

What are Ben Roberts-Smith's chances against Fairfax?

The former soldier has launched defamation action over a front-page story in *The Age*. His reputation is inevitably harmed, but the question of whether he'll win the case is a bit more complicated.

[MICHAEL BRADLEY](#)

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“Ben Roberts-Smith — Victoria Cross recipient, Father of the Year, business leader and mental health advocate — is one of Australia’s most respected public figures.” So begins the [front-page article](#) in *The Age* of August 11, for which Roberts-Smith is [now suing Fairfax for defamation](#). He claims that his “business, personal and professional reputation has been and will be brought into public disrepute, odium, ridicule and contempt”.

Roberts-Smith had earlier tried to stop publication of the story altogether, failing to get an injunction from the Federal Court the night before. That ensured extra publicity for what was already going to be a huge story. *The Age* ran with a series of allegations of potential war crimes committed by Roberts-Smith in Afghanistan, as well as bullying behaviour while serving, and inappropriate conduct back home (an extra-marital affair and alleged domestic violence towards his girlfriend). There’s no question: *The Age* did a number on Roberts-Smith, and his personal reputation has inevitably been severely harmed. Will he win his defamation case though?

[\[How Ben Roberts-Smith is managing the media\]](#)

It’s been suggested that this story has similarities to the Joe Hockey case, when he [sued Fairfax](#) for a *Sydney Morning Herald* article that alleged he had been

effectively selling access to himself to donors while serving as treasurer. The court found that the substance of the article was true, but Fairfax fell over on the headline “Treasurer for Sale”, which implied a far more sinister level of personal corruption than the article could substantiate.

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The Sydney Morning Herald

INDEPENDENT. ALWAYS.

EXCLUSIVE: Joe Hockey's secretive fund-raising body

Treasurer for sale

■ North Sydney Forum charges up to \$22,000 for access to Treasurer

■ VIP members remain secret, disclosing fee only as party donation

■ Forum took \$30,000 in donations from Obeid-linked company



Sean Nicholls
State Political Editor

Treasurer Joe Hockey is offering privileged access to a select group including business people and industry lobbyists in return for tens of thousands of dollars in donations to the Liberal Party via a secretive fund-raising body whose activities are not fully disclosed.

The Sydney Morning Herald
This practice of politicians effectively selling access is a disquieting development in our political culture. It's time for the North Sydney Forum to come clean about who are Mr Hockey's financial backers and what they get for their largesse. It is too simplistic for Mr Hockey to claim he is somehow at arm's length from the activities of the forum.
» Editorial, Page 14

The Age ran the Roberts-Smith story with the headline “The Cracks in a War Hero’s Facade”, and a large illustration representing him as a statue which has taken a bit of a beating. The suggestion is that the illustration, taken on its own, may be more seriously defamatory than the article which accompanies it.

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Calling out those most popular
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SATURDAY

THE AGE

Melbourne since 1854

ZACH OF ALL TRADES
The cat's out of the bag
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SPECIAL INVESTIGATION

THE CRACKS IN A WAR HERO'S FACADE

Ben Roberts-Smith — Victoria Cross recipient, Father of the Year, business leader and mental health advocate — is one of Australia's most respected public figures. But serious questions have been raised about his past, and the Prime Minister has confirmed the former SAS soldier is under police investigation. Roberts-Smith denies allegations made against him. Last night in the Federal Court he failed to stop publication of this story.

Nick McKenzie
David Wroe
Chris Masters

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Police blitz on teen crime

Joe Hinchliffe

Police have arrested 14 people including a 14-year-old boy and seized stolen cars and a military assault rifle following a “terrifying” spree of carjackings and aggravated robberies across Melbourne’s south-eastern suburbs.

Those have been charged with a string of offences, including armed robbery, aggravated carjacking and possession of a prohibited weapon, handling stolen goods and unlicensed driving.

Police expect to make more arrests and lay further charges in coming days.

All of those arrested whose ages have been released are teenage males from a variety of backgrounds.

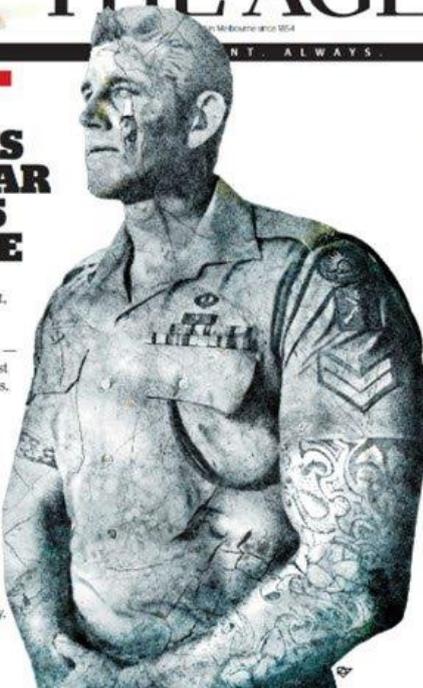
Officers arrested the 14 suspects on Thursday and yesterday in Cranbourne, Pakenham, Inverness South, Officer, Nare Warren South, Clyde North, Cranbourne North and Davison.

Detective Inspector Shayne Funnell said there were “more people we want to speak to”. “The investigation will continue past today and we do expect further arrests early next week,” he said yesterday.

He also indicated more charges would be laid against those already arrested.

Victoria Police said its investigators recovered two stolen vehicles: a black Holden

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Well, nah — not so in my view. It's important to understand the distinction for which the Hockey case now stands as authority. The reason Fairfax lost wasn't because the headline was a bit of an over-reach. It was because they put the headline on posters and social media, physically separated from the whole article.

It has always been assumed by the courts in defamation cases that people are diligent readers (and viewers). If they see a headline in a newspaper, it is taken as given that they will read the whole article under that headline. Therefore, the piece is looked at as a whole. In that context, the suggestion that Joe Hockey might have been "for sale" was qualified by the article itself, which made it clear that there was no suggestion he was taking bribes, rather he was just effectively selling access to himself — which was not illegal.

The headline "Treasurer for sale" had however also been placed on posters, without the article. There was nothing else for the punters to read, so they were left with just the knowledge that Fairfax was saying that Joe Hockey could be bought; and that, the judge found, was defamatory. Because it was also untrue, Fairfax had no defence. I don't know whether the cartoon illustration of Roberts-Smith was published on its own anywhere, but I don't think it matters. All it conveys to me is that the public image of a particular God-like figure has been somewhat tarnished, but it gives no indication of how. The headline, likewise, is generic and uninformative.

The really nasty stuff is in the detail of the article. The stories told there are extremely serious, involving alleged behaviour which may offend domestic and international criminal law. Against that background, the headline and illustration are pretty benign. The point is that, whether a reader saw them in conjunction with or independently of the full article, they wouldn't have created a worse impression or damaged Roberts-Smith's reputation more than a casual read of the article would. On the substance, Fairfax will plead truth. They will have legalised this piece a billion times before publication, and must have felt pretty comfortable before going to print — knowing that Roberts-Smith was 99% sure to sue.

Roberts-Smith alleges that much of what Fairfax ran with is the product of federal crimes, because the military investigation into his activities in Afghanistan is all top-secret. No doubt someone broke a law by leaking this stuff, and maybe Roberts-Smith's lawyers will try to nobble Fairfax's defence by playing the national security card over their supporting evidence. I don't think that'll wash. Truth is truth. Either the allegations exist or they don't. *The Age* was clear in not saying that they've been established.

There is something of a modern trend among public figures to think that the publication of the fact that they've been accused of doing something bad is no different from the publication of a conclusion they actually did it. The law still, however, says that those are quite distinct things. And that the public can tell the difference.

So I don't think Roberts-Smith has much of a case. In filing it, he risks giving Fairfax a bigger platform to put his military and personal lives in the spotlight and see whether they can widen the cracks a bit more. It's high risk. Personally, I prefer the approach of that other war hero, the Duke of Wellington, when a scandal-monger tried to blackmail him for money, threatening to run a story that he had had an affair

with a sex worker. “Publish and be damned”, the Duke replied. And they did. He was fine.

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