

# The Bulletin

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[Bulletin Home](#) > Features > Stories

Smoked out

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By Julie-Anne Davies

The agonising death of an Australian in Texas has triggered a legal battle that could finally call the tobacco industry to account. Julie-Anne Davies reports.



As deathbed scenes go, Don Laurie's was a doozy. The 65-year-old Australian Vietnam veteran lay propped in his makeshift hospital cot in the living room of his trailer home in Kingsford, a dirt-poor blot on the map, deep in the heart of Texas. Sucking on oxygen and injecting himself with morphine to counter the pain, Laurie could have been forgiven for wondering how the hell it had come to this. Six months earlier, he had been handed an unequivocal death sentence when doctors diagnosed lung cancer. Now, with only weeks to live, Laurie was surrounded on all sides by lawyers. It must have been some sight for the Kingsford locals as they watched from the solitary roadhouse diner as the black stretch limousines ferried the legal troupe through town. There were 11 in all, including three Queen's Counsels and a NSW judge. They had flown from Australia to hear Laurie testify that the cigarettes he had smoked from the age of nine were about to kill him. In the tiny adjoining

kitchen, Laurie's wife Jean and three adult children prepared jam sandwiches for the lawyers' morning tea. It was an overwhelming experience for Laurie, a man described by his daughter Judith Vanderhost as a "stand-up guy, a good father, a Christian man who loved his wife dearly". He felt honoured that the court would fly across the world to hear what a "humble, simple nobody would have to say", she told *The Bulletin*. (Picture by [photolibary.com](#)).

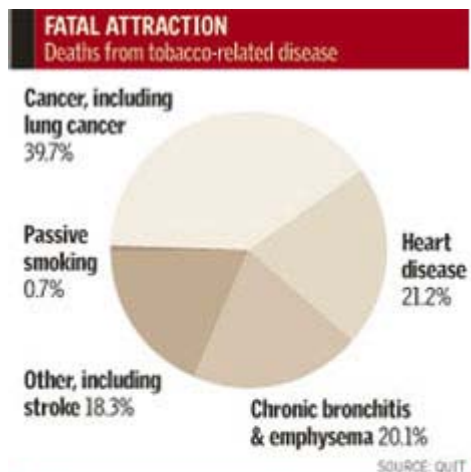


Don Laurie may have been a simple man, but his death only one month after the extraordinary court hearing is guaranteed to cause legal ructions well beyond Kingsford. He could become the first Australian – and one of only a handful in the world – to successfully sue a tobacco company for smoking-related lung cancer.

"Should this case go to trial, it will be the first time ever an Australian court has considered the merits of a cancer victim's claim against a tobacco company. To date, all smoking claims have been decided on technicalities, or discontinued," says Laurie's solicitor, Andrew Higgins, of law firm Slater & Gordon. In 2001, the world's first successful compensation claim against a tobacco company was made in the Victorian Supreme Court. Melbourne woman Rolah McCabe, who was dying of lung cancer, was awarded \$700,000 before the landmark ruling was overturned on appeal. Slater & Gordon also ran that case.

Higgins, who was at Laurie's side during the gruelling bedside court hearing in April, describes the whole experience as surreal, like something out of a B-grade Hollywood movie. "Kingsford is the kind of place where you expect to see spinifex

rolling down the main street. The Lauries are deeply conservative Bush supporters who also happen to represent the underclass of America. They have nothing. So imagine how it looked when the tobacco company lawyers turned up in convoy demanding the kind of facilities you would expect to see at the AWB royal commission. The court was sitting inside a trailer home in the middle of nowhere, for God's sake."



Although he lived in the US for more than 30 years, Laurie had decided to reach back into his former life in Australia to seek justice for the terrible hand he believed he had been dealt. "If one person changes their way of life from this suit, then my dad didn't die in vain," Vanderhost says. "His death should be a testimony of standing up for what is right regardless of how difficult it is."

Standing up to Big Tobacco is about as difficult as it can get inside a courtroom. On March 15, Laurie's lawyers issued a statement of claim against British American Tobacco Australia Services (BATAS) in the NSW Dust Tribunal – the court that typically deals with asbestos-related cases. In it, Laurie accuses BATAS of deliberately encouraging people, including children and adolescents, to smoke despite knowing that tobacco was addictive and caused cancer. Further, the Laurie claim alleges that BATAS operated a policy of document destruction for the sole purpose of preventing damaging evidence being used in litigation against it.



► **The insiders**

Yes, Don Laurie may have been a simple man but the legal action he set in motion before dying is shaping up to be some dogfight. It has the potential to pit James Hardie Industries and the federal government against the tobacco monolith. The Laurie family is also suing Hardie and the Commonwealth. They argue that his cancer was caused not only because he smoked 20 cigarettes a day for 21 years but also because he was exposed to asbestos when he worked as a boiler-maker for James Hardie Industries and, later, the Australian Navy. The combination, they claim, was deadly.

Interestingly, says Higgins, Hardie's lawyers spent most of the five-hour hearing in Texas questioning Don Laurie about his smoking. Laurie's legal team is clearly hoping that Hardie and the Commonwealth will point the finger at the tobacco-maker in an effort to clear themselves. There is a precedent. Last month, BATAS reached a confidential settlement with transport services company Brambles after it was sued for a contribution to a \$200,000 compensation claim made to former Brambles employee Alan Mowbray, who died of lung cancer in 2001, was exposed to asbestos when he worked for Brambles as a mechanic. Like Laurie, he had also been a long-term smoker. Anti-tobacco lawyers and advocates were watching the case intently here and overseas when Brambles upped the ante by accusing BATAS of engaging in systemic document destruction. (Picture by Eamon Gallagher).

"We are unable to comment on the specifics of any matter presently pending before the court," said Brendan Brady, BATAS director of corporate and regulatory affairs. "However, we would confirm that we shall vigorously defend any case brought against the company on the basis, among other things, that people in Australia and elsewhere have been aware of the risks associated with smoking for many decades."

THE BIGGEST Cs Estimated percentages of cancers caused by smoking		
Cancer type	Men	Women
Lung	84%	77%
Mouth and pharynx	57%	51%
Oesophagus	54%	46%
Larynx	73%	66%
Bladder	43%	36%
Kidney - parenchyma	28%	21%
Kidney - pelvis	55%	48%
Pancreas	24%	19%
Stomach	14%	11%

The stage was set for an explosive trial after Judge Jim Curtis – the same judge, incidentally, who presided over Laurie's bedside court appearance – ordered BATAS to hand over tens of thousands of pages of secret documents. He ruled there was evidence that the company had engaged in a document-retention policy "in furtherance of a commission to a fraud". It was a damning ruling. But then it was all over before it got going. Brambles had a mysterious change of heart. A joint statement was issued on July 5 from the two companies saying the matter had been resolved and, amazingly, no payment had been made "to or by either party".

Expert witnesses such as Professor Jack Henningfield, an American nicotine addiction expert who had been persuaded by Brambles to fly to Australia to give evidence against BATAS, were contacted and told not to come. No explanation was given. Enter Don Laurie. In so many ways his timing could not be better.

The tobacco war in Australia is hotting up. Just ask a smoker. The graphic new health warnings on cigarette packs featuring gangrenous legs and

emphysemic lungs have hit their mark. The new images cover 30% of the front and 90% of the back of packets, including explanatory information and the Quitline logo and phone number. This time it is smokers' self-preservation button that's being pushed. Hard.

The accompanying television campaign featuring the knife-wielding surgeon had Australians dialling the Quitline in unprecedented numbers (see *graph p20*). There were 11,648 calls nationally in the month leading up to the campaign's May 8 launch. This almost doubled to 21,643 calls in the four weeks after the ads aired. And there's more gore coming our way, starting this week. The second stage in the anti-smoking campaign begins on Wednesday night with a new TV advertisement which homes in on mouth cancer. This *is* reality television.



The idea of the confronting images, says Todd Harper, chief executive of Quit Victoria which is one of the two major sponsors behind the advertising campaign, is to piggyback on the cigarette pack warnings and ram the message home to smokers about the truly terrible and often unspoken health risks of smoking. The next series of packet warnings begins in November and will focus on blindness and heart disease. No one wants a foot amputated or a tongue removed, but until now smokers have not had to dwell on these dire consequences.



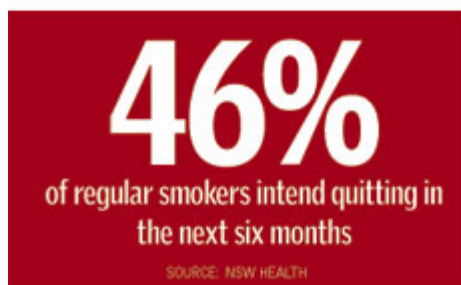
At the same time, Harper says, state and territory governments need to move quickly to introduce new anti-tobacco laws. "We can lock in lower levels of smoking in the community by bringing in reforms like point-of-sale advertising bans and Australia-wide smoking bans in pubs and clubs. These can surf on the back of the graphic warnings." In fact, Queensland and Tasmania have already made their bars and pubs smoke-free and by next July the rest of Australia's drinking holes (aside from the Northern Territory and high-roller rooms in casinos) will also be *largely* smoke-free.

There is some disquiet within the anti-tobacco lobby that states like NSW and Victoria have created loopholes for hotels by redefining what constitutes an "open space". Anita Tang, from the Cancer Council of Australia, says the tobacco industry and the hotel industry have been successful yet again in clawing back some seemingly lost ground. "We have architects and builders running around at the moment advising the hotel industry on how to get around this one," she says.

"We have the states all agreeing to ban smoking from high-roller rooms in casinos but they want to introduce it at the same time everywhere. There's no agreement about when that will be. And we've just seen NSW agree that a room in a club or pub which is 75% enclosed is in fact an open space. We're definitely not there yet." Point-of-sale display of tobacco products is the other big issue on the agenda.

One of the world's leading anti-tobacco public health experts is Professor Simon Chapman of Sydney University. He has just spent a week in Washington attending the World Conference on Tobacco where he presented a number of papers. He was also due to give evidence for Brambles in the Mowbray case but, like Henningfield, was told not to turn up. "All the US legal people are dismayed," Chapman says. "There's all sorts of speculation that some sort of deal has been done but I suspect

we'll never find out."



The next wave of tobacco ref-orm, he says, will be the introduction of generic packaging for all brands of cigarettes. It hasn't happened anywhere yet but Chapman predicts it will occur in the next decade. "I don't think we can ever say we've won. There is no full-stop when it comes to tobacco control, at least not while it is a legal product. But I do think it is quite conceivable that within 15 years, we'll see smoking rates as low as 5%. As cigarette prices continue to climb, smoking will become a special occasion pastime."

There is much talk within the tobacco industry, especially among tobacco retailers and their adversaries, about point-of-sale display. The anti-tobacco brigade calls it advertising. The retailers and tobacco industry say it is not. There are already space restrictions but now there is a big push to remove the entire galaxy of colourful cigarette displays at the store counter. It is the next holy grail for tobacco controllers. They see it as a natural progression from the principle first established in Australia in 1976 when all advertising was banned on radio and TV.

The tobacco industry views the shop shelves as their last piece of territory. Take away that and where else can they market their product? According to evidence published in the US and Britain, tobacco companies are paying incentives to retailers to display their products prominently. The National Alliance of Tobacco Retailers, an Australian lobby group, is vociferous in its opposition to any ban. In a highly charged submission to a recent NSW parliamentary inquiry, which was considering prohibiting point-of-sale displays, it said: "The implication that smokers or would-be quitters become helpless morons at the sight of tobacco packages and that their resistance is 'inevitably' weakened is simply nonsense."

The retailers are concerned at the willingness of governments to "confiscate valuable retail space in shops for displaying anti-smoking signs, posters and other information, while [it] is communicated through expensive paid advertisements in the commercially valuable space and time of magazines, newspapers, radio and TV."

One would assume the NATR is monitoring developments in Tasmania closely. The state, which has one of the highest smoking rates in Australia, is

considering a total ban, something the other states and territories have shied away from. Some are calling it the "Jim Bacon factor" – a reference to the poignant anti-smoking message left by the previous premier who died from lung cancer. Bacon was a pack-a-day man for most of his life.

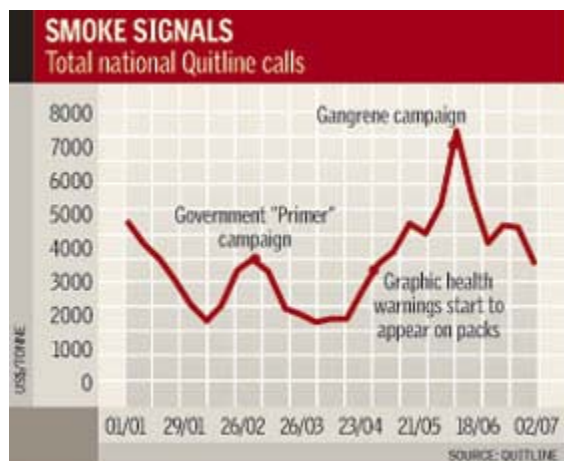
The Tasmanian government is also deciding whether to make it an offence to smoke in a car where there are child passengers. If it does, it will be the first place in the world to do so. "This is about the public health rights of children," says Tasmania's Director of Public Health, Roscoe Taylor. "We want to take it to a new level where not only are we protecting kids against the serious health effects of inhaling smoke inside cars – increased rates of asthma, respiratory infections, just to name a few – but also we're keen for them to live in a world where they feel confident about saying, 'Stop it, mum, you're killing me'."

Some argue that enforcement would be impossible but Taylor disagrees: "When seat-belts were made mandatory, it was policed opportunistically by police and look how well that's worked. You only need a few high-profile prosecutions before the community gets the message that it's not OK to smoke in your car with kids on board." Tasmania is also looking to prohibit children from selling tobacco products. Compliance surveys have found that young people were selling a significant number of the cigarettes that were being bought by under-age smokers.

Anne Jones from ASH isn't as optimistic as some of her tobacco-control colleagues. She believes political apathy and the still very great persuasive powers of the tobacco lobby have stalled the fight against smoking, which is the leading cause of death in our community, killing 19,000 people every year. Smoking-related diseases are the most preventable diseases in Australia. About 20% of Australians are regular smokers, down from 37%, 20 years ago. Yet, Jones argues, those figures could have been so much better. "It could have been below 10% by the end of this decade if governments had continued to fund public health strategies." The federal government is the main offender, she claims.

The federal government raises more than \$5.2bn annually from tobacco excise but has apportioned just \$24m over the next four years for tobacco-control measures. In contrast, NSW has just agreed to spend \$12m this year. This is a huge increase and many credit the state government's decision to the influence of Frank Sartor (the minister assisting the minister for health)

whose previous partner died from throat cancer.



There is no doubt that personal tragedies such as Sartor's and Jim Bacon's have had an impact on tobacco reform in Australia. A study on the history of tobacco reform in NSW, published in the *Australian and New Zealand Journal of Public Health*, included interviews with 17 former MPs. Their anecdotes are illuminating. Former NSW Premier Nick Greiner, who went on to become chairman of the board of the tobacco company WD&HO Wills Australia (which later became British American Tobacco Australia) acknowledges it was an issue that affected perceptions of a party's "general moral valence". But as former health minister Peter Collins concluded, "It wasn't a vote winner." Another former state health minister, Laurie Brereton, said the only defeat he suffered in the cabinet room was when he proposed to raise the fines for sale of tobacco to children. "They thought that was going a bit too far," he says.

Jones says: "The halcyon days were when Michael Wooldridge was [federal] health minister and Australia was held out as a beacon in anti-smoking public education around the world. There was a 2%

decline in smoking rates after the 'Every Cigarette is Doing You Harm' campaign, but those days are over." ASH doesn't want to be seen as "wearing the hair shirt" on tobacco reform, Jones says. "Yes, we've made good progress but a lot of it is incremental. There is no mystery about how to cut smoking rates. You need good, comprehensive, well-funded public health programs. It really is that simple."

So how important is a big win against the tobacco industry in the Australian courts? Peter Gordon, the renowned product liability plaintiff lawyer who ran the McCabe case – and is still bitter about the final result – is adamant that the legal system must also do its bit in the fight against smoking. "It's important for very simple reasons," Gordon argues. "Many totally innocent kids were induced to smoke with no real understanding of the dangers and when they became adults, no real chance to overcome the addiction. That was the tobacco company plan. It's happened to hundreds of thousands of Australians the same way. Do we really want to look back in 50 years and see all that and say, well, the legal system imposed no liability for that; for all of the wrongful death and wanton destruction? Not once. It's important to stand up for what our justice system is able to be."

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