the Entrayles: The Corporate Citizen in Law?' (1998) 5 *E-Law: Murdoch University Electronic Journal of Law*; Neil Andrews, 'Bad Company? The Corporate Form in an Uncertain Law' (1998) 9 *Australian Journal of Corporate Law* 39; M Bradley et al., 'The Purposes and Accountability of the Corporation in Contemporary Society: Corporate Governance at a Crossroads' (1999) 62 *Law and Contemporary Problems* 9, 11.

<sup>65</sup> Foucault, *The Will to Knowledge*, above n 36, 100.

Within the discursive field of corporate regulation, numerous discourses interact and compete for dominance, with varying degrees of success: consumerism, environmentalism, Marxism, various moral discourses. None of these, however, dominate corporate regulation to the extent of neo-liberalism.

Unlike discourses such as feminism or environmentalism, neo-liberalism is a discourse concerned explicitly with governance. Unlike other discourses of governance, such as authoritarianism or interventionism, neo-liberalism advocates a dispersal of governance. The regulator relies upon the rationality of the objects of regulation to lead them to regulate themselves, with only minimal intervention required. Foucault himself argued that liberalism represents the colonisation of reason of state by the discourse of economics.<sup>66</sup> To govern according to the dictates of liberalism demands that one think not in terms of the administrative state but in terms of civil society. It demands that a nation's territory and resources be managed not in the interests of the ruler but rather in the collective interests of the ruled. Finally, it demands the recognition of a new kind of political subjectivity: the juridical subject in the administrative state obeys a different logic to that of the economic subject within civil society.

Neo-liberalism, like liberalism, as a style of governance relies more upon ideological commitment by the subject than upon direct coercion by the state. An understanding of neo-liberalism's ongoing dominance thus requires an examination of the ways in which, and the reasons why, subjects apparently choose to accept neo-liberalism's dominance and participate in its propagation.

*The dominance of neo-liberalism has both positive and negative consequences.*

Neo-liberal policies explicitly favour investors. The *Corporations Act* and the common law oblige directors to prioritise the financial interests of the corporation at the expense of the interests of their employees, customers and community. This benefits the corporation itself in financial terms, which in turn provides financial benefits to the corporation's investors in terms of increased returns and improved share value. Investors also benefit from the neo-liberal emphasis upon wealth maximisation and investor protection. However, investors can be disadvantaged by the emphasis upon deregulation and a corresponding lack of constraints upon self-dealing directors.

To the extent that free market policies encourage competition, and competition generally leads to lower prices and better value for money, neo-liberalism benefits consumers. On the other hand, deregulation creates more opportunities for price fixing, the establishment of monopolies and other anti-competitive practices, all of which disadvantage customers. In any event, the focus upon lower prices and other financial benefits assumes the validity of the economic rationalist notion that greater wealth and the consequent ability to *consume more* is beneficial. This notion

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<sup>66</sup> Paras, above n 40, 104.

is so entrenched in contemporary common sense that it is difficult to step back and question it, but is it not possible that wellbeing – in the general sense of the absence of suffering – is inversely related to an ability to consume, or is not directly related to consumer choice or purchasing power at all? This is a point that has been made repeatedly by consumerism's opponents.<sup>67</sup> Religious opponents claim that consumerism is immoral, and interferes with the relationship between the human and the divine. Political opponents claim that rampant consumerism contributes to crime, war, and widespread social malaise.

The principal beneficiaries of neo-liberalism's ideological dominance appear to be the directors themselves. A lack of close regulation and the legislative bias in favour of boards at the expense of investors permits company directors to pay themselves generous yet legally legitimate salaries.<sup>68</sup> It also permits some directors to engage in transactions that are not necessarily beneficial to the corporation and its investors, but are beneficial to the directors themselves. It is not claimed that directors have engineered neo-liberalism's dominance for their own advantage. Consistent with the non-subjective position explained earlier, the claim is that neo-liberalism ensures its propagative success by encouraging, protecting and rewarding those best able to use their social and financial influence to encourage others to embrace neo-liberalism: company directors.

The privileging within corporate regulation of neo-liberal values, such as individualism, deregulation and wealth maximisation, allows, in fact encourages and rewards, a degree of self dealing by corporate players. Neo-liberal corporate regulation constructs a particular subject position, that of the wealth-maximising, individualistic entrepreneur: directors are encouraged to prioritise the goal of wealth maximisation, and to conceive of themselves as independent individuals rather than as members of a community. While the apparent intent of legislators is for directors to apply these values to the corporation it is inevitable that some directors will apply these values to themselves, and seek to maximise their own wealth and do so independently rather than as a member of the corporate community. There is a fine line between the courageous and deservedly rewarded corporate hero and the reckless and self-dealing corporate villain. In fact, depending upon the circumstances, the same conduct and the same person could be allocated to either

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<sup>67</sup> Some of the more notable opponents of consumerism include Karl Marx, Guy Debord, Thorstein Veblen and Naomi Klein.

<sup>68</sup> This is not a recent development: 'The more usual and accepted conclusion from the available evidence is that shareholders as such have lost all genuine control over the affairs of "their" companies. The board of directors, or management as a whole, is in a much better position to dominate the affairs of the company both on a day to day basis, as is their duty, and also in general meeting ... Management typically controls not only the conduct of the meetings but the content of the various resolutions, and in addition is generally in control of the proxy voting system, despite the various attempts, both in Britain, and more especially in America, to ensure that the proxy system gives genuine voting power to the mass of shareholders who cannot be expected to attend, nor could be physically accommodated at company meetings. For practical purposes the management of any large public company may safely be regarded as a self-perpetuating oligarchy, largely free from effective pressures from their shareholders.' Tom Hadden, *Company Law and Capitalism* (1972), 131.

category. HIH's Ray Williams, for example, was in 1998 awarded an Order of Australia for personal and corporate contributions to medical and welfare organisations and an honorary Doctor of Laws for significant contributions to medical science.<sup>69</sup> Four years later he was being blamed for Australia's worst corporate collapse. As Clarke and Dean point out:

The salient characteristics of the major players in the companies that have failed are also present in the helmsmen and women of those that have not. For the most part they too are dominant personalities, draw more heavily on debt financing in boom times, live well, and have expensive homes, luxury cars and yachts. They also come in all shapes and sizes, operate networks of school and club chums, and frequently have affiliations with those engaged to undertake audits.<sup>70</sup>

Neo-liberal corporate regulation does more than encourage individualistic and wealth maximising entrepreneurs, it rewards and protects them. Directors of financially successful corporations are rewarded by being given the managerial freedom to determine their own working conditions and salaries. And even the directors of financially unsuccessful corporations are protected by the law from the consequences of their mismanagement. This might seem like a surprising claim given, for example, Rodney Adler's civil penalty of \$450 000 and obligation to contribute to an \$8 million compensation payment. But compare that to the debts of \$5.3 billion owed by HIH at the time of its collapse.

The conviction of Rodney Adler has been portrayed as an instance of the law being deployed by regulators acting on behalf of a concerned public and advancing moral discourses of honesty and social responsibility. And in fact, Rodney Adler himself saw his own conviction as being primarily about honesty and dishonesty. As he said in an interview shortly before being incarcerated, 'I was a company director of HIH and I lied and when you lie you deserve to be punished'.<sup>71</sup> However, the enforcement of director's duties is also consistent with the neo-liberal values of investor protection and wealth maximisation, and rather than a moral disruption of the neo-liberal project, state intervention is an important element of that project. In fact, when we consider the statements made by regulators and the judiciary at the time, it is clear that their concern was the preservation of the investors' financial interests and the upholding of the directors' fiduciary responsibilities to the company, rather than enforcing morality or achieving justice. In handing down Adler's sentence, Justice Dunford said:

The offences are serious and display an appalling lack of commercial morality ... Directors are not appointed to advance their own interests but to manage the company for the benefit of its shareholders to whom they owe fiduciary duties ... They were

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<sup>69</sup> Frank Clarke and Graeme Dean, 'Corporate Collapses Analysed' in CCH (ed), *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (2001), 77.

<sup>70</sup> Ibid 79.

<sup>71</sup> ABC Radio, 'Rodney Adler', Sunday Profile, 17 April 2005 <[http://www.abc.net.au/backyard/archive/2005\\_archive.htm](http://www.abc.net.au/backyard/archive/2005_archive.htm)> at 20 November 2008.

not stupid errors of judgement but deliberate lies, criminal and in breach of his fiduciary duties to HIH as a director.<sup>72</sup>

According to Jeffrey Lucy, Chairman of ASIC, following Adler's sentencing:

ASIC is fully satisfied and believes this sentence appropriately serves the public interest, and reflects the serious nature of the charges on which Mr Adler has been convicted. The custodial sentence handed to Mr Adler sends a clear message to corporate Australia that ASIC, the community and the Courts will not tolerate criminal behaviour against the interests of shareholders. Mr Adler was in a position of trust as a director of HIH but he put his own financial interests before the interests of HIH shareholders. The law is very clear, company directors must act honestly and in the best interests of shareholders. The sentence delivered today by Justice Dunford shows how the courts will deal with directors who fail to uphold their legal duty.<sup>73</sup>

Rodney Adler's conviction was *not*, contrary to community expectation and perception, punishment for the consequences of HIH's failure. As Justice Dunford emphasised:

[Adler] ... has not been charged or convicted of being a director of a large public company which went broke resulting in large losses to shareholders and creditors, including a large number of insurance claimants, whose claims could not be met and others such as building owners who could not get their work done or completed because insurance for buildings ceased to be available. As he has not been charged or convicted of any of those things, he cannot be sentenced or punished for them in these proceedings.<sup>74</sup>

The doctrines of separate legal personality and limited liability ensured that blame for the consequences of HIH's financial mismanagement was ultimately laid upon HIH itself, and since HIH was in liquidation, nobody could be punished. The enormous cost of the HIH collapse was borne by the community.

The inevitability of director recklessness and self dealing and of corporate collapses within a liberal or neo-liberal regulatory system has long been recognised. According to Clarke and Dean, 'spates of corporate failure and distress have been recurrent events since the creation of the modern corporation over 150 years ago'.<sup>75</sup> They go on to say:

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<sup>72</sup> *R v Rodney Stephen Adler* [2005] NSWSC 274 (14 April 2005).

<sup>73</sup> Australian Securities and Investments Commission, 'Rodney Adler Sentenced to Four-and-a-Half Years' Jail' (Press Release 05-91 24 March 2005) <[http://www.asic.gov.au/asic/asic\\_pub.nsf/byheadline/05-91+Rodney+Adler+sentenced+to+four-and-a-half+years'+jail?openDocument](http://www.asic.gov.au/asic/asic_pub.nsf/byheadline/05-91+Rodney+Adler+sentenced+to+four-and-a-half+years'+jail?openDocument)> at 23 May 2006.

<sup>74</sup> *R v Rodney Stephen Adler* [2005] NSWSC 274 (14 April 2005).

<sup>75</sup> Clarke and Dean, above n 69, 72. Bosch traces the pattern back even further: 'Ever since the South Sea Bubble burst in 1720 there have been periodic reminders that company collapses are a recurrent characteristic of capitalist economies. The dramatic creation of wealth associated with free enterprise has always been associated with risk; when human beings are strongly

Despite the brouhaha surrounding the recent collapses of HIH, One.Tel and Harris Scarfe, they are little more than replays of those earlier events in Australia's corporate history. Same scenarios, different actors ... Without any intention of lessening the economic and social significance of the failure of HIH and One.Tel, over-reaction to them tends to divert attention from the most important lessons to be learned from the successive waves of corporate distress – the repetitious evidence of systemic defects in the corporate regulatory system.<sup>76</sup>

Within contemporary society, the consequences of corporate failure have become ever more serious. Technological advances and the emergence of a global economy have produced larger corporations, and 'the bigger the company, the bigger the crash'.<sup>77</sup> More people than ever before are exposed to the consequences of corporate mismanagement and failure.

Advocates of neo-liberalism claim that a neo-liberal approach to the regulation of corporations and to legal regulation generally benefits most or even all members of the community.<sup>78</sup> Free markets yield the most efficient production, which in time generates the greatest collective prosperity. The privileging of the corporation as a separate legal entity and the application of free market mechanisms in a deregulated environment are the best means of achieving wealth. The wealth maximisation of corporations and investors is good for the general economy and, by extension, good for the community.<sup>79</sup>

This is 'trickle-down' theory, an economic model which has been largely discredited.<sup>80</sup> The neo-liberal claim that unregulated markets maximise wellbeing has been challenged on a number of accounts: it is based upon a misunderstanding of the dynamics of human motivation, and it assumes that everything has a market value. Even when considering the merits of neo-liberalism in purely economic terms, its claims are questionable; markets price many things incorrectly, which means that pure markets do not yield optimal economic outcomes.<sup>81</sup>

While there does appear to be evidence that the implementation of neo-liberal policies has led to improvements in productivity, consumer choice and material

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motivated by the hope of gain, success breeds confidence and tends to drive out caution; and when luck changes the chance of disaster is real'. Bosch, above n 58, 1.

<sup>76</sup> Clarke and Dean, above n 69, 74.

<sup>77</sup> Bosch, above n 58, 1.

<sup>78</sup> According to Harvey, neo-liberalism 'proposes that human well-being can best be advanced by liberating individual entrepreneurial freedoms and skills within an institutional framework characterized by strong private property rights, free markets and free trade.' David Harvey, *A Brief History of Neoliberalism* (2005) 2.

<sup>79</sup> Orr, above n 43, 217.

<sup>80</sup> According to economist Robert H Frank, for example, trickle down theory is 'supported neither by theory nor evidence.' Robert H Frank, 'In the Real World of Work and Wages, Trickle-down Theories Don't Hold Up', *New York Times*, 12 April 2007 <<http://www.nytimes.com/2007/04/12/business/12scene.html>> at 20 November 2008.

<sup>81</sup> Robert Kuttner, *Everything for Sale: The Virtues and Limits of Markets* (1997).

welfare in some locations, evidence from a wide range of contexts suggests that neo-liberalism has severe and in some respects systemic flaws in terms of delivering human security, social justice and democracy. Neo-liberalism has not fulfilled, and shows little sign of fulfilling, the goal of maximal wellbeing for all.<sup>82</sup> Compared to historical examples of planned economies, market economies do appear to have higher average incomes, but these incomes are unequally distributed. By facilitating wealth maximisation by the corporate elite, neo-liberalism exacerbates the existing social and economic inequalities within the community.

How is it, then, that despite the negative consequences of its dominance of corporate regulation, neo-liberalism continues to propagate so successfully?

*Resistance could undermine the dominance of neo-liberalism, but the community is distracted and appeased.*

As an expression of power, discourse is inevitably confronted by resistance, and in this regard neo-liberalism is no different to any other discourse.<sup>83</sup> And as an aggressive global discourse, neo-liberalism provokes aggressive global resistance. This resistance is not singular but plural. Foucault insisted:

[T]here is no single locus of great Refusal, no soul of revolt, source of all rebellions, or pure law of the revolutionary. Instead there is a plurality of resistances, each of them a special case; resistances that are possible, necessary, improbable; others that are spontaneous, savage, solitary, concerted, rampant or violent; still others that are quick to compromise, interested, or sacrificial ...<sup>84</sup>

Resistance to neo-liberalism takes a variety of forms: direct and explicit criticism of neo-liberal discourse; demands for closer regulation of the market and of corporations; calls for greater levels of government intervention in order to promote the interests of consumers, employees, and the disadvantaged; media criticism of the conduct of corporations and directors; criticism of directors' salaries; consumer boycotts; and, in some notable instances, public demonstrations, violence and rioting.

Such resistance to neo-liberalism threatens the freedom that corporations and directors presently enjoy, freedom that allows them to take risks in the interests of investors, but that also allows them to take advantage of opportunities in their own interests. While active resistance to neo-liberal policies occasionally receives media attention, actual participation in active resistance is limited to a vocal minority. However, if that vocal minority were to become a vocal majority, if anti-neo-liberal protestors made up a significant proportion of the electorate, or if government

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<sup>82</sup> United Nations Research Institute for Social Development, *The Sources of Neoliberal Globalisation* (2005).

<sup>83</sup> Foucault, *The Will to Knowledge*, above n 36, 94–5.

<sup>84</sup> *Ibid* 96.

adherence to neo-liberal values became an election issue, then the neo-liberal dominance of corporate regulation might be threatened.

Corporate collapses, such as that of HIH Insurance, and the consequent widespread impact upon the Australian community, are obvious examples of a negative consequence of the privileging of neo-liberal values within corporate regulation. Minimal government intervention into the affairs of HIH, and inadequate monitoring by the relevant regulatory authorities,<sup>85</sup> while consistent with the neo-liberal ideals of individualism and market freedom, allowed the HIH directors to make financial and operational decisions which were to no one's advantage but their own. The collapse of HIH contributed to the growing resentment on the part of many members of the community towards the apparently unrestrained exercise of corporate power. It could have focused the wider community's attention upon neo-liberalism's negative consequences, and led to the asking of critical questions about the inherent defects in neo-liberal faith in the market. It could have awakened the community to the possibility of overt resistance to neo-liberalism. But it didn't.

This is not because resistance to neo-liberalism has 'failed'. The Foucauldian position is that resistance is neither successful nor unsuccessful; resistance to any discourse is inevitable, and the more fruitful inquiry is into the effect and extent of that resistance. Neo-liberal discourse continues to be, in terms of legitimisation, propagation and dispersal, enormously successful. The dominance of neo-liberalism within government policy, legislation and regulatory practice is a global phenomenon. There are numerous sites of resistance to neo-liberalism, but why are these instances of resistance not more effective or extensive?

Clearly, neo-liberalism's dominance is not the result of the direct abolition by neo-liberal governments of resistance and of competing discourses. An explicit insistence upon complete homogeneity of discourse would only encourage even greater levels of resistance on the part of the oppressed and excluded. Instead, neo-liberalism wards off overt complaint and revolt through the deployment of a range of indirect strategies, including the normalisation of neo-liberal values and terminology, the penalising of critics of market freedom,<sup>86</sup> and the sensational

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<sup>85</sup> Jay points to the replacement in 1998 of the special Canberra-based Insurance and Superannuation Commission with the Sydney-based, one-size-fits-all Australian Prudential Regulation Authority with a plethora of other regulator categories to watch over. Christopher Jay, 'The Day of Reckoning' in CCH (ed) *Collapse Incorporated: Tales, Safeguards and Responsibilities of Corporate Australia* (2001) 14, 24.

<sup>86</sup> 'The internal ideological strength of the market is less visible than its expansionism, but no less real. The market, to use a biological analogy, has an immune response. The structures of a market society obstruct criticism and opposition to the market, it neutralises attacks from within. The filter working of the job market is the best example: it is much harder for opponents of the market to get a job, than for its supporters. This filter effect is in action every time a vacancy is filled, and is often institutionalised in the form of permanent assessment. Employees at an investment bank – who can lose their job if their tie is the wrong colour – are unlikely to suddenly join anti-capitalist demonstrations. Over time, the probable effect is a lessening of all criticism, and a general acceptance of the market as inevitable and "normal"'

prosecution of those who are caught taking advantage of the freedom which neo-liberalism accords. While state intervention in the form of public enforcement of corporations law by corporate regulators appears to be inconsistent with the neo-liberal values of deregulation and market freedom, it is in fact an important protection mechanism ensuring the perpetuation of neo-liberalism's ideological dominance. High profile corporate convictions are a distraction and reassurance.

They are a distraction: the spectacle of a high profile corporate conviction becomes a form of populist entertainment in the same way that documentaries such as *The Corporation* and *Enron: The Smartest Guys in the Room*<sup>87</sup> and the movies of Michael Moore are populist entertainment. The anti-corporate, anti-globalisation and anti-neo-liberal crusade – whether by a film director, an outspoken regulator or even a member of the judiciary – allows concerned members of the community to buy into an ‘inauthentic simulation of revolutionary praxis’.<sup>88</sup> It encourages passive spectating. Resistance becomes another product to be consumed. It is ironic that the most passionate opponents of neo-liberalism are themselves guilty of commodifying resistance and making opposition to neo-liberalism something to be observed and enjoyed rather than actually engaged in. Spectacular convictions thus discourage rather than encourage actual resistance to neo-liberal dominance.

And corporate convictions are a reassurance. When corporate regulators interrupt the operation of the free market to prosecute and successfully convict a director for breaching corporate law, investors are assured that their investments are being protected by a regime that is prepared to take action on their behalf against directors who betray the trust that investors put in them. Regulators are explicit about this aspect of corporate convictions. According to ASIC Chairman Mr Jeffrey Lucy, for example, ‘ASIC’s work for consumers, investors, business, and markets benefits the community by promoting higher standards and *public confidence in Australia’s financial system*’.<sup>89</sup> Regulators frequently go out of their way to ensure that corporate convictions are widely publicised:

[T]here could be little doubt that ASIC is indeed trying to achieve as much media attention as possible. If it is not the case, how would ASIC achieve maximum regulatory impact and send out an appropriate signal to the marketplace? That is surely achieved by focusing on high profile prosecutions that will get the media's attention and help ASIC to warn the marketplace of the dire consequences that may flow from breaching the corporations law.<sup>90</sup>

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Paul Treanor, *The Ethics of the Free Market: Why Market Liberalism Is Wrong* (1997) <<http://web.inter.nl.net/users/Paul.Treanor/free-market.html>> at 3 April 2007.

<sup>87</sup> *The Corporation*, Madman Cinema (2003); *Enron: The Smartest Guys in the Room*, Magnolia Pictures (2006).

<sup>88</sup> Grant Morrison, *The Invisibles: Counting to None* (1999), 213.

<sup>89</sup> ASIC, ‘Working for Australia’ press release, above n 2. Emphasis added.

<sup>90</sup> Du Plessis, above n 11, 243. quoting F Assaf, ‘What Will Trigger ASIC’s Strategies?’ (2002) *May Law Society Journal* 60, 60. Berna Collier observed that ‘it is important to note that all the recent enforcement action by ASIC does more than target individuals who breached the law. It has an education and market confidence impact’. Berna Collier, ‘The Role of ASIC in

The wider community is assured by high profile corporate convictions that the status quo is fair, that all are equal before the law, and that fundamental change is not needed. The system – the neo-liberal system – is working. Investors and the community direct their fury towards particular individuals, and the ongoing dominance of the discursive field of corporate law by neo-liberal discourse continues largely unchallenged.

#### IV CONCLUSION

Corporations law is not an expression of apolitical sovereign power deployed to regulate the corporation and its directors in the best interests of the community. It is not a check on rampant neo-liberalism; it is utterly implicated in the neo-liberal project. It is not that the law has been compromised; the law never was uncompromised, and there is no such thing as an ideologically unbiased regulatory mechanism. Law's form and substance are determined by the outcomes of the ongoing contests between competing discourses, and if it was not neo-liberalism shaping the law it would be some other ideology.

This paper has examined the ways in which neo-liberalism continues to dominate the discursive field of corporate regulation despite the harmful consequences of that dominance. We allow neo-liberalism to propagate successfully – in fact we participate in the privileging of neo-liberal values – because we literally find it difficult to speak about corporate regulation in any other way. We might, with some effort, bring a critically reflective perspective into existence but, to paraphrase the Monty Python team,<sup>91</sup> 'this is rarely achieved owing to [our] unique ability to be distracted ... by everyday trivia'. We allow ourselves to be reassured, and our attention to be diverted away from the negative consequences of neo-liberalism's ideological dominance, by the sensational prosecution of corporate criminals. Potential resistance to neo-liberal discourse becomes mere outrage directed towards specific individuals. Reform of corporations law is limited to tinkering at the edges, and debate about reform remains entirely framed within the vocabulary of neo-liberalism. Neo-liberalism continues to dominate corporate regulation and government policy generally not because it is the ideal discourse or because it is better at maximising wellbeing than any alternative, but because it suppresses awareness and exploration of alternatives.

It is not suggested that those convicted of corporate crimes are deliberately sacrificed by a secret cabal of neo-liberals seeking to maintain their privileged position by distracting investors and the community. Nor is it suggested that when ASIC prosecutes a director they are deliberately doing so in order to preserve neo-liberalism's ideological dominance. The competition between discourses, and

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Corporate Governance' (Paper presented at the Corporate Governance Summit, Sydney, 27 November 2002) 6.

<sup>91</sup> [Monty Python's] *The Meaning of Life*, Celandine Films (1983).

ideological dominance, is a largely non-subjective phenomenon. Discourse creates subjects, not the other way around: discourse shapes and determines perceptions, choices and actions. To the extent that our subjective realities are dominated and determined by discourse, we do not have free will, but are instead acting out the will of a collective, inter-subjective will to truth.

Free will and freedom of choice are, however, possible: freedom emerges in the space between discourses. When one discourse is confronted by another, there is a moment, a space where the limitations and contextuality of all discourses become visible and an awareness of one's freedom to take or leave any given discourse can blossom. Unfortunately, the more successful or dominant a given discourse is within a given discursive field, the less frequently these opportunities arise, and the dominance of the discourse is reinforced through a frustrating cycle of feedback.

The latest attempts to reform the law – such as requirements for disclosure of director remuneration, recovery of excessive remuneration by liquidators, legislated corporate social responsibility, continuous disclosure, codes of good practice, and so on – are unlikely to succeed at dislodging individualism, market freedom and wealth maximisation from their position as the principle norms of corporate regulation. Resistance to neo-liberalism is inevitable, but efforts to reform the law in ways inconsistent with neo-liberal values are likely to be delayed, de-fanged or derailed entirely because in the perpetual struggle between discourses and interests, neo-liberalism is entrenched in a position of dominance, its historical victories fuelling its current victories. From its dominant position neo-liberalism establishes and enforces the language rules, acts as gatekeeper, and excludes alternative perspectives and discourses. The community applauded when Rodney Adler was sent to jail, but did not question the neo-liberal values which encouraged and justified his behaviour.