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HOLD THE FRONT PAGE: NEWS-GATHERING IN A TIME OF CHANGE

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Introduction

1. It is a real privilege to have been asked to give this public lecture and, echoing the Vice Chancellor, I am pleased to acknowledge that we are standing on the land of the Wurundjeri people and to pay respect to their Elders and families past and present. I would also like to thank the Centre for Advanced Journalism at the University of Melbourne for the invitation. I am delighted to be here.
2. I hope you will forgive me for providing some context to what I am about to say. As you are aware, I have spent the last 17 months engaged in an Inquiry into the culture, practices and ethics of the press. The Report was published nearly a fortnight ago, on 29 November 2012, and, as I have said before, it may be that some of you are hoping that I will elaborate. If you are, I am afraid that you are going to be disappointed. When I launched the Report, which must be read in the context of the Terms of Reference for the Inquiry, I said this:
'I believe that the Report can and must speak for itself; to that end, I will be making no further comment. Nobody will be speaking for me about its contents either now or in the future.'
3. The reason is very simple. I treat the Report as a judgment and judges simply do not enter into discussion about judgments they have given; they do not respond

to comment, however misconceived; neither do they seek to correct error. The judgment, or in this case, the Report, has to speak for itself. I am entirely content that it does.

4. That does not mean that I cannot talk about the law. It is common for judges to give lectures or to make speeches about areas of the law within their expertise or issues of legal public concern, provided only they do not touch upon their own decisions or others which might fall to them for determination.
5. What do I intend to speak about? The title of tonight's lecture is suggestive, at least, of two things. First, at the present time, news gathering is taking place against a changing, if not a rapidly and dramatically changing, background. I refer, of course, to the internet and will focus initially on some aspects of that development. But there is another, more well-established background to news-gathering which is often misunderstood and which provides incentives for journalists as we recognise them to be, but which also has its own limitations which must be understood and addressed: in one word, that is the law and the place that it occupies in relation to story gathering and reporting. As a result, I also intend to examine some of the issues to which the criminal and the civil law have given rise.

The internet – a changing competitive background

6. The popular press has been in its present form, more or less, since the mid-19th Century. It developed as a consequence of technological innovations which rendered printing less expensive – so much less expensive, that newspapers could be sold for as little as a penny¹.
7. Since that time we have lived in a world dominated by the popular, professional media, whether that is print or broadcast media. It is how we learnt what was happening at both a national and international level. Initially newspapers, then radio, then television, all jostled for position as prime providers of news and information. But technology has made our world very different. First, there was the proliferation of television stations with news being provided not just at 7.00

¹ D. Solove, *The Future of Reputation – gossip, rumor, and privacy on the internet*, (Yale) (2007) at 106ff

am, on the hour and then at 6.00 pm and 10.00 pm. It is now provided 24/7 and the newspapers are no longer the first to bring it to our attention.

8. Secondly, and a cause of monumental change, has been the internet. In particular, it has created a challenge to the print media, unlike any form or type of competition which it has yet faced. As advertising migrates on line with massive loss of revenue, this challenge is well understood. But there are other, extremely significant, concerns not least relating to the way that we, as a society, keep up to date with the world around us and the extent to which we now seek content and opinion, all of which is expensive to obtain and process, without paying anything for it. Recent events have brought this challenge into sharp relief.
9. So, journals such as *The Huffington Post* are published only on line. I struggled with the noun: should they still be called newspapers? Further, as you may well be aware, *Newsweek*, recently announced that it was to abandon its print edition. From this December, it is to become an internet only publication². In Australia, Greg Hywood, the Chief Executive Officer of Fairfax Media, (the second largest newspaper publisher behind News Ltd) has observed that the company is on a journey moving from predominance in print to predominance in digital form. He has suggested that *The Age* and the *Sydney Morning Herald* might not exist in print form within three years³.
10. The change to the business model has led to the closure of a large number of local newspapers in the United Kingdom and the United States with the consequent reduction in the extent to which local services, whether government, health, education or transport can be held to account. When I started at the bar, there was a local reporter in every court: that is no longer the case. Society will be less well served as a result.
11. Do not misunderstand what I am saying. The press is fighting back and great innovation has resulted. In an effort to extend reach and retain advertisers, some newspapers are now free: the *Evening Standard* in London and the *Mx*

² S. Frier & E. Lee, *Newsweek to become on-line only after 80 years in print*, (18 October 2012); <http://www.bloomberg.com/news/2012-10-18/newsweek-to-become-online-only-after-80-years-in-print.html>.

³ Mr Hywood made these comments at the Fairfax Media AGM, held on 24 October 2012. A report of his remarks was carried in the Herald Sun. Jeff Haley, *Clock Ticking for Fairfax Newspapers Says Chief Executive Greg Hywood*, 25 October 2012. <http://www.heraldsun.com.au/business/clock-ticking-for-fairfax-papers-says-chief-executive-greg-hywood/story-fn7j19iv-1226502675525>

newspaper here in Melbourne are examples. Furthermore, the press is more than able to convert from print to digital platforms. Some of the websites provided by the newspaper publishers are truly fantastic sources of information and comment, presented attractively with podcasts, interactive displays, ever-expanding content and opportunity for reader feedback. This suggests that it is not going to be too long before a significant number of front pages will be electronic only.

12. The problem of generating a monetary return, however, remains. How to pay for the journalism, the on location reporting, the explanation and the comment all from the brightest and best journalists of our time? One approach has been the creation of a pay wall which, in the UK, works for specialist papers such as *The Financial Times*, but, by all accounts, is less successful for the News International title, *The Times*. In Australia, both the national dailies now have paywalls. Although I understand that the pricing model was adjusted last year, Fairfax Media has operated a paywall for some time for the *Australian Financial Review* and has said that it intends to introduce one next year for its metropolitan mastheads, *The Age* and *The Sydney Morning Herald*. Late last year, *The Australian* newspaper, owned by News Limited, introduced a paywall. Meanwhile, this year, the *Herald Sun*, also owned by News Limited, became the first Australian metropolitan daily, and the first tabloid, to introduce a pay wall. The success of this strategy remains to be seen but it is critical that the challenge of making the digital platform pay must be overcome. If the vital role that the press occupy is to be preserved, hard won stories, sometimes extremely expensive to research and frequently very much in the public interest, must be part of a commercially viable model.

13. This issue is, however, only part of the problem. As I have said, newspapers trade in information and informed comment; selling these commodities is important to their survival. The internet, on the other hand, generally does not trade. True, in Australia, there are a number of small independent journals that publish only on the internet, take advertising and employ professional journalists: The best known will be *Crikey*, which was founded by single journalist, Stephen Mayne, and is now owned by Private Media Partners. Another well known example is *Business Spectator* founded by well-established reputable financial journalists, in partnership with Eric Beecher of Private Media Partners, and recently sold to News Limited. Then there is the magazine style *Mamamia*, founded by journalist

Mia Freedman, and *The Hoopla*, founded by comedian and journalist Wendy Harmer. Or *The Design Files*, founded by Lucy Feagins, which is giving the glossy hard copy lifestyle magazines a run for their money. There are other, less well known examples serving specialist audiences, a number of which are now making a modest amount of money.

14. Further, there are some bloggers who carry advertising and tweeters who are sponsored. In the main, however, online bloggers and tweeters are amateur reporters who do not sell anything: they simply publish online, convey on Facebook, upload onto YouTube, tweet or re-tweet. It is they who have become yet further competitors of the press, adding to the competition that is so immediately and graphically provided by radio and television.
15. Although potentially causing damage to the business model for the press, in more than one sense, blogging adds to free speech and is not necessarily a bad thing. Indeed, in his recent book *The Rise of the Fifth Estate*⁴ the former public servant Greg Jericho, who came to prominence entirely through his political commentary on the *Grog's Gamut* blog, asserts that the best bloggers provide comment and analysis every bit as good as that found in mainstream media, and in some cases better. He also argues that those active on social media act as “watchdogs” on the mainstream journalists, fact checking, arguing and calling to account in a fashion not possible only a very short while ago.
16. The same can be said for the wider internet. Organisations such as Full Fact in the UK exist to challenge the accuracy of press reporting and achieve considerable publicity through their websites. Although unregulated and, therefore, potentially dangerous, aspects of the internet are undeniably a force for good. The problem for the international community will be to harness the good and discourage or remove incentives from those that have been set up and exist deliberately to flout with impunity the rights of others. One reason for doing so was provided to the Inquiry when it was asserted that “privacy is for pedo’s”.
17. In the future, professional newspapers, magazines and journals both online and in print, will compete ever more directly with the blogger and tweeter, whether good, bad or indifferent, whether accurate or fiction dressed as fact. In this environment, we are therefore likely to see both professional and amateur news-

⁴ G Jericho *The Rise of the Fifth Estate* Scribe Books 2012

gathering and comment operate solely, or at the least predominately, on the internet; I say predominately because, for my part, I have no doubt that we are likely to continue seeing newspapers in print along with print runs for specialist markets or purchasers.

18. This migration to the internet of the established media may yet be some time in the future. But, as I have explained, it has started, and the growth of specialist online competitors to the established media will no doubt continue apace. We cannot, as Grant Gilmore put it, simply intone, as Blackstone would have exhorted,

*'Let us preserve, unchanged, the estate which we have been lucky enough to inherit, Let us avoid any attempt at reform . . .'*⁵

We don't have that luxury. We are going to have to give serious consideration to the changes that will result from these developments but, on the other hand, we must not go the other extreme and discard what is important or of value in our attempts to react to events around us.

19. We are, for instance, going to have to consider the role which the civil and criminal law play, and how a changed environment affects the application and efficacy of the law. In this regard I want to pose a question. It is one raised, in another context, by the US constitutional scholar, Phillip Bobbitt, in his book *Terror and Consent*. It strikes me though it is equally applicable to the question of how we are to ensure that the legal framework – by which I mean to criminal and civil law not the regulatory framework – operates in the background to any front page. The question can be summarised by asking whether we follow Blackstone or whether we follow that other great titan of the common law, Mansfield.

20. The distinction Bobbitt draws between these two giants of our legal past is this. On the one hand, as I have observed, Blackstone was a champion of the status quo, a defender of the traditional, inherited, law. On the other hand Mansfield, the founder of much of the common law, believed in developing the law in light of actual practice and, in respect of commercial law, did so in order to reflect *'the*

⁵ G. Gilmore, *The Ages of American Law*, (1977) (Yale University Press) cited P. Bobbitt, *Terror and Consent* (Penguin) (2008) in at 461.

*international, cosmopolitan character of the mercantile community.*⁶ The question for us all will be what changes may – or will – become necessary to ensure that the criminal and civil law remain effective. In considering that question we may well have to consider what constitutes both the international and the cosmopolitan make up of the internet.

21. Focusing on these questions, it is essential to give due consideration to the law as it presently is. With that in mind, I want to spend some time looking at the nature of both the criminal and civil law as it now operates. Having done so I want briefly to consider the areas where what is required for the future may challenge or at least question what has worked hitherto. Here, also, I recognise that I add to the pressures on journalists.

The legal background – the criminal law

22. The criminal law can touch upon the work of journalists in many ways and inevitably prescribes the ways in which it is acceptable for stories to be obtained. Journalists, whether professional or amateur, whether in the print media or the online media, are subject to the same law as everyone else. How in practice does the criminal law operate? Like all laws it is not self-effecting. It relies, in the ultimate analysis, on detection, investigation and notification.
23. In the UK, as in Australia, crimes come to be notified to the police and investigated in a number of different ways. First and most likely is that a complaint of crime or possible crime is made to the police. The victim of, say, a burglary or a robbery will contact the police and report the matter. Equally plausible is that the police will be notified in the event that the victim of, say, a shooting attends hospital.
24. Alternatively, the police might themselves either be called to the scene of a crime (whether by a victim or witness) or they might be present and witness events for themselves (such as might occur during an occasion of public disorder). This report might be immediate and contemporaneous with events; it might follow after days (a burglary only detected when the householder returns home after holiday), after weeks or months (fraud); or even after many years (historic sexual abuse).

⁶ Bobbit (2008) at 462.

25. Whenever and however notified, if the police take up the complaint, they will then obtain statements from witnesses and pursue such investigations as they can. An inquiry might involve scenes of crime officers, forensic scientists or other experts; it might involve the collection of documentary or other real evidence; it might involve the pursuit of information from those who might know who is responsible.
26. Alternatively, for some criminal offences (and, in particular, for some of the most serious and those which do not generate victims likely to complain to the police), rather than wait for a possible victim, the police will target either an offence or a suspected offender. By way of example, large scale supply of Class A drugs may well be detected because of some intelligence leading to surveillance and the development of evidence in that way. Police resources may well be devoted to target serious criminal activity without waiting for the crime to be committed. In this type of case, however, again, evidence will be followed up, collated and researched in the same way.
27. Whatever might have drawn the attention of the police either to the crime or the alleged criminal, many of the same investigative techniques will be deployed in order to bring those guilty of crime before the courts. Thus, during the course of an investigation for an indictable offence, a search warrant or search warrants can be obtained (for the UK, see s. 8 et seq. of the Police and Criminal Evidence Act 1984; there are undoubtedly equivalent powers in Australia). The potential relevant evidence is then seized.
28. Assuming reasonable grounds can be established for the commission of an indictable offence, a suspect may be arrested and once lawfully on premises being searched, the police can seize anything in plain view which the officer has reasonable grounds for believing has been obtained in consequence of the commission of an offence (to prevent it being lost damaged, altered or destroyed) and anything which the officer has reasonable grounds for believing constitutes evidence in relation to an offence being investigated or any other offence: see s. 19 of the 1984 Act; this, again, is likely to be commonplace although perhaps expressed in different terms. These searches may reveal further evidence. When it comes to journalistic material, however, in the UK, there are very important restrictions to these powers and limits on how far the police can go.

29. This summary of the process is important. It underlines the vital importance of what constitutes the trigger for a police investigation. In the first case, it was the complaint of the victim or other knowledge that a crime had been committed. In the second, it was the intelligence or suspicion that crime was in train, thereby leading to a pro-active investigation of the principal suspects. On any showing, something had to start the investigative ball rolling.
30. Turning to the offences which may or could be committed by journalists in pursuit of a story, the target of the story is unlikely to be aware that he or she is the victim of crime. A story will be assumed to have emanated from a relative or friend, aware of the details, and even if, as now, there is a suspicion that something more is involved, that a phone message has been intercepted or an e mail hacked, there will be no evidence that this has been the case. A complaint to the police will be unlikely and, even if the victim takes the suspicion to the police, on a one-off basis, in the absence of special circumstances, it is equally unlikely that it will be considered operationally proportionate to deploy the highly specialised and expensive expertise necessary to investigate.
31. Even assuming I am wrong, and a complaint is made which is investigated, it cannot be assumed that the investigation will reveal what has been going on sufficient to expose all such criminal wrongdoing. In the two operations examined in great detail in my Report, what was significant was not merely the limited original complaint and the reason for the investigations. In both cases, what happened was that the authorities were led to a private investigator who they suspected of crime – breach of data protection in one case and phone hacking in the other.
32. When search warrants were executed however, the authorities discovered a mountain of information in the form of the records which had been kept. In relation to the data protection case, there were books recording what information had been sought by which papers and prima facie evidence of many offences having been committed. In relation to the phone hacking case, 11,000 pieces of paper were recovered with details of thousands of individuals, including in many cases, their mobile numbers and the pins that could be used to access messages. Without those records, nobody would have been any the wiser as to the extent of

what had been going on and it would be surprising, indeed, if these were the only people in the country doing this sort of thing.

33. In other words, absent evidence to point to the commission of an offence (which requires rather more than mere assertion before any report, let alone investigation, can be considered justifiable), nobody who has been the subject of intrusion will necessarily be aware of the circumstances in which information about them came to enter the public domain. At its highest will be a concern that someone has provided information to a journalist which has then been published but any attempt to identify from whom or how that material was obtained will fail on the basis that no journalist will reveal a source.

34. In this regard it is only right to acknowledge that the law very properly affords journalists a great deal of respect, in order to protect very important rights of freedom of expression and a free press, important not least to ensure that the press is able to carry out its entirely legitimate responsibility of telling truth to power and of holding power to account. Seeking to go behind these principles raises important questions and means that the police will only do so in the most compelling of circumstances.

35. Other issues also arise, such as the extent to which the police can expend resources on investigations. Police resources are not limitless. Priorities have to be set. It is therefore inevitable that a decision will have to be taken at an early stage whether the public interest sufficiently requires resources for this type of investigation, perhaps at the expense of investigating other criminal activity or undertaking other types of police work.

36. Even where a decision to investigate is taken and is then properly carried out, it will then be a matter of discretion whether to prosecute: a point made clear as long ago as 1951 by then Attorney General, Sir Hartley Shawcross Q.C., who in a statement to the House of Commons said,

*'It has never been the rule in this country — I hope it never will be — that suspected criminal offences must automatically be the subject of prosecution.'*⁷

⁷ House of Commons Debates, vol 483, column 681.

37. Both the UK and Australia provide for the present manifestation of this discretion within the Code for Crown Prosecutors and the Prosecution Policy of the Commonwealth respectively, which not only prescribes an evidential test (whether there is sufficient evidence to provide a realistic prospect of conviction against each suspect on each charge) but also a public interest test which, in England and Wales, is articulated in this way⁸:

4.12 A prosecution will usually take place unless the prosecutor is sure that there are public interest factors tending against prosecution which outweigh those tending in favour, or unless the prosecutor is satisfied that the public interest may be properly served, in the first instance, by offering the offender the opportunity to have the matter dealt with by an out-of-court disposal (see section 7). The more serious the offence or the offender's record of criminal behaviour, the more likely it is that a prosecution will be required in the public interest.

4.13 Assessing the public interest is not simply a matter of adding up the number of factors on each side and seeing which side has the greater number. Each case must be considered on its own facts and on its own merits. Prosecutors must decide the importance of each public interest factor in the circumstances of each case and go on to make an overall assessment. It is quite possible that one factor alone may outweigh a number of other factors which tend in the opposite direction. Although there may be public interest factors tending against prosecution in a particular case, prosecutors should consider whether nonetheless a prosecution should go ahead and for those factors to be put to the court for consideration when sentence is passed.

38. This raises a number of considerations. First, it should be clear that the successful investigation of alleged criminality depends on a number of factors. Most significant of those in this context is that it may well be the case, as it was in respect of phone hacking in the UK, that the victims of the alleged criminal behaviour were unaware of the fact that offences might have been committed. Secondly, the growth of the internet, and the amount of private information we

⁸ Crown Prosecution Service, 'The Code for Crown Prosecutors', February 2010: see <http://www.cps.gov.uk/publications/docs/code2010english.pdf>.

place upon it, increases potential avenues for criminal access to private information. Again, as with phone hacking, potential victims are unlikely to be aware of such action.

39. Remote access to private information is likely to become an increasing risk, as more and ever more information is stored in that way. We are also well aware that the scope of unlawful access to that information is not limited by physical boundaries. Hackers do not have to be in the same country as the computers they are hacking. This raises a question for investigation and enforcement of the criminal law. How are we to carry it out effectively in those circumstances? Are we going to have to give greater thought, than we have at present, to cross-border engagement, investigation and enforcement? If the information is obtained from a hacker based in a foreign jurisdiction, how are we to deal with that effectively?
40. Considerations and questions multiply. If the criminal law is to remain an effective backstop, are we going to have to follow Mansfield rather than Blackstone? It seems to me that it is more than probable that we reflect the approach of Mansfield, and that we will have to look at how the professional media – and the amateurs – work in practice.
41. What does not seem to be an option is to simply assume that we will, without further consideration, simply take the same past, historical approach to the criminal law, investigation and enforcement. If the issues which arise at present are not to become all the more significant in the future, we are likely to have to give our approach considered thought. The answer is likely to involve closer co-operation specifically to deal with what are, after all, global or supra-national problems.

The legal background – the civil law

42. If the growth of the internet is posing questions for criminal law it is equally doing so for the civil law. The development of a more internet-based professional media is likely to raise further questions. What are those questions?
43. The first concerns enforcement of the civil law, whether it be the law of defamation, of misuse of private information, or more generally, of privacy. It is sometimes suggested that the growth of the internet has made effective

enforcement of the civil law more difficult, if not impossible. Some have suggested that the internet is like the Wild West, and one without an effective sheriff or a Wyatt Earp to ride into town.

44. There have, of course, been a number of well-known examples where a seemingly lawless approach has been taken by internet users. Possibly the most well-known, or widely reported, occurred during the early part of 2011. I refer to what was described in England press as super-injunction spring⁹. As you probably know the term super-injunction was coined by Alan Rusbridger, the editor of *The Guardian* newspaper. It describes an interim injunction granted in privacy proceedings, and which enjoins the disclosure of both the substantive content of the injunction and the very fact of the injunction.
45. The injunctions were, generally speaking, obtained by celebrities in order to stop the public disclosure of information concerning their private lives. They were often obtained against persons unknown, but also served on newspapers which would be bound by the terms of the injunction. Because the respondents to the injunction were generally unknown, and because the injunction would only bind third parties – that is the news media – while it was in force as an interim injunction, there was a tendency on the part of the claimants not to pursue their claims beyond the interim stage. The super-injunction became in effect a final injunction.
46. It has subsequently become apparent that the actual number of such injunctions was not as great as supposed at the time, not least because a large number of interim injunctions which simply anonymised the names of the parties were wrongly described as super-injunctions – and hence gave rise to the impression that there were more of them than was likely to have been the case.
47. At the time though, in an atmosphere which believed that such injunctions were rife, and the media were chaffing at being made subject to them, as they restricted their ability to print stories, the internet was very different. Vast numbers of individuals, very many anonymously, were blogging and tweeting names of individuals who it was said had obtained the injunctions as well as the reasons

⁹ <http://inform.wordpress.com/2011/06/08/superinjunction-spring-publicity-issues-in-the-court-of-protection-judith-townend/>

why they believed the individuals had obtained them. Rumour upon rumour swirled around.

48. It was no doubt the case that, as with any rumour, many were unfounded and no doubt defamed innocent individuals. Equally, it was no doubt the case that a number of the names circulating had obtained the injunctions and ought therefore to have had the benefit of the law's protection. This situation clearly exacerbated the media's concerns. They were subject to the injunctions, and were liable to the force of the law if they breached them. They had, however, to watch the very same injunctions being breached with apparent impunity by many thousands on the internet.

49. It is understandable why celebrities might not want to take enforcement action against those blogging their names in breach of injunctions. To do so would arguably be a time-consuming, and expensive affair. In some cases it might be difficult to track down the individuals. But more importantly perhaps it would have simply added to what has become known as the Barbra Streisand effect i.e., further attempts to stop the publication of the information on the internet might well have simply inflamed the situation and led to even greater dissemination.

50. This example highlights an important difference between, on the one hand, those bloggers and tweeters who have no real reputation for accuracy or reliability but are, in many ways, no more than electronic versions of pub gossip, and, on the other hand, the established media and established journalists who have a powerful reputation for accuracy, and in the overwhelming majority of cases for acting within the law, and the internet. The established media conforms to the law, and when they do not they remain potentially liable to the law. Where the established media has a web-based publication – an online edition – it is susceptible, for instance, to take down notices. Equally it is liable to pay damages in appropriate cases and has an appropriately deep pocket to do so. The writ of the law runs against them.

51. In the super-injunction example, the writ of the law was, perhaps, believed not to run against bloggers and tweeters. This is perhaps an example of the wider phenomenon I mentioned earlier: the belief that the law does not, and cannot apply to the internet. In many ways this is a pernicious and false belief: false because the law can be enforced against those who blog and tweet; pernicious

because the idea that the law does not apply to some while it applies to others undermines the rule of law as it is inconsistent with the idea of equality before the law. Procedural justice requires the law to be equally applicable to all.

52. What does it mean if this issue is not resolved to ensure the law is equally applicable against both bloggers and tweeters as well as against the established media as far as news-gathering is concerned?
53. First, it has a potential effect on media culture, on journalistic culture. If the media in general and journalists in particular see the law going unenforced against those who blog and tweet might this undermine media standards through encouraging them to adopt a casual approach to the law? Lawlessness in one area may infect other areas. It may then lead to a more generally casual approach to ethical news-gathering by journalists; one which was less and less likely to approach that role within the boundaries set by the civil, and the criminal, law.
54. This effect may not be a direct one, in that it might not lead journalists to run stories online in breach of injunctions. I return to this in a moment. Rather it might lead to journalists adopting an approach which was less than scrupulous in the pursuit of stories. In order to steal a march on bloggers and tweeters, they might be tempted to cut corners, to break or at least bend the law to obtain information for stories or to infringe privacy improperly to the same end. It may encourage unethical, and potentially, unlawful practices to get a story. The effect then is an indirect one, and one which lies behind the headline and the front page scoop. In a culture which sees some act with impunity in the face of the civil law, and the criminal law, a general decline in standards may arise.
55. Secondly, as I alluded to a moment ago, it might have a direct effect: it might lead the established media to attempt to compete with bloggers in the provision of information to the public in breach of injunctions. Such a situation could particularly arise in those circumstances where an established newspaper moves entirely online, and perhaps moves its base outside the jurisdiction in which it targets its publication.
56. It seems to me that this risk is one which, at the present and for the medium term at least, is unlikely to arise. This is the case due to the role which the established media play in society. If they were to be seen, and understood, to be regularly

acting in breach of the law, they would start to lose their authoritative voice; if they lost that voice they would simply be one more online purveyor of gossip with the attendant loss of influence which that would entail. Equally, where the established media is concerned, the ability to enforce judgments, whether by way of damages or via contempt of court, will retain its potency and is more than likely to do so even in an entirely online age.

57. This is not to suggest complacency. As with the criminal law, issues are likely to arise in respect of the enforcement of the civil law. Those issues are likely to arise from differing approaches to freedom of expression across the world; differing approaches which may make it difficult to enforce judgments from one State to another. This may well require us all to consider the best approach to such issues if we are to maintain comity amongst States and establish cross-border recognition and enforcement of judgments.

58. Again it may require us to reconsider the approaches we have taken in the past, to develop a cosmopolitan approach and one which supports the rule of law through a fair and effective international framework. It might be said that if we facilitate or condone breaches of the law, and thereby weaken the rule of law by failing to act and to recognise judgments and court orders which emanate from other countries, we encourage the weakening of the rule of law at home too. In other words, in respect of the civil law also, we may have to adopt Mansfield's approach.

Conclusion – Holding the front page

59. Where does this leave us? There is no doubt that the mainstream, professional media is in the process of evolving, that it is moving towards a business model based around the internet. It is also likely that in the not-too-distant future a large percentage, if not the majority, of the print media will be entirely online: that it will no longer be a print media.

60. The question for us is how to ensure that the criminal and civil legal framework, which in the main, provides the framework within which the mainstream media operates, is able to continue to play that role in the future. It seems to me that while this raises important – and challenging – issues, they are not insurmountable.

61. If we are to ensure that appropriate standards are maintained, we must meet those challenges, and ensure that the media not only remains subject to the law but that it is not placed at a disadvantage where the enforcement of the law is concerned. We will therefore have to think creatively about how we ensure that the law is capable of equal application, and is applied equally and fairly, against the mainstream media and bloggers, tweeters and other amateur online journalists.

62. In short, if we are to ensure that we have the media we deserve, we are going to have to be more Mansfield than Blackstone. Thank you¹⁰.

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¹⁰ I gratefully acknowledge the assistance that I have received in the preparation of this lecture from John Sorabji in London and Margaret Simons in Melbourne.