

Enterprise law: from market failures to market conditions, and stakeholder governance

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The paradigm of 'market failure' is well established among economists to justify intervention by law in markets. Yet to lawyers, this is profoundly nonsensical, because markets themselves are constructed by law, including the law of contract, property, corporations, and a host of legislative and human rights. If legal arrangements that create markets lead to damaging welfare outcomes, it is not so much that a 'market' has failed, but the legal rules. There is no such thing as the market, as an objective fact, rather than infinite arrangements of laws, and the society that upholds them. Recognising this, a grammar for lawyers who study the constitution of our economy would be better served by shifting from a paradigm of 'market failures' to 'market conditions', to identify what norms are empirically observed as leading to productive human development, not crashes, depressions or poverty. Where conditions for markets to function are not made out, democratic societies generally use a mixture of public ownership and sector-specific regulation to achieve better outcomes. However, changing an enterprise's system of finance (from private to public) or rights (to fair standards of service or prices) does not address how governance should work. If the goal in public enterprise is to ensure the interests of stakeholders are well served – namely investors, workers, and service-users – then it is logical that stakeholders should have votes in governance. This talk will unpack examples of modern stakeholder governance, as it is developing today.

This talk is based on chapter 2 of Ewan McGaughey, *Principles of Enterprise Law: the Economic Constitution and Human Rights* (Cambridge UP 2022)