

## **Submission from the Veterinary Surgeons' Board**

The Veterinary Surgeons' Board is a Board established under the provisions of the *Veterinary Surgeons Act 1960* (Act). The Act provides that, subject to the Minister, the Board is responsible for administering the Act and Regulations.

The Board consists of five members being a representative from the Department of Agriculture and Food, a person nominated by the Minister (generally a solicitor or barrister), two registered veterinary surgeons elected by ballot by registered veterinary surgeons, and one veterinary surgeon nominated by the Western Australian Division of the Australian Veterinary Association (AVA).

The Board is responsible for its own finances. The Board's sole income is from registration fees received from registered veterinary surgeons, veterinary nurses, authorised persons, premise registrations and body corporate registrations.

In 2005, the *State Administrative Tribunal Act 2004* removed all the disciplinary powers of the Board. The result is that the Board has to refer disciplinary matters to the Tribunal regardless of the seriousness of the alleged professional misconduct.

Prior to the establishment of the SAT the Board dealt with all matters relating to veterinary surgeons, their professional conduct and registration. The Board had the powers of a Royal Commission and enquiries against veterinary surgeons were conducted in an inquisitorial manner. Most formal enquiries were completed in one day and if a finding of unprofessional conduct was made against a veterinary surgeon they were informed of that decision and penalty on the same day. Only in rare cases were matters referred to the traditional court system.

Since the SAT was established the cost to the Board of preferring all complaints to the SAT has had a substantial negative impact on the Board's finances, resulting in increased registration fees and the expansion of the Board's reserve funds to cater for increased, or unexpected legal fees.

The cost of legal fees incurred by the Board as a result preferring cases to the SAT rather than the Board conducting the hearings has increased by more than \$50,000 per annum. The Board has not conducted an audit of the increase in other costs such as the expense of gathering detailed evidence, increased staff time, increased board sitting fees and expert witness fees which have occurred since the establishment of the SAT, but it is likely to be similar to the increase in legal fees.

**Board's legal expenses for disciplinary proceedings between 2002/2003 and 2012/2013**

| <b>Financial Year</b>                       | <b>Legal Expenses</b> |
|---|-----------------------|
| 2002/2003                                   | \$26,000              |
| 2003/2004                                   | \$18,000              |
| 2004/05 – SAT established on 1 January 2005 | \$55,000              |
| 2005/2006                                   | \$87,000              |
| 2006/2007                                   | \$97,443              |
| 2007/2008                                   | \$62,297              |
| 2009/2010                                   | \$68,770              |
| 2010/2011                                   | \$94,927              |
| 2011/2012                                   | \$80,928              |
| 2012/2013                                   | \$82,950              |

A serious concern of the Board is that in the event of protracted case at the Tribunal the Board's entire legal budget for that year may be exceeded on just one case.

For example, the Board is aware that the veterinary Board in another Australian jurisdiction recently incurred a \$600,000 legal bill for a complaint against a veterinary surgeon. Such a bill would greatly exceed the Board's annual budget and use much of the Board's reserve funds, and would cripple the WA Board financially. The requirement to prefer cases to the SAT means that the potential financial risk to the Board is of far greater importance when the Board determines whether to pursue a matter than when the Board conducted its own hearings

The introduction of the SAT has effectively resulted in the Board's disciplinary processes switching from a formal enquiry to a prosecution. Prior to the SAT the Board had to have sufficient evidence to commence an enquiry, and then conducted the enquiry to determine the facts of the case. If those facts proved in which unprofessional conduct was established, a penalty was imposed. The process was efficient, timely, inexpensive to perform, and an audit by the Attorney General's department demonstrated it protected the public interest.

With preferal of a case to the SAT the Board must gather detailed evidence analogous to that required for a trial, and if a formal hearing is conducted the Board must present the evidence to the Tribunal. Due to the time taken, the legal costs incurred with formal tribunal hearings and the unpredictability of outcomes the Board settles many of the cases at SAT mediations or formal conferences. In many instances the agreed penalty is less than the Board considers appropriate, and while this route offers substantial savings in time and

money, the Board questions whether it is truly in the public's interest for veterinary surgeons to receive reduced penalties through this process.

Legal representation is not required at the SAT for mediation or formal hearings. However, due to the complexity of the processes and the legal discussions held with mediators and tribunal members, the Board invariably has instructing solicitors or barristers in attendance. In most instances respondent veterinary surgeons also have legal representation. Taking into account the time taken at mediation or hearings, the legal costs for the Board and respondent veterinary surgeons can be substantial. Other costs for the Board include increased staff and board members' time, SAT fees, costs for Board members to represent the Board at mediations, and expert witness fees. Respondent's costs include time away from work, legal expenses, possible employment of locum tenens or lost work, and expert witness fees. It is noteworthy that the Board either does not recover its legal fees or more generally only recovers a proportion of the fees. The respondent in most circumstances cannot recover their legal costs if they successfully defend a case.

In addition to the financial impact on the Board and the respondent veterinary surgeon(s), the Board is seriously concerned about the substantial increase in time taken to resolve matters at the SAT compared to when the Board had the power to deal with disciplinary matters. On average, prior to the establishment of the SAT, the period from the time of the Board deciding that a complaint had sufficient merit to justify the holding of a formal enquiry was four to six months.

The Board has preferred twenty two matters to the SAT. The average time to resolve a matter at the SAT is estimated at nine months. The shortest time in which a matter has been dealt with by consent is four months. One matter has taken four years and is still not resolved.

Another matter in which the Board was seeking a reprimand against a veterinary surgeon took fifteen months to resolve at the SAT. The Board incurred approximately \$44,000 in legal costs and it was awarded \$30,000 in costs against the veterinary surgeon. The Board considers that the time taken and the costs incurred were totally out of proportion to the severity of the offence but the matter warranted a sanction so the Board had no choice but to pursue the matter until it was resolved at the SAT. A substantial contributing factor for the length of time taken to resolve the matter was due to the veterinary surgeon seeking support and advice from an organisation that purports to provide legal support to veterinary surgeons which does not employ registered lawyers but takes an aggressively adversarial stance. In effect the SAT process has created a niche for this kind of legal industry for veterinary surgeons who are confused by the complexity of the SAT process and are seeking affordable legal support.

Having a third party involved in the investigation and resolution of complaints has increased the complexity of the process and time taken to resolve matters. For example, in one matter the Board and the respondent veterinary surgeon agreed on the resolution of a matter at mediation but the SAT did not accept the mediated settlement. It took a further five months of negotiation with the SAT and the respondent veterinary surgeon, with the accompanying legal expenses, before a final mediated settlement was reached.

The Board has had three matters that could not be resolved at mediation and were heard by a SAT tribunal.

Prior to the establishment of the SAT, decisions as to whether the conduct of a veterinary surgeon was unprofessional were made by the Board, of which four of the five members (or their deputies) are experienced veterinary surgeons.

With the establishment of the SAT only one registered veterinary surgeon sits on the tribunal, and the chair of the tribunal is either a lawyer or a judge. The Board is not aware of the selection criteria for the veterinary surgeon, but they cannot be a member of the Board. Thus, when the tribunal is determining the matter, the view of the one veterinary surgeon, who may or may not be conversant with current standards of practice and is not conversant with the Board's view on current veterinary standards, is available and if that view is in the minority the outcome of the case is determined by people with little or no knowledge of veterinary standards.

Another concern is that the tribunal requires the Board and the respondent to each furnish an "expert" witness of similar skills and background to the respondent to assist the tribunal in establishing the professional standard of conduct expected by a veterinary surgeon of good repute and competency. In some instances the expert witnesses are unable to agree, and in at least one case where the expert witnesses did agree that the respondent's conduct was unprofessional the tribunal chose to ignore their testimony. The Board strongly believes that the standard of professional conduct is more properly determined by a Board constituted under legislation to provide a mix of members, the majority of whom are veterinary surgeons with the experience and expertise to make such judgements, rather than the SAT relying on the views of one or two veterinary practitioners who have not been elected or appointed for this purpose, and which the SAT can choose to ignore.

On page 18 of the Productivity Commission's issues paper it states that the former President of the Victorian Civil and Administrative Tribunal, Justice Morris commented in part "the tribunal is empowered to inform itself on any matter as it sees fit" and that this power is used to achieve a "fair conduct of the case" and achieve a "just outcome".

The Board's experience is at odds with the view expressed by Justice Morris. In the Board's most recent case before the tribunal it was expected that the expert witnesses would be required to give evidence for half a day. Instead they gave evidence for two days. The Board's view is that this was largely due to the respondent veterinary surgeon's lawyer being permitted to question the expert witnesses on matters that were irrelevant to the case despite formal objections from the Board's barrister. For example, the expert witnesses were asked to comment at length on guidelines for mobile veterinary practices in other states and territories and whether their own practices complied with those requirements. This was irrelevant as veterinary surgeons registered in WA must adhere to this state's veterinary legislation, not that in another jurisdiction. In addition other witnesses called by the defence were asked to express opinions on matters of which they had little or no relevant knowledge. For example an RSCPA officer was asked questions on professional standards of veterinary surgeons. The response from the tribunal to the Board's barrister's objections was that the matters should be explored in case they did turn out to be relevant and if they were not explored it could form the basis of an appeal.

It is the Board's view that the legal representatives for either party should not be permitted to introduce irrelevant material. Further, the Board is of the view that the tribunal's power to inform itself should be used judiciously and not as an avenue by either party to drag out a hearing by introducing irrelevant matters and confusing the issues.

The Board is especially concerned that the additional time required for the SAT to deal with emergency matters has resulted in veterinary surgeons who have engaged in serious professional misconduct or substance abuse being able to continue practise and have access to drugs; thus placing animals and the public at risk for longer periods than was the case when the Board dealt with these matters directly. The Board is currently reviewing a Bill which it hopes if legislated will rectify some or most of these deficiencies.

Apart from the financial costs and length of time taken for disciplinary matters going to the SAT, the Board is concerned with the relative safety of the SAT decision making process with regard to the conduct of veterinary surgeons and the penalties which may be imposed.

The Board considers the removal of a veterinary surgeon's name from the register (deregistration) to be the most severe penalty available and rarely seeks to impose this penalty. However, in some cases where the infringement is so severe and/or the public's safety is at risk, the imposition of the penalty is appropriate. The Board is extremely concerned at the apparent reluctance of the SAT to deregister or suspend the registration of veterinary surgeons and "deprive them of their livelihood". It is the Board's view that the protection of the public and maintenance of appropriate professional veterinary standards is a higher priority than the rights of an individual veterinary surgeon to continue to earn an income from a profession when the available evidence is that they are not fit to do so.

In summary, the Board is of the opinion that the Board has the knowledge, skills and experience to ensure that disciplinary matters are expeditiously dealt, with while protecting the public's interest and minimising cost, than has been possible since the inception of the SAT.