

SUMMARY OF DECISION OF RAD BOARD¹

HARNESS RACING VICTORIA STEWARDS - HRV

MS ELLEN TORMEY AND MR GLENN DOUGLAS – DEFENDANTS

HEARING OF THE HRV RACING AND DISCIPLINARY BOARD

**BOARD MEMBERS: JUDGE GRAEME HICKS, CHAIRPERSON, AND MR ROBERT ABRAHAMS,
DEPUTY CHAIRPERSON**

APPEARANCES: MR ADRIAN ANDERSON OF COUNSEL FOR HRV

**MR DAMIAN SHEALES OF COUNSEL, FOR THE DEFENDANTS, INSTRUCTED BY MS
CLAUDETTE CHUA OF COCKBURN & CO SOLICITORS**

DATE OF HEARING: 24 AND 25 SEPTEMBER 2019

DATE OF ORDERS: 11 DECEMBER 2019

Charges:

The HRV stewards charged Ms Ellen Tormey with a breach of rule 193(7) which reads:

A person shall not allow or permit another person to attempt to perform or perform any of the actions prohibited by sub – rules (1), (2), or (3).

Note: 193(1) states: A person shall not attempt to stomach tube or stomach tube a horse nominated for a race or event within 48 hours of the commencement of the race or event.

Particulars of the charge

1. On 1 December 2018, the horse, ‘**The Boss Man**’, was engaged to complete in race 4, the ‘TAB Inter Dominion Trotting Championship (1st Round Qualifying Heat 2) (Group 3) at the Tabcorp Park Melton harness racing meeting.
2. At the relevant time you were the registered trainer of The Boss Man.
3. On 1 December 2018 HRV Stewards attended your registered training establishment and observed licensed person Glenn Douglas in the same box as The Boss Man in close proximity to wet stomach tubing equipment.
4. You did allow Glenn Douglas to stomach tube or attempt to stomach tube the horse The Boss Man, a horse nominated for a race within 48 hours the commencement of that race.

Plea: Not Guilty.

The stewards charged Mr Glenn Douglas of a breach of rule 193(1) which reads:

A person shall not attempt to stomach tube or stomach tube a horse nominated for a race or event within 48 hours of the commencement of the race or event.

Particulars of the charge

1. On 1 December 2018, the horse, **The Boss Man**, was engaged to complete in race 4, the ‘TAB Inter Dominion Trotting Championship (1st Round Qualifying Heat 2) (Group 3) at the Tabcorp Park Melton harness racing meeting.
2. At the relevant time you were a licensed Grade A trainer and Grade A driver.

¹ This is a summary of the RAD Board Decision. The complete decision has not been published in its entirety.

3. On 1 December 2018, HRV Stewards attended the registered training establishment of Ellen Tormey and observed you in the same box as The Boss Man in close proximity to wet stomach tubing equipment.
4. You did stomach tube or attempt to stomach tube the horse The Boss Man, a horse nominated for a race within 48 hours of the commencement of that race.

Plea: Not Guilty

FINDINGS

The Board finds as follows:

1. Ms Ellen Tormey is guilty of breaching rule 193(7) by allowing or permitting another person (Mr Glenn Douglas) to stomach tube a horse (The Boss Man) which was nominated for a race or event within 48 hours of the commencement of the race or event.
2. Mr Glenn Douglas is guilty of breaching rule 193(1) by stomach tubing a horse (The Boss Man) which was nominated for a race or event within 48 hours of the commencement of the race or event.

BACKGROUND

On the afternoon of 1 December 2018 Mr Neal Conder and Mr Russell Anderson, stewards of the HRV Integrity Department, carried out an inspection of Ms Ellen Tormey's licenced training establishment at 681 McIvor Highway, Junortoun.

That evening a horse, The Boss Man, trained by Ms Tormey was scheduled to race in the first round of the qualifying heats of the TAB Inter Dominion Trotting Championship at the harness racing meeting at Melton in race 4 at 7.34pm.

The act of stomach tubing a horse involves the passing of a rubber or plastic tube, of appropriate dimensions, through the nostril of a horse, through the oesophagus and into the stomach. A funnel is attached to the other end of the tube into which a prepared mixture, usually in a bucket, is poured so that the contents drain down the tube into the stomach of the horse.

The act of stomach tubing a horse can be used for legitimate equine health reasons and is not prohibited under the Rules of Harness Racing unless it takes place within 48 hours of a race in which the horse is competing.

Dr Cust gave evidence that stomach tubing a horse with an alkalising agent can raise the level of carbon dioxide (TCO₂) in the body of the horse with the possible effect of delaying the onset of the production of lactic acid which produces the pain, the fatigue and the sore muscles. By buffering that acid with alkalising agents, one of the aims is to delay the onset of fatigue of those muscles and assist in the recovery from strenuous exercise.

(Transcript page 96 lines 25-34 and page 97 line 18-2)

Horses have a natural TCO₂ level. It is only if the level of TCO₂ is above 36 millimoles per litre of blood plasma (**mmol/L**) that it is a prohibited substance under the rules of HRV.

Dr Cust gave evidence that 4–6 hours before a race is due to start is the optimal time to administer an alkalising agent via a stomach tube and a person who is stomach tubing a horse within 4–6 hours of a race is endeavouring to raise the TCO₂ level to the highest level possible but still under the level of 36mm/L.

EVIDENCE

1. At the hearing the following documents (marked as exhibit 1) were tendered by HRV:
 - (a) The Stewards brief, including witness statement of Mr Neal Conder dated 14 May 2019, witness statement of Mr Russell Anderson dated 22 May 2019, witness statement of Dr Richard Cust dated 26 June 2019, witness statement of Dr Julia Aspinall dated 12 February 2019 and witness statement of Associate Professor Dr Catherine Steel;
 - (b) A Supplementary folder of documents (also included in exhibit 1), the contents of which, were by agreement of the parties, limited to the supplementary expert witness statement of Dr Richard Cust, dated 18 September 2019, the supplementary statement of Neal Conder dated 18 September 2019 and the exhibits thereto marked SNC7, SNC9, SNC10, SNC11, SNC13, SNC14, SNC15, and SNC19; and
 - (c) Videos of Ms Tormey's stable area.
2. Mr Neal Conder, Mr Russell Anderson, Dr Richard Cust, Associate Professor Dr Cate Steel and Dr Julia Aspinall gave evidence at the hearing on behalf the HRV.
3. A transcript of the evidence given by these witnesses at the hearing was provided to the Board.
4. The defendants did not give any evidence in the hearing and no witnesses were called to give evidence on their behalf. No documents were tendered on behalf of the defendants.
5. A chronology was prepared by Counsel for both parties. A copy was provided to the Board.

WRITTEN SUBMISSIONS OF THE PARTIES

Following the completion of the hearing the parties made the following written submissions:

HRV 7 October 2019,

The Defendants 21 October 2019,

HRV in Reply 30 October 2019, and

Further Submissions of the Defendants undated but received in early November 2019.

STANDARD AND BURDEN OF PROOF

In coming to its determination, the Board has had regard to the principles articulated in *Briginshaw v Briginshaw* [1938] HCA 34; 60 CLR 336.

The Board is required to be comfortably satisfied on the balance of probabilities that Ms Tormey and Mr Douglas are guilty of the charges, taking into account the gravity of the consequences and seriousness of the allegations.

The allegations in this case are serious allegations with potentially significant consequences for the livelihood of each applicant.

The onus of proof is upon HRV.

To uphold each charge, HRV must establish a more probable inference in favour of what is alleged and the inference must be something which follows from the given premises as being at least probably true.

There is no requirement to establish that the inference is the only inference reasonably open.

Where a case is based on circumstantial evidence, such as this one, the circumstantial facts are to be considered in combination and working together, rather than in isolation from each other. The

Board's task is to consider the weight of the combination of circumstantial facts proved to its

satisfaction, and then to determine whether the combined weight of those facts supports the inference, on the balance of probabilities, in favour of what is alleged.

PROOF OF EACH CHARGE

Proof of the guilt of breaching rule 193(7) in the case of Ms Tormey and rule 193(1) in the case of Mr Douglas, can be established by two alternative methods of proof.

That is, a breach of rule 193(7) or a breach of rule 193(1) can be established by proving either an attempt to commit the alleged act or by proving the commission of the alleged act.

Mr Anderson, for HRV, at the start of the case stated that HRV was putting its case in the alternative, being either an attempt at or the actual stomach tubing of The Boss Man within 48 hours of scheduled race on 1 December 2018.

The Board accepts that in order for the charges against each defendant to be proved, the members of the Board must make a unanimous decision as to the method of proof.

PRELIMINARY MATTERS

1. CONSCIOUSNESS OF GUILT

Mr Sheales submitted that HRV could not rely on the concept of consciousness of guilt.

Mr Anderson in his written submissions argued that each of the defendants had demonstrated consciousness of guilt. In the case of Mr Douglas by abruptly departing the scene when confronted by the stewards at Ms Tormey's property on

1 December 2018. In the case of Ms Tormey, when she lied to the stewards by telling them that no one else was present at the stables when she knew that Mr Douglas was there.

The law relating to consciousness of guilt (which is expansive) requires the tribunal to be satisfied that the lies and/or the conduct are reasonably capable of amounting to an implied admission of the charge, or to one of its elements.

In the case of Mr Douglas, he is and was a licensed person under the rules of HRV. The stewards had the power to direct Mr Douglas not to leave the property until after the stable inspection and their investigations had been completed including a search of the vehicles belonging to both Mr Douglas and Ms Tormey. The stewards did not direct Mr Douglas to stay on the property. We note that Mr Douglas did not drive his vehicle immediately away from the property as he stopped to check the oil level in Ms Tormey's vehicle.

During the stable inspection by the stewards Ms Tormey called out to Mr Douglas to check her vehicle to see if the oil level was okay. Mr Douglas did this. He had unfettered access to Ms Tormey's vehicle and his own. He was free to leave which he did.

We find that Mr Douglas's conduct is not reasonably capable of amounting in law to a consciousness of guilt.

In the case of Ms Tormey, we find that such lies are not reasonably capable of amounting, in law to a consciousness of guilt.

In these circumstances, the Board is of the opinion that consciousness of guilt cannot be maintained against either Ms Tormey or Mr Douglas.

2. PROCEDURAL FAIRNESS

Mr Sheales submitted that it was incumbent upon HRV to state what part of the explanations given by the defendants were untrue.

We disagree. Both Ms Tormey and Mr Douglas denied stomach tubing or attempting to stomach

tube The Boss Man. However, the very charges laid and prosecuted against them allege that they did.

It is disingenuous to suggest that the defendants were unaware that their previous explanations somehow would be accepted and regarded as the truth.

There is no procedural unfairness in HRV not pointing out what parts of their explanations, given in interviews by the stewards, would or would not be accepted as truthful.

At the outset, HRV clearly put its case in the alternative against both defendants. Both defendants knew they were being accused of, in the case of Mr Douglas attempting to stomach tube or actually stomach tubing The Boss Man and in the case of Ms Tormey, allowing or permitting Mr Douglas to do it, within 48 hours of the commencement of the race in which The Boss Man had been entered on 1 December 2018. The brief of documents prepared by HRV and provided to the defendants contained all the circumstantial facts upon which HRV relied in support of its case.

We find that there has been no procedural unfairness to the defendants in the way that HRV put its case against the defendants.

SUMMARY OF HRV STEWARDS' INSPECTION OF MS TORMEY'S STABLES ON 1 DECEMBER 2018

Mr Conder

1. On the afternoon of 1 December 2018, Mr Neal Conder and Mr Russell Anderson, both HRV stewards, drove to a location near of Ms Tormey's stables at 681 Mclvor Highway, Junortoun. They initially conducted surveillance from a position on the Mclvor Highway where Mr Conder had a view of the eastern end of the stable block.
2. Between approximately 3:10pm and 3:15pm Mr Conder observed a male and female walking through this area. He recognised the female as Ellen Tormey but could not clearly identify the male. He also observed a horse that which was tied up outside stable block.
3. At approximately 3:22pm the Stewards entered the property on foot by the front gate and walk down the driveway.
4. Ms Tormey approached them on the driveway approximately halfway between the house and the stable block.
5. The Stewards followed her to the wash bay where a horse was tied up. Ms Tormey informed the Stewards she had been washing the horse Nomi Malone outside the stables in the wash bay area.
6. Mr Anderson took a photograph of this horse at 3:23pm (exhibit **RA1** to his statement).
7. Mr Conder observed Ms Tormey to be agitated and asked if she had anyone with her to which she replied 'No'. Mr Conder asked her again if she had any one helping her to which she again replied 'No'. But, after hesitating, she said '*Glenn is around the back.*'
8. Mr Conder told Ms Tormey they needed to see The Boss Man. Ms Tormey walked across the front of the stable block and past a stall with a closed door on which there was a prominent sign reading 'The Boss Man'.
9. Mr Conder then walked around to the back of the stable block and observed Mr Glenn Douglas standing in a corner of the rear section of The Boss Man's stable.
10. The Boss Man's stable is comprised of two sections. The front section of the stable which is of brick construction and the rear section which is enclosed by a wire fence and gate and is open to the elements. There is an interior wall separating the front and rear sections of the stable, save that there is an opening in the internal wall which allowed The Boss Man to freely walk between

both sections.

11. When Mr Conder approached the rear section of the Boss Mans stable, he observed Mr Douglas in the rear section with his back turned towards Mr Conder and urinating. In the front section of the stable The Boss Man was attached by a clip to the wall so he could not move from that location.
12. Mr Conder moved past The Boss Man's stable and stood against a rail at the next stable. He then observed Mr Anderson enter The Boss Man's stable from the front and approach Mr Douglas from inside this stable. Mr Conder heard Mr Douglas say he was having '*a piss or a pull, whatever you want to call it*' and Mr Douglas then exited The Boss Man's stable through the front.
13. Mr Conder walked back around to the front of the stables again and saw Mr Douglas walking towards a white ute. Ms Tormey asked him to check the oil in a dark grey dual-cab ute attached to the float which he did and he then went to the white ute and after a brief discussion with Mr Anderson drove out of the property.
14. By approximately 3:27pm Ms Tormey had taken The Boss Man out of the stable which Mr Douglas had left and tied the horse up outside the front door of the stable.
15. Mr Conder then noticed that The Boss Man had a wet off-side (right hand) nostril while the other nostril was dry. A photograph was taken of the nostrils. **(NC1)**
16. Mr Conder asked Ms Tormey to be up front and had The Boss Man been treated to which she replied '*No, he hasn't had anything*'. Mr Conder stated that The Boss Man had a wet off side nostril and asked had Mr Douglas administered a stomach tube to The Boss Man, to which Ms Tormey restated '*No, he has not been treated, his nose is always like that*'.
17. Mr Conder and Mr Anderson conducted a further search of the stable area. Mr Conder again walked around to the back of the stable area where he observed a small storage area. From the video tendered before us it appeared to be approximately a metre wide. Mr Conder was blocked from entering the small storage area by a pile of horse rugs. This small storage area is located next to The Boss Man's stable. Mr Conder observed a blue bag right at the rear of this small storage area.
18. As a result, Mr Conder walked around to the front of the stable block and then into The Boss Man's stable. This was the stable in which The Boss Man and Glenn Douglas had been in together. Mr Conder walked through the front section of The Boss Man's stable and through the opening between the two sections and into the rear area of the stable next to which he had observed the blue bag. He looked at the small storage area where he had seen the blue bag and saw that it was located at the back of that area. From his position in the rear section of The Boss Man's stable he reached over a rail of about waist height and lifted up the bag from the small storage area into The Boss Man's stable.
19. Mr Conder took the blue bag to the front of the stable block and opened it in front of Ms Tormey.
20. Ms Tormey stated that the bag and the contents were Scott Dyer's and had been there '*for ages*'. Mr Conder noticed there was no dust or dirt on top of the bag or on any of the contents of the bag.
21. Mr Conder then took the contents of the bag out in front of Ms Tormey. He observed that the bag contained a semi-transparent funnel which was wet, a small white bucket which was also wet and which contained a small amount of discoloured liquid. The bag also contained a yellowish plastic tube which contained an amount of liquid within it.
22. Mr Conder pointed out to Ms Tormey that all the contents were wet in the bucket and that the

tube still had liquid in them. Ms Tormey replied that it *'just sits in there'*.

23. While discussing these matters further with Ms Tormey and standing in front of The Boss Man, Mr Conder both observed and heard The Boss Man belch. Ms Tormey also heard the noise and stated that The Boss Man *'regularly makes noises such as groaning'*. Mr Conder advised Ms Tormey that in his experience a belch such as that was synonymous with a horse that had been stomach tubed
24. At approximately 3:37pm, HRV Animal Welfare and Licensing Steward. Lucy Lingard-Smith. arrived at the property and she took photos.
25. At 3:39pm Mr Conder conducted a recorded interview with Ms Tormey. **(NC2)**
26. At approximately 4:35pm The Boss Man and Nomi Malone were loaded onto a float and driven to Tabcorp Park Melton.
27. Upon arrival Mr Conder took the blue bag containing the bucket, funnel and tube to the steward's room.
28. The stewards commenced an inquiry and at 7:19pm ordered the late scratching of The Boss Man from race 4, the first qualifying race of the Inter-Dominion Trotting Championship which was due to start at 7:34pm (SB page 353).
29. While at Tabcorp Park Melton, several blood samples were taken from The Boss Man which were analysed by Racing Analytical Services Ltd (**RASL**). We refer to the analysis of these samples later in this decision.

Mr Russell Anderson

1. On 1 December 2018 at approximately 3:22pm, Mr Russell Anderson, accompanied by Mr Conder, entered the license training establishment of Ms Tormey on foot via the front gate.
2. Mr Anderson corroborated Mr Conder's evidence at the stables when he, Mr Anderson, was present.
3. Mr Anderson described how, at one stage, he followed Ms Tormey into the front section of The Boss Man's stable and observed The Boss Man as it was clipped up prior to being taken out of the front section of the stable by Ms Tormey. (Transcript page 40 lines 21–38.
4. At 3:46pm Mr Anderson commenced an assessment of The Boss Man's stable. He took several photographs (**RA2 to RA15**).
5. The photographs taken by Mr Anderson included a photograph of the area in the corner of the rear section of The Boss Man's stable where Mr Douglas had indicated he was urinating, several photographs of shoe tread impressions, the shape and size of the shoes worn by Mr Douglas, a photograph of the area where Mr Conder indicated he had located the blue bag and tubing equipment, a photograph of the shoe impression directly adjacent to that area, a photograph of the shoe impression which Mr Anderson saw was made by Mr Douglas after he had finished urinating and was walking towards Mr Anderson.
6. Mr Anderson referred to exhibits **RA5** and **RA6** which he said are photographs of the shoe impression where Mr Douglas stood while he was urinating.
7. He referred to exhibit **RA7** which he said is a photograph of a shoe impression adjacent to the area where Mr Conder told him he had located the blue bag containing the stomach tubing equipment.
8. He referred to exhibit **RA8** which he said shows a photograph of a shoe impression towards the top of the photograph which he saw Mr Douglas make. (Transcript page 45 lines 34–38.)

9. Mr Anderson looked closely at the area in the stable where The Boss Man had been clipped up.
10. He referred to exhibit **RA11** which he said was a photograph of a shoe impression below the tie-up area where he had observed The Boss Man clipped up. He took a photograph of this impression as he considered it was the same as the shoe impression made by Mr Douglas when he was first sighted. Mr Anderson considered that this was evidence that Mr Douglas had stood in this area to the right of the tie up point. (SB page 360 paragraph 19.)
11. He said he observed a wet patch on the ground directly below the tie up where The Boss Man had been clipped up. He said that this wet patch is shown in exhibits **RA13** and **RA14**.
12. He examined the wet patch and stated that he observed: *'It hadn't been there for a lengthy period of time because it hadn't - some of it had soaked in but not all of it, so it was relatively fresh'*. (Transcript page 49 lines 20–22.)
13. He also stated *'I put my hands into it and feel it, and it has gone in about this far into the stable base. So, there was a reasonable - and it was wet'*. (Transcript page 49 lines 27–29.)
14. He estimated the wet patch was about 1½ inches deep.
15. He referred to exhibit **RA15** which he said shows the clip to which he saw The Boss Man attached in the front section of The Boss Man's stable.
16. As to the shoe impressions, Mr Anderson stated that he was quite clear about this evidence because Ms Tormey was wearing thongs, he was wearing flat soled shoes, Mr Conder had a set of boots on and the shoe marks made by Mr Douglas were not similar to any marks made by these shoes or footwear (Transcript page 47 lines 28–31.)

TRANSCRIPTS OF INTERVIEWS

Transcripts of the steward's interviews of Ms Tormey on 1 December 2018 at her training establishment, at Tabcorp Park Melton later on the same date and at the offices of Harness Racing Victoria on 4 March 2019, of the conversation between Scott Dyer and Anthony Pearce on 1 December 2018, of the interview of Neil Dyer on 2 December 2018, of the interview Scott Dyer on 16 January 2019, of the interview of Dylan Marshall on 16 January 2019 and the interview of Glenn Douglas on 4 March 2019 at the offices of Harness Racing Victoria were tendered in evidence.

Both Ms Tormey and Mr Douglas denied being in any way involved in or permitting the attempted or actual stomach tubing of the Boss Man on 1 December 2018

ISSUES NOT IN DISPUTE

It is alleged by HRV that on 1 December 2018 the stewards found wet stomach tubing equipment in a blue bag at Ms Tormey's stables next to the rear section of The Boss Man's stable.

At one stage of the stewards' interview of Mr Douglas on 4 March 2019 (SB Page 303 line 31) he expressed the opinion that part of the stomach tubing equipment (the yellowish plastic tube) was not suitable for stomach tubing horses. Nonetheless the case before us proceeded on the basis that the equipment found by the stewards at Ms Tormey's stables on 1 December 2018 was stomach tubing equipment which was used to the purpose of stomach tubing a horse and had been left at her stables by Mr Scott Dyer.

Throughout the hearing there was no challenge by Mr Sheales that this equipment was not stomach tubing equipment.

Accordingly, there is no dispute between the parties that:

1. the equipment found at the stables of Ms Tormey in the blue bag by the stewards on 1 December 2018 was stomach tubing equipment;

2. when the equipment was found by the stewards the funnel was wet, the tube was wet and contained a brown liquid and there was brown liquid in the bucket;
3. this brown liquid was subsequently analysed and found to contain an alkalisising agent; and
4. alkalisising agents can be used for the purpose of stomach tubing a horse with the aim of improving its performance in races.

THE STOMACH TUBING EQUIPMENT FOUND BY THE STEWARDS

Evidence of Ms Tormey

The first person to give an explanation concerning the stomach tubing equipment and its ownership was Ms Tormey when she was shown the stomach tubing equipment by Mr Conder on the day the stewards attended her stables on 1 December 2018.

In his statement dated 14 May 2019, Mr Conder states that on 1 December 2018 when he opened the blue bag in front of Ms Tormey and showed her the stomach tubing equipment Ms Tormey replied the bag and the contents were Scott Dyer's and had been there '*for ages*'. (SB page 3, paragraph 15, lines 2-3.)

Mr Conder noticed there was no dust or dirt on the top of the bag nor on any of the contents of the bag.

When Mr Conder pointed out to Ms Tormey that all the contents were still wet and the bucket and the tube still had liquid in them Ms Tormey stated it '*just sits in there*'. (SB page 3, paragraph 15, lines 10-11.)

Later that day at 3:39pm Mr Conder commenced a recorded interview with Ms Tormey in the presence of Mr Anderson. During this interview Mr Anderson asked Ms Tormey '*Did you see Mr Douglas with this tube?*'.

Ms Tormey replied: '*No. Well it always gets kept in that cooler, actually I haven't had it for ages and then Scott brought it back last weekend*'.

Ms Tormey added: '*It's Scott Dyer's tube. He brought it back last weekend because I needed to give Kentucky Gold to The Boss Man because he tied up*'. (SB page 14 lines 25-27 and 30-32.)

Mr Conder asked Ms Tormey: '*So you said Mr Dyer returned that last week, that tube and bucket and funnel?*'. Ms Tormey replied: '*Yep*'.

Mr Conder then asked Ms Tormey: '*Yep. And you said prior to that that it had been there for quite a while so you are changing that, that comment now?*'.

Ms Tormey replied: '*Well I'm not sure where he put it. Like ...*'. (SB page 15 lines 16-24.)

In a subsequent Interview by the stewards on 4 March 2019, and when challenged by the stewards, Ms Tormey maintained that Scott Dyer dropped off the stomach tubing equipment to her stables, but this time she said he brought it back on the Wednesday of the week leading up to 1 December 2018 and not on the weekend which she had previously stated. (SB page 200, line 12, page 201, line 9, page 202, line 33-37 and page 205, line 35.)

Ms Tormey continued to maintain that stomach tubing equipment was owned by Scott Dyer. (SB page 199, line 36 and page 215 line 11-25) saying: '*Well, it's been his for however long I can remember*'.

Evidence of Scott Dyer

Scott Dyer telephoned the stewards and spoke to Anthony Pearce on 1 December 2018. He said he had spoken to Ms Tormey (by telephone) and she was very upset. When questioned by Mr Pearce, Scott Dyer denied being at Ms Tormey's stables that day. He stated that his uncle, Neil Dyer, might

have been to her stables during the week before 1 December 2018 and given The Boss Man a saline drench because it had to race three times in that week. Scott Dyer said Neil Dyer had his own stomach tubing equipment and he possibly would have used it.

Evidence of Neil Dyer

Neil Dyer was interviewed by the stewards on 2 December 2018. He stated that he had not been at Ms Tormey's property during the last six or eight months. He said he had his own stomach tubing equipment. He denied that he ever stomach tubed The Boss Man.

Further Evidence of Scott Dyer

Scott Dyer was interviewed in person by the stewards (Anthony Pearce and Steve Svanosio) on 16 January 2019 at Romsey. He denied that he was at Ms Tormey's stables on 1 December 2018. He stated that he often spoke to Ms Tormey and she had already rung him twice that morning and she was coming down to have tea with him that evening. He said he asked his uncle, Neil Dyer, if he could give The Boss Man a saline drench during the week because it was going to be a hot week leading up to a big race and the horse ties up a lot. But he said his uncle never did it. He told the stewards that the last time he was at Ms Tormey's stables was on Tuesday, 27 November 2018. He stated that no one asked him to stomach tube a horse and he was not involved in any treatment of any horses that day.

When the stewards informed him that Ms Tormey claimed during her interview that the stomach equipment was his and he brought it to her stables during the week prior to 1 December 2018, he replied that the stomach tubing equipment would be his and he probably brought it there years ago. (SB page 77 lines 6–8.)

He said he did not recall bringing it back to Ms Tormey's stables because he would not have needed it. (SB page 77 line 20.)

Later that day, after Mr Dyer's interview and in response to his telephone call to the stewards, the stewards again interviewed him by telephone commencing at 12:07pm. Mr Dyer told them that he had a poor memory but had now recalled that he was pretty sure he had asked Dylan Marshall if he could administer a saline drench to The Boss Man which might have been on the Wednesday or Tuesday. (SB page 84 lines 8–10, 18–20, and 41). Mr Dyer said the product used for the drench would probably be Kentucky Gold. (SB page 85 lines 25 and 26.)

The stewards asked Mr Dyer why he hadn't mentioned Dylan Marshall in his previous two interviews back on 1 December and earlier that morning.

Mr Dyer said he had spoken to Ms Tormey this morning and she told him that *'the horse must have got done'* (drenched) *'the Kentucky Gold thing wasn't there so she assumed that it was done'*. (SB page 86 line 44–46 and page 87 lines 4–12.)

Mr Dyer told the stewards he did not mention Mr Marshall to Ms Tormey but he did tell her he had two visitors to answer some questions. He also said he had not spoken to Mr Marshall. (SB page 87 lines 14–24.)

This was the first time, being 16 January 2019, that Dylan Marshall's name had been mentioned.

Evidence of Dylan Marshall

On 16 January 2019, stewards (Anthony Pearce and Stephen Svanosio) interviewed Mr Dylan Marshall. In answer to various questions Mr Marshall provided the following information:

1. He has salined drenched some of Ms Tormey's horses in the past when Ms Tormey has rung and asked him to do it.
2. He does not recall treating any of Ms Tormey's horses on 1 December 2018.

3. It is very possible that Ms Tormey asked him on the Tuesday or Wednesday leading up to the heats of the Inter-Dominion on 1 December 2018 if he could treat a horse or horses for her. (SB page 96 lines 42–48.)
4. It is very possible that Scott Dyer called him during the week leading up to 1 December 2018. (SB page 97 lines 20 and 34–35.)
5. Mr Marshall stated that he takes and only uses his own stomach tubing equipment to drench horses which he described as a clearish coloured tube, a bluey coloured bucket and a clearish funnel with a black bottom on it. (SB page 98 lines 14–33.)
6. Mr Marshall stated that he definitely did not leave his stomach tubing equipment at Ms Tormey's property in November 2018. (Page 100 line 8.)

Evidence of Glenn Douglas

Mr Douglas was interviewed by the stewards on 4 March 2019. He gave evidence of the practices he follows in stomach tubing a horse. (SB page 270 commencing at line 27.)

He stated that he has his own stomach tubing equipment. He described the equipment by saying the tube is very old, it's got a different colour on top on it to connect the funnel to. There's a bit of tape around that because it's falling apart a little bit. The funnel is black, the jug is brown. (SB page 271 lines 40–42, page 272 lines 1–3.)

He was shown photographs of the stomach tubing equipment the stewards found at Ms Tormey's property. He stated it was not his equipment. He denied using that stomach tubing equipment to drench The Boss Man. (SB page 305 line 29.)

FINDINGS REGARDING THE STOMACH TUBING EQUIPMENT FOUND BY THE STEWARDS AT MS TORMEY'S STABLES ON 1 DECEMBER 2018.

We find that:

1. Mr Scott Dyer was the owner of the stomach tubing equipment which the stewards found at Ms Tormey's stables on 1 December 2018. He told the stewards he probably brought to Ms Tormey's stables years ago. (SB page 77 line 6–8.) He did not use it to stomach tube The Boss Man or any other horse in the week leading up to and including 1 December 2018.
2. Mr Neil Dyer did not use the stomach tubing equipment or any other equipment to stomach tube The Boss Man or any other horse in the week leading up to and including 1 December 2018.
3. Mr Marshall did not use the stomach tubing equipment to stomach tube The Boss Man or any other horse in the week leading up to and including 1 December 2018.
4. No person has stated that they used the wet stomach tubing equipment found by the stewards in the week leading up to and including 1 December 2018 to stomach tube The Boss Man or any other horse.

SUBMISSIONS

Mr Anderson, in his submissions 7 October 2019, in paragraph 10, listed the various 'premises' from which he submitted that the likely inference to be drawn from the evidence was that Mr Douglas tubed or attempted to tube The Boss Man within 48 hours of the subject race.

Mr Sheales in his submissions of 21 October 2019, in paragraph 12, listed each of these premises and submitted there were valid explanations for each piece of circumstantial evidence relied upon by HRV.

Mr Anderson, in his submissions in reply, of 30 October 2019, responded by going through each of the matters raised by Mr Sheales and submitting that there were no valid explanations put forward.

As the parties have approached the task in this way, so will the Board.

The task before the Board though is to consider the totality of the facts that it finds have been proved and then to decide whether the totality of those facts prove the guilt of the defendants to the relevant standard. A circumstantial fact of itself may prove nothing. It is the totality of the facts that the Board finds proven that need to be assessed.

We set out below the premises put forward by Mr Anderson and the explanations put forward by Mr Sheales.

Premise 10(a) & (b) - The Boss Man was engaged to compete in the race at 7:34pm on 1 December 2018. Mr Douglas was found in the box with The Boss Man around 3:22pm on 1 December 2018 with a wet tube, funnel and a small white bucket (the tubing equipment) within reach from The Boss Man's box.

The defendants' explanations

The defendants' offered a number of explanations, including that:

1. Tormey had asked him to come and mend a fence, which fence she showed to the Stewards.
2. The tubing equipment was not in easy reach, not in the horse's box.

Based on the evidence of Mr Conder, the video he showed at the hearing of the stable block and the photographs taken by Mr Russell Anderson we find that the location where the stewards found the stomach tubing equipment was within easy reach of someone in The Boss Man's stable.

We will deal with the issues of the fence later in this decision.

Premise 10(c), (d) - The funnel was wet, the tube still contained a brown liquid and the bucket still contained some brown liquid, Mr Douglas knows how to tube a horse.

The defendants' explanations

1. That Dylan Marshall believed it was 'very possible' that the date he tubed a horse for Tormey was the Wednesday before the Stewards visit, that the tubing equipment was left in a bag, which evidence the Stewards do not dispute.
2. That Douglas would use his own equipment to tube a horse.
3. That Douglas would never stomach tube a horse without a twitch, as the horse will bleed otherwise.
4. That Douglas was not skilled enough to tube a horse alone, or without a twitch, nor would he be capable of using the tube that was found.

In view of the context of Mr Marshall's answer, on page 97 line 35 of the stewards brief and the questions preceding it, where he uses the expression '*that's very possible*' it is not clear to the Board whether he is referring to a request to stomach tube a horse for Ms Tormey or an actual stomach tubing of a horse.

In any event, Mr Marshall said that he takes and uses his own tubing gear which included a funnel '*with a black bottom on it*' and '*a bluey coloured bucket*'. This does not match the semitransparent funnel and white bucket found by the stewards within easy access of The Boss Man's stable.

On page 98 lines 41–45 of the steward's brief, Mr Marshall states that he left his stomach tubing equipment in a bag '*about a week ago*'. As his interview took place on 16 January 2019 is clear that he is stating that he left his stomach tubing equipment in a bag at Ms Tormey's stables about a week prior to that date of the interview and not in December 2018. When asked by the stewards did, he leave his stomach tubing equipment at Ms Tormey's property in November 2018 he replied '*definitely not*'. (SB page 100 lines 1–8.)

We find that the stomach tubing equipment found by the stewards was not used by Mr Marshall in the weeks leading up to or on 1 December 2018.

As to Mr Douglas, the Board is not satisfied that he gave truthful evidence to the stewards. We do not accept his statement that he would not be capable of using the stomach tubing equipment that was found by the stewards at Ms Tormey's stables.

When interviewed by Mr Day on 4 March 2019, Mr Douglas was shown photographs of the tubing equipment found by the stewards at Ms Tormey's property he said '*it's the wrong type of tube,*' and '*it is a garden hose*'. (SB page 303 lines 31 and 36.) This equipment belonged to Scott Dyer which he had used for stomach tubing horses. This being the case it could not be '*the wrong type of tube*' as claimed by Mr Douglas. Mr Sheales at no time argued that the equipment found by the stewards was not stomach tubing equipment.

Mr Douglas stated that horses can only be stomach tubed via the left- hand nostril. (SB page 264, lines 36 and 37.) However, Dr Cust gave evidence in his statement dated 26 June 2019 that a horse can be stomach tubed via either nostril. This makes obvious sense as both nostrils lead to the oesophagus which leads to the stomach of the horse.

Dr Cust gave evidence that it is possible for one person to tube a horse. (Transcript page 89 line 9.) In addition, Dr Cust stated that it is generally easier to tube an older horse (transcript page 109) and we note that at the time The Boss Man was nine years old.

We note that Ms Tormey is an experienced horse trainer and was present with Mr Douglas at the stables and if required she could have provided him with the necessary assistance to enable him to stomach tube The Boss Man.

We find that Dr Cust was a reliable and accurate witness. We find that:

1. The equipment found by the stewards was suitable for stomach tubing a horse;
2. The equipment when found by the stewards was wet and contained a brown coloured liquid;
3. Upon analysis the brown liquid was found to contain alkalising agents;
4. Horses can be stomach tubed through either nostril;
5. It is possible for one person to stomach tube a horse;
6. Mr Douglas was not truthful in his explanations to the stewards concerning the stomach tubing equipment and whether it could be used to stomach tube a horse.

No twitch was found at Ms Tormey's stables on 1 December 2018.

We are of the view that this is a relevant fact to be taken into account in our deliberations.

As a matter of fairness, though no evidence was led on the issue of a twitch, we are prepared to accept that it is a small object used in the industry to assist, if required, to stomach tube a horse.

As to the packet of Kentucky Gold that was said to be used during the week leading up to 1 December 2018 no person has stated that he or she used Kentucky Gold to stomach tube a horse with the stomach tubing equipment found by the stewards during that week or at all.

We accept that on 1 December 2018 no packet of an alkalising agent was found and we have taken that into account in our deliberations.

Premise 10(e) - Mr Russell Anderson observed footprints similar size, shape and tread to Mr Douglas' footprints adjacent to the tubing equipment and adjacent to the spot where The Boss Man was clipped to the wall of the box.

The defendants' explanation

That the evidence is irrelevant or highly speculative.

Mr Anderson, in his written statement and before the Board at the hearing, gave evidence that he observed Mr Douglas walking in The Boss Man's stable and he took photographs of Mr Douglas' shoe impressions. He observed Mr Douglas make a shoe impression while walking towards him in The Boss Man's stable, which he photographed. He also observed shoe impressions which were of a similar size, shape and tread which he had observed Mr Douglas make which were adjacent to where Mr Conder found the tubing equipment and also directly below the spot where The Boss Man was clipped to the wall of its stable by Ms Tormey. He considered that this was evidence that Mr Douglas had stood in these areas. He noted that the shoe impressions were distinct from those left by Ms Tormey who was wearing thongs, his own flat soled shoes and the boots worn by Mr Conder.

Mr Anderson is not an expert in the area of shoe impressions. Though not a perfect example, in an identification case, for instance, a witness is allowed to give evidence that although he or she could not positively identify the accused he or she is still able to say they observed a person who was of similar height, weight and size as the accused and this is accepted as a piece of circumstantial evidence.

Though Mr Anderson is not an expert witness, we find that Mr Anderson's observations of the shoe impressions are of some weight and are a piece of circumstantial evidence which we are entitled to consider.

Premise 10(f) - There was a wet patch on the floor below the tie-up where The Boss Man's head was clipped to the wall.

The defendants' explanation

1. It may have been from the water in the stall;
2. It may have been from the hose;
3. That sawdust doesn't absorb, the moisture will sit there for up to 4 days and not dry.

A wet patch of sawdust was observed by the stewards in the front section of The Boss Man's stable when they visited Ms Tormey's property on 1 December 2018. The wet patch was located by Mr Anderson directly below where The Boss Man's head had been clipped to the side of the stable by Ms Tormey. She stated that she had clipped him up so that he would not be able to gain access to water before his race scheduled that evening at 7:34pm.

When interviewed by Mr Day of the Stewards on 4 March 2019 he asked Ms Tormey if she could give an explanation of why there was a wet patch directly below where The Boss Man was tied up.

Ms Tormey stated: *'It could have been the hose, it could have been anything'*. (SB page 226, line 43–45.)

Ms Tormey then explained that when she is filling up the water in the stables, she goes in with a hose with the water usually running but although she holds a kink in the hose it does not mean she does not spill water everywhere.

Mr Day replied that her answer is the key point adding that: *'The only wet patch (in the stable) is directly below the tie-up'* to which Ms Tormey replies *'Yep'*. (SB page 229 lines 1-3.)

We note Ms Tormey's comments at page 226 line 31–33 that *'It (water) actually sit there (on the sawdust) for about four days and doesn't dry'*.

We refer to the evidence of Mr Anderson in relation to his inspection of the wet patch in the stable of The Boss Man. (his statement dated 22 May 2019) and his evidence at the hearing. He stated that his inspection of the wet patch indicated *'That the liquid ... hadn't been there for a lengthy period of time ... because some of it had soaked in but not all of it so it was relatively fresh'*. (Transcript page 49 lines

20-23.) He also stated he put his hands into the wet patch to feel it and noticed it had gone in to the sawdust by about 1½ inches and it was wet. (Transcript page 49 lines 27–29 and page 52 line 28.)

When the stewards showed Mr Douglas photographs of the wet patch, he suggested that if The Boss Man had a drink before it got tied up it could have dribbled water out. However, he did not know that Ms Tormey's very purpose in clipping up The Boss Man was to stop him having a drink.

Dr Cust gave evidence that during the procedure of stomach tubing a horse '*it's not uncommon*' for liquid to fall on the ground. When asked how often that tends to happen, he stated '*I would say most of the time*'. (Transcript page 89 lines 11–18.)

We find that:

1. There was a wet patch directly below where The Boss Man's head was clipped up and that it was recently wet;
2. It is not uncommon for liquid to fall to the ground during the stomach tubing of a horse.

Premise 10(g) – The Boss Man's right nostril was wet.

The defendants' explanation

1. That this was unremarkable.
2. That tubing horses involves the left hand nostril, Tormey thought only the left and Douglas said he only inserts into the left hand nostril.
3. That the horse had discharge in its nostrils the day before.
4. That she had to wipe the horse's nose the previous day for the photographer Ashlea Brennan, to '*clean up its head*'.
5. That Douglas could offer no explanation as he '*had not been near the horse*'.

Mr Conder observed that The Boss Man had a wet right nostril when it was brought out of its stable on 1 December 2018 while the left nostril was dry.

Dr Cust gave evidence that it is quite common for a horse to have a wet nostril after it has been stomach tubed. He explained that a horse can be stomach tube via either nostril. Dr Cust also gave evidence in his statement of 18 September 2019 that a wet nostril could occur as a result of mild sinus inflammation, allergy or infection.

Ms Tormey stated that The Boss Man '*always has*' wet nostrils.

Ms Tormey referred to a discharge in both its nostrils the day before. We do not consider this provides an explanation why the right-hand nostril was wet and the left hand nostril was dry, as observed by Mr Conder on 1 December 2018.

Importantly, Mr Anderson observed that upon arrival at Melton later that afternoon both nostrils of The Boss Man were dry.

The Boss Man's previous trainer and driver, Mr Scott Dyer, stated that he did not observe the horse having wet nostrils.

Ms Tormey stated, during her interviews with the stewards, that Scott Dyer has a poor memory to which he has admitted and he has suffered from ongoing depression.

No expert evidence was put before us as to the nature and extent of Mr Scott Dyer's mental health and memory capabilities.

Mr Dyer was the registered trainer of The Boss Man for over four years from 29 December 2012 to 19 January 2015 and from 18 September 2015 to 1 November 2017. (SB page 127 lines 43-45 and page

128 line 1-3.) In addition, the performance history of The Boss Man's records during that during the period 1 July 2012 to 16 May 2015 shows that Scott Dyer drove The Boss Man on 36 occasions in its first 37 races. (SB pages 347 and 348.)

We find that:

1. On 1 December 2018 when The Boss Man was at Ms Tormey's stables only the right nostril on The Boss Man was wet;
2. Both nostrils were dry later that afternoon when observed at Melton by Mr Anderson;
3. Mr Scott Dyer, the previous trainer and driver of The Boss Man, stated that he did not observe The Boss Man *'always having wet nostrils'*.

Premise 10(h) – The Boss Man belched in the presence of Mr Conder and Ms Tormey in the minutes after the alleged tubing.

The defendants' explanation

1. That the horse made a sound like *'a bit of a belch'*.
2. That the horse groans and stuff.
3. That the horse *'snorts and carries on. He always groans and stuff. It's a common occurrence with the horse so even though you said it belched it actually always does that'*.
4. The horse has had stomach issues.
5. Other horses such as Grinnersawinner did it all the time.

Mr Conder, in his statement of 14 May 2019, stated that he both observed and heard The Boss Man belch when he was standing in front of the horse shortly after it had been taken out of its stable.

When cross-examined by Mr Sheales he stated that he had not previously observed a horse belching after being tubed.

He was not cross-examined about his assertion that the noise he heard was a belch.

When interviewed by Mr Conder shortly afterwards, Ms Tormey agreed *'there was a bit of a belch'*.

When interviewed by the stewards later that day at Melton she stated: *'He always snorts and carries on. He always groans and stuff. It's like a common occurrence with the horse so even though you said it belched it actually always does that'*. (SB page 20, line 44.)

Dr Aspinall, veterinary surgeon gave evidence that it is generally accepted that horses do not belch because the cardiac sphincter (the valve between the stomach and the oesophagus) only allows a one-way flow. The sphincter is very well developed in horses. This oblique angle at which the oesophagus connects to the stomach explains why a horse's stomach would typically explode before the animal could vomit. (Her statement of 12 February 2019 second paragraph line 1- 5.)

Dr Cust gave evidence that it is not infrequent for a horse to belch after it has been stomach tubed. (Transcript page 91, first paragraph.)

Both veterinarians independently stated that approximately 10–15% of horses belch after stomach tubing. (Dr Cust Transcript page 91 line 30, Dr Aspinall Transcript page 137 line 17-18.)

Dr Aspinall also stated that if a horse was stomach tubed with bicarbonate, producing carbon dioxide, (an alkalisising agent) then by doing this *'you're increasing your chances again'* that a horse would belch after the tubing. (Transcript page 138 line 17-19.)

The brown liquid found in the stomach tubing equipment located by the stewards was found upon analysed by RASL to contain alkalisising agents.

In relation to the time period within which belch in could occur following stomach tubing Dr Cust said it was variable, it could occur immediately or after a period of time.

Dr Aspinall gave evidence that the time period in which a horse would belch after stomach tubing would be variable but she was comfortable in saying five minutes or under.

The Boss Man's previous trainer and driver, Mr Scott Dyer, when asked by the stewards on 16 January 2019 at Romsey whether The Boss Man made any special noises as opposed to another horse or belching or anything like that, he replied "*Not that I'm aware of, no.*"

We find that:

1. The Boss Man did belch shortly after it was taken out of its stable in the presence of Mr Conder and Ms Tormey;
2. It is generally accepted that horses do not belch;
3. It is '*not infrequent*' for a horse to belch after it has been stomach tubed;
4. If a horse has been stomach tubed with an alkalisng agent it increases the chances of the horse belching;
5. Belching can occur immediately after stomach tubing or within a variable period of time; and
6. Approximately 10% – 15% of horses belch after being stomach tubed.
7. Mr Scott Dyer, the previous trainer and driver of The Boss Man, stated that he was not aware of The Boss Man making special noises such as belching.

Premise 11(c) – Ms Tormey called Mr Douglas at 3:03pm and engaged him to come to her stables around 3:13pm coinciding with the optimal time for administering alkalisng agents before a race.

The defendants' explanations

The defendants provided, inter alia, the following explanation:

1. Tormey had asked him to come and mend a fence, which fence she showed to the Stewards.

Ms Tormey initially told the stewards when interviewed at her stables on 1 December 2018 that she asked Mr Douglas to come to her property to fix a fence. (SB page 13 line 17.)

When interviewed by the stewards at Melton later that day she again told the stewards that Mr Douglas '*was just there to fix that fence*'. (SB page 21 line 17.)

She later backed away from this story.

When asked by the stewards why Mr Douglas was in the box with The Boss Man, Ms Tormey replied '*We were both in the box ...*'. (SB page 27 line 20.)

When asked by Mr Day, was he there to fix fences, Mr Douglas replied: '*No.*' (SB page 30 line 46.)

The Boss Man was scheduled to race that evening at 7:34pm, Mr Douglas would have arrived at Ms Tormey's stables approximately 4 hours and 10 minutes prior to The Boss Man's race.

Dr Cust, in his witness statement dated 26 June 2019, stated that the ideal time to administer an alkalisng agent to a horse was between 4–6 hours prior to the time of its race for the greatest effect.

Mr Anderson, in his submissions dated 7 October 2019 in paragraph 10(J), made reference to three other earlier occasions when Mr Douglas attended Ms Tormey's property at her request via text messages, in time periods ranging from 4 hours, 4 hours and 20 minutes and 4 hours and 13 minutes prior to the time that horses trained by Ms Tormey were scheduled to race. (Details of these occurrences are set out in Appendix 1.)

The explanations advanced do not in our view exclude the possibility that Mr Douglas did stomach tube The Boss Man on 1 December 2018 within 48 hours prior to its scheduled race.

Premise 10(j) – The time that Mr Douglas was found in The Boss Man’s box coincides with the optimal time for administering alkalising agents before a race.

We find that the time at which Mr Douglas was found in The Boss Man’s box was within the optimal time for the administration of alkalising agents to a horse before a race.

Premise 10(i) - the brown liquid found in the tube and analysed by RASL contained alkalising agents.

We find that the brown liquid found in the stomach tubing equipment that was found by the stewards contained alkalising agents. This was not in dispute between the parties.

RESULTS OF ANALYSIS BY RASL OF BLOOD SAMPLES TAKEN FROM THE BOSS MAN AT MELTON ON 1 DECEMBER 2018

We find that the evidence relating to TCO₂ levels detected in the blood plasma of The Boss Man is consistent with (a) the horse being stomach tubed within 48 hours of its scheduled race or (b) not being stomach tubed. Although these levels were below the permitted threshold of 36mm/L this does not preclude the possibility that The Boss Man was stomach tubed on 1 December 2018.

ASSESSMENT OF WITNESSES

We find that both Mr Conder and Mr Anderson were honest and reliable witnesses.

We find that Dr Cust, Dr Steel and Dr Aspinall were all honest and reliable witnesses.

We find that both Ms Tormey and Mr Douglas were not honest and reliable witnesses. We set out below our reasons.

1. When Ms Tormey met the stewards after they had entered her property, approximately halfway between the house and the stable block, she lied to them by twice stating that no-one was with her on the property. Shortly afterwards she stated *‘Glenn is around the back’*. Mr Conder observed her to be agitated.
2. Ms Tormey’s evidence about the wet stomach tubing equipment found by the stewards at her property was untruthful. She changed her version of events on several occasions.
 - (a) She initially told the stewards that the equipment had been at her property *‘for ages’* and yet the equipment was wet and contained a brownish liquid and Mr Conder noticed there was no dust or dirt on the top of the bag.
 - (b) When Mr Conder pointed out that the contents were wet and had liquid in them Ms Tormey replied saying *‘It just sits in there’*.
 - (c) She changed her story to saying *‘I haven’t had it ages and then Scott brought it back last weekend’*.
 - (d) She later changed her story again saying that Scott Dyer brought it back to her property on the Wednesday of the week leading to 1 December 2018.
 - (e) When asked by the stewards why she changed her story she replied: *‘I was just – it was just I didn’t mean to – I didn’t give a specific time or date because I wasn’t exactly sure’*.
3. When Mr Conder interviewed Ms Tormey at her stables on 1 December 2018, she told him that she was washing Nomi Malone when the stewards arrived at 3:22pm (SB page 11, line 37-39.) However, when Ms Tormey was interviewed by Mr Day at Melton that evening, she changed her story and told him that both she and Mr Douglas were in the box (stable) of The Boss Man. (SB page 27 line 20-36.)

4. Ms Tormey changed her story after she received a phone call from Mr Douglas at Melton on the evening of 1 December 2018 at 6:42pm, during the period when her interview by the stewards was temporarily adjourned so the stewards could attend to the running of race 2 at 6:38pm.
5. At a later date the stewards examined Ms Tormey's mobile phone and found that the call log record of this telephone call had been deleted. In her interview by the stewards on 4 March 2019, the stewards referred Ms Tormey to this telephone call to her mobile phone from Mr Douglas and she said she had no memory of the telephone call and she didn't remember speaking to Mr Douglas and didn't think she did. When asked by Mr Day did, she delete the call log she stated she didn't remember and she was not in the habit of deleting call logs. (SB pages 193 line 1 – line 23 on page 194)
6. Neither Ms Tormey nor Mr Douglas told the stewards of their conversation during this telephone call on 1 December 2018.
7. When interviewed by the stewards at Melton on the evening of 1 December 2018, Ms Tormey stated that she came out of the box (stable) of The Boss Man when she saw someone. (SB page 27 line 20) The Boss Man's stable has two sections, front section and a rear section. Ms Tormey stated that they were in the rear section of the stable. (SB page 119 line 38-41). From watching the videos that were played during the hearing it was clear it would not have been possible for Ms Tormey to have seen the stewards when they entered her property when she was in the rear section of The Boss Man's stable.
8. During the inspection of Ms Tormey's stables on 1 December 2018, Mr Conder observed The Boss Man belch in the presence of Ms Tormey. Later that afternoon when interviewed by the stewards at Melton, Ms Tormey told the stewards that The Boss Man always belches. Dr Aspinall gave evidence that, due to their anatomical structure, horses generally do not belch. She and Dr Cust both stated that one exception was that approximately 10–15% of horses belched after being stomach tubed.
9. Ms Tormey and Mr Douglas were interviewed separately by the Stewards and both were asked by the stewards to provide an explanation for the coincidences that occurred when on four occasions Ms Tormey requested Mr Douglas to come to her property within a period of 4–4½ hours prior to the time that a horse she trained was scheduled to race which time period was described by Dr Cust as within the optimal time period to stomach tube a horse with an alkalisant agent prior to its race. They both stated that they could not recall contents of the telephone conversations. The Board finds that they have not been truthful and does not accept they have provided credible explanations for these coincidences.
10. When Mr Douglas was interviewed by the stewards at Melton on the evening of 1 December 2018, Mr Day told him that Mr Conder had provided evidence that he was in the stable with The Boss Man. Mr Douglas denied this by saying *'I wasn't in the stable sir, I was at the back of the stable having a leak. Would that be fair enough?'* and that he was *'working behind it'* and *'anyway I wasn't in the stall but I was at the back of it'*. (SB page 28, lines 35–39, page 28 line 48, page 29 line 1.) When Mr Conder put it to him that The Boss Man was in the same box Mr Douglas changed his story and stated: *'Yep, well I don't know I don't know The Boss Man. There was a horse in it yes'*. (SB page 29 line 5-6)

The Board does not accept that Mr Douglas did not *'know The Boss Man'*. Mr Douglas and Ms Tormey had been friends for several years. Mr Douglas had been to Ms Tormey's stables on many occasions. The name 'The Boss Man' was prominently displayed on the door to the front of the horses' stable.

The Boss Man was scheduled to race that evening at Melton at 7:34pm in a heat of the Inter Dominion Trotting Championship, one of the most prestigious and important races on the harness racing calendar. At the time Mr Douglas made these statements the stewards had not retrieved the telephone records between he and Ms Tormey which demonstrated that Mr

Douglas had been at Ms Tormey's property on several occasions.

11. When interviewed by Mr Day on 4 March 2019, Mr Douglas was shown photographs of the tubing equipment found by the stewards at Ms Tormey's property he said '*it's the wrong type of tube,*' and '*it is a garden hose.*' (SB page 303 lines 31 and 36.) This tubing equipment belonged to Scott Dyer. He had used it in the past to stomach tube horses. This being the case it could not be '*the wrong type of tube*' as claimed by Mr Douglas. We find that Mr Douglas was not being truthful by saying that the equipment found by the stewards was not suitable for the purpose of stomach tubing a horse.
12. Mr Sheales at no time argued that the equipment found by the stewards was not suitable for stomach tubing a horse. The premise put forward by Mr Sheales in his written submissions was that the wet stomach tubing equipment found by the stewards had been used during the week leading up to 1 December 2018 to stomach tube a horse and very possibly by Mr Marshall.
13. When interviewed by the stewards on 4 March 2019 Mr Douglas stated that horses can only be stomach tubed via the left-hand nostril. (SB page 264, lines 36-37 and page 312 lines 41-42.) Dr Cust gave evidence in his statement dated 26 June 2019 that a horse can be stomach tubed via either nostril. This makes obvious sense as both nostrils lead to the oesophagus which leads to the stomach the horse. On 1 December 2018, Mr Conder observed that The Boss Man's right nostril was wet when he was taken out of its stable.

Dr Cust gave evidence that a wet nostril in a horse can occur following stomach tubing. The Board finds that Mr Douglas gave misleading evidence to the stewards when he stated that a horse can only be stomach tube via its left nostril.
14. When interviewed by the stewards on 4 March 2019 Mr Douglas stated that when he stomachs tubes a horse, he has another person hold it still for him as he is not skilled enough to do it by himself. (SB page 273 lines 10-12) Dr Cust gave evidence that it is possible for one person to tube a horse. (Transcript page 89 line 9.)
15. Ms Tormey is an experienced horse trainer and was present with Mr Douglas at the stables and if required she could have provided him with the necessary assistance to enable him to stomach tube The Boss Man.
16. Dr Cust stated that it is generally easier to tube an older horse (transcript page 109) and we note that at the time The Boss Man was nine years old.

DECISION

Taking into account, as a totality, all of the circumstantial facts that we have found proven we are unanimous in being comfortably satisfied that the combined weight of the combination of such facts supports the inference, on the balance of probabilities, that

Mr Douglas stomach tubed The Boss Man on 1 December 2018 within 48 hours of when The Boss Man was scheduled to race in Race 4, Heat 2, of the TAB Inter-Dominion Trotting Championship at Tabcorp Park Melton at 7.34pm.

In summary form and in no particular order of importance, the relevant circumstantial facts which we have taken into account as a whole in reaching our decision are listed below.

1. On 1 December 2018 The Boss Man, trained by Ms Tormey, was scheduled to race in a heat of the Inter-Dominion Trotting Championship at Tabcorp Park Melton at 7:34pm.
2. The stewards entered Ms Tormey's property at approximately 3:22pm on 1 December 2018.
3. When the stewards arrived at Ms Tormey's property both Ms Tormey and Mr Douglas were alone together in the stable area.

4. Ms Tormey was the registered trainer of The Boss Man.
5. Prior to entering Ms Tormey's property Mr Conder and Mr Anderson conducted surveillance from a position on the M14 Highway where Mr Conder had a view of the stable area. Between approximately 3:10pm and 3:15pm Mr Conder observed Ms Tormey and a male walking through this area.
6. Shortly after the stewards entered her property Ms Tormey lied twice to them about the presence of Mr Douglas at the property.
7. Mr Douglas was found in the rear section of The Boss Man's stable shortly after 3:22pm on 1 December 2018.
8. During a search of The Boss Man's stable Mr Conder noticed a blue bag in a small storage area next to The Boss Man's stable.
9. Mr Conder was able to easily retrieve the blue bag from the small storage area whilst still in The Boss Man's stable.
10. Mr Conder conducted an examination of the contents of the blue bag, in the presence of Ms Tormey, which revealed equipment that was suitable to stomach tube a horse.
11. The stomach tubing equipment was within easy access of someone in The Boss Man's stable.
12. This stomach tubing equipment was comprised of a funnel, a small white bucket and a yellowish plastic tube.
13. Ms Tormey stated that the bag and contents were Scott Dyer's and had been there "*for ages*". Mr Conder observed there was no dust or dirt on the top of the bag nor on any of the contents of the bag.
14. When the stewards first examined the stomach tubing equipment, they found the funnel was wet, the bucket was also wet and contained a small amount of brown discoloured liquid and the plastic tube also contained a small amount of brown discoloured liquid within it.
15. The wetness of the equipment was consistent with recent usage.
16. The brown liquid was found to contain alkalising agents.
17. When the stewards arrived at Ms Tormey's property they observed that The Boss Man was attached by its head collar to a clip attached to the wall of the front section of The Boss Man's stable so it could not move around the stable.
18. Ms Tormey stated that she did this to prevent The Boss Man having access to water prior to its scheduled race that evening at 7:34pm.
19. At approximately 3:27pm, The Boss Man had been taken out of its stable by Ms Tormey and Mr Conder observed that it had a wet off side (right hand) nostril while the other nostril was dry and pointed this out to Ms Tormey.
20. Ms Tormey told the stewards that The Boss Man always has wet nostrils.
21. The Boss Man's previous trainer and driver, Scott Dyer, stated he was not aware of the horse having wet nostrils.
22. On the afternoon of 1 December 2018, The Boss Man was floated to the harness racing track at Tabcorp Park Melton and upon arrival Mr Russell Anderson of the stewards observed that both his nostrils were dry.
23. Dr Cust gave evidence that it is quite common horse to have a wet nostril as a result of being stomach tubed.

24. Dr Cust gave evidence that a horse can be stomach tubed through either nostril and one person can stomach tube a horse.
25. Shortly after The Boss Man had been taken out of its stable, Mr Conder both observed and heard the horse belch. Ms Tormey agreed there was '*a bit of a belch*'.
26. Ms Tormey told the stewards that The Boss Man always belches.
27. Dr Aspinall, veterinarian surgeon, gave evidence that it is generally accepted that horses do not belch but a horse can belch after it has been stomach tubed.
28. Dr Aspinall and Dr Cust both gave evidence that approximately 10–15% of horses belch after they have been stomach tubed.
29. Dr Aspinall gave evidence that stomach tubing a horse with an alkalisng agent increases the chances of the horse belching. The brown liquid found in the wet stomach tubing equipment contained alkalisng agents.
30. Dr Cust gave evidence that following stomach tubing belching can occur immediately or within a variable time.
31. The Boss Man's previous trainer and driver, Scott Dyer, stated he was not aware of the horse belching.
32. Mr Anderson inspected The Boss Man's stable and observed that there was a wet patch of sawdust directly below where The Boss Man's head had been clipped up.
33. Mr Anderson examined the wet patch and found it to be approximately 1½ inches deep. He put his hands into the patch and felt it was wet. He stated it hadn't been there for a lengthy period of time because not all of it had soaked in and it was relatively fresh. The wet patch was consistent with a recent spillage.
34. Dr Cust gave evidence that it is not uncommon for liquid to fall to the ground during the stomach tubing of a horse.
35. During Mr Anderson's inspection of The Boss Man's stable he watched Mr Douglas walk towards him observed the shoe impressions he made in the sawdust covering of the floor of the stable. He observed other shoe impressions in the stable which were similar in size, shape and tread which were located (a) adjacent to the area where Mr Conder located the blue bag and (b) below the area where The Boss Man had been clipped up.
36. Mr Scott Dyer was the owner of the stomach tubing equipment which the stewards found at Ms Tormey's stables on 1 December 2018. He told the stewards he probably brought it to Ms Tormey's stables years ago. He did not use it to stomach tube The Boss Man, or any other horse, in the week leading up to and including 1 December 2018.
37. Mr Neil Dyer did not use the stomach tubing equipment found by the stewards or any other equipment to stomach tube The Boss Man, or any other horse, in the week leading up to and including 1 December 2018.
38. Mr Marshall did not use the stomach tubing equipment found by the stewards to stomach tube The Boss Man, or any other horse, in the week leading up to and including 1 December 2018.
39. Mr Marshall stated that he uses his own equipment to stomach tube horses.
40. No person has stated that he or she used the wet stomach tubing equipment found by the stewards to stomach tube The Boss Man, or any other horse, during the week leading up to and including 1 December 2018.
41. Dr Cust gave evidence that stomach tubing a horse with an alkalisng agent can raise the level of

carbon dioxide (TCO₂) in the body of the horse with the possible effect of delaying the onset of the production of lactic acid which produces the pain, the fatigue and the sore muscles. By buffering that acid with alkalising agents, one of the aims is to delay the onset of fatigue of those muscles and assist in the recovery from strenuous exercise.

42. A horse participating in the Inter Dominion Trotting Championship is required to race three times in eight days.
43. Dr Cust gave evidence that 4–6 hours before a race is due to start is the optimal time to administer an alkalising agent to a horse via a stomach tube and a person who is stomach tubing a horse within 4–6 hours of a race is endeavouring to raise the TCO₂ levels to the highest level possible but still under the threshold level of 36mm/L above which it becomes a prohibited substance under the rules of HRV.
44. Dr Cust gave evidence that it was possible for an experienced trainer to stomach tube a horse between 1 and 5 minutes.
45. Mr Douglas was experienced in stomach tubing horses. Ms Tormey did not know how to stomach tube a horse
46. Mr Douglas was found in The Boss Man's stable by Mr Conder within the optimal time for the administration of alkalising agents to a horse before a race.
47. On four occasions, being 31 August, 17 November, 22 November and 1 December 2018, Ms Tormey requested Mr Douglas to come to her property.
48. These requests were all within the period that Dr Cust stated was the optimal period for stomach tubing a horse with an alkalising agent.
49. The defendants stated to the stewards that they could not recall the reasons for these visits.
50. The Board finds that the reasons given by the defendants were not credible explanations for these four coincidences occurring within the optimal time.
51. We have found that both Ms Tormey and Mr Douglas were not honest and reliable witnesses.

ALLOWING OR PERMITTING

The charge against Ms Tormey is that she allowed or permitted Mr Douglas to attempt to stomach tube or stomach tube The Boss Man which was engaged to complete in race 4, heat 2 of the Inter-Dominion Trotting Championship at Melton harness racing meeting on 1 December 2018 within 48 hours of the commencement of that race.

When the stewards entered Ms Tormey's property at approximately 3:22pm on 1 December 2018 there were only two people present; Ms Tormey and Mr Douglas.

They were friends and had known each for a number of years. Mr Douglas had visited Ms Tormey's property on a number of occasions.

On the afternoon of 1 December 2018 at 3:03pm Ms Tormey telephoned Mr Douglas and asked him to come to her property. At the time Mr Douglas was at Roma Pocock's property which was nearby. He arrived at Ms Tormey's property several minutes after this telephone call.

Ms Tormey was the registered trainer of The Boss Man.

Ms Tormey did not know how to stomach tube a horse. Mr Douglas did know how to stomach tube a horse.

When the stewards arrived at Ms Tormey's property both Ms Tormey and Mr Douglas were alone together in the stable area.

We have found that Mr Douglas did stomach tube The Boss Man after he arrived at Ms Tormey's property on that day.

Taking into account that Ms Tormey was the trainer of The Boss Man and therefore responsible for its care and treatment and that

Ms Tormey and Mr Douglas were the only two people present in the stable area at the relevant time, we are unanimous in being comfortably satisfied on the required standard of proof that

Ms Tormey allowed or permitted Mr Douglas to stomach tube The Boss Man.

JONES v DUNKEL

Irrespective of any of the principles in *Jones v Dunkel*, the Board has found, based on the circumstantial evidence, the charges proven against both defendants.

Accordingly, there is no need for the Board to consider the principles in *Jones v Dunkel*. However, as both parties have raised these principles, we feel obliged to briefly say something about them and whether they apply in the case before us.

We are of the opinion that they do apply. In saying this we make the following points:

1. The principles cannot be used to provide gaps in the evidence;
2. Each of the defendants provided exculpatory statements to the stewards when they were interviewed and denied any involvement in stomach tubing The Boss Man;
3. Mr Sheales, on behalf of the defendants, submitted that due to the fact that the Board is a disciplinary Tribunal and each of the defendants is under compulsion to answer questions put to them by the stewards and that each of the defendants denied committing any offence, that the principles in *Jones v Dunkel* should have no application;
4. We disagree. The principles in *Jones v Dunkel* have long been found to apply at VCAT and in disciplinary matters. See *Legal Services Commissioner v Brereton* 2008 VCAT 1723;
5. Both defendants decided not to give evidence and expose themselves to cross-examination;
6. No witnesses were called on behalf of the defendants;
7. The defendants were present on both days throughout the hearing before us and no evidence was placed before us that they were unavailable to give evidence in the sense that they may, for instance, have been suffering from a health issue that prevented them from doing so.

In these circumstances we are satisfied that we are entitled to draw the inference that their evidence would not have assisted their respective cases.

On the evidence we are comfortably satisfied to the appropriate standard of proof that the charges against each of the defendants have been proven. We are fortified in making these findings against each defendant due to their failure to give evidence before us during the hearing.

Judge Graeme Hicks (Chairperson) and Mr Robert Abrahams (Deputy Chairperson)
HRV Racing and Disciplinary Board.

APPENDIX 1

TEXT MESSAGES BETWEEN MS TORMEY AND MR DOUGLAS AND MS TORMEY'S VERBAL REQUEST TO MR DOUGLAS ON THE BELOW DATES.

HRV referred to exchanges of text messages between Ms Tormey and Mr Douglas on the below dates:

- (a) On 31 August 2018 Ms Tormey requested Mr Douglas to come to her property at 2:00pm. Ms Tormey trained the horse, MAR PACIFICO, which was scheduled to race that day at Kilmore harness racing meeting at 6:02pm, a period of four hours prior to 2:00pm being the time which Ms Tormey had requested Mr Douglas to attend her property.
- (b) On 17 November 2018 Ms Tormey requested Mr Douglas to come to her property on 18 November 2018 at 10:30am which he replied he could not do. Ms Tormey trained a horse, HANCOCKS HERO, which was scheduled to race at Gunbower harness racing meeting that day at 2:50pm, a period of four hours and 20 minutes prior to 10:30am being the time Ms Tormey had requested Mr Douglas to attend her property.
- (c) On 22 November 2018 Ms Tormey requested Mr Douglas to attend her property on 23 November 2018 at 2:30pm. Ms Tormey trained a horse, NOMI MALONE, which was scheduled to race at Melton harness racing meeting that day at 6:43pm, being a period of four hours and 13 min prior to the time Ms Tormey had requested Mr Douglas to attend her property.
- (d) On 1 December 2018 Mr Douglas attended Ms Tormey's property at her verbal request at about 3:10pm. The Boss Man trained by Ms Tormey was scheduled to race at Melton harness racing meeting that day at 7:34pm in the TAB Inter Dominion Trotting Championship (1st Round Qualifying Heat 2). The time Mr Douglas attended Ms Tormey's property at approximately 3:10pm was a period of four hours and 24 minutes prior to 7:34pm the scheduled starting time of The Boss Man's race.

Ms Tormey's Explanations

When interviewed by the HRV stewards Ms Tormey gave explanations, which included:

- (a) In relation to her text to Mr Douglas on 22 November 2018, she stated: *'As I said it's not, it's not to do with the help, it was to do with something else'*. (SB page 159 line 17.)

Mr Douglas's Explanations

The stewards interviewed Mr Glenn Douglas on 4 March 2019. During the interview they asked him for his explanation of the above- mentioned text messages sent to him by Ms Tormey. The explanations included:

- (a) Text from Ms Tormey to Glenn Douglas on 31 August 2018 at 8:25am: *'You around at 2?'*. Glenn Douglas replied: *'Sure will be'*. Ms Tormey replied: *'Can you please help me?'*. Mr Douglas replied: *'Of course'*.

When the stewards asked Mr Douglas what this text was about, he replied: *'I've got no idea'*. (SB page 280 line 24.)

The stewards asked: *'She asked you to come around four hours prior to the race'* (i.e. the race Mar Pacifico was in that day).

Mr Douglas replied; *'That's got nothing to do with me. Like I said, I was just going around - when we can. If she's got work - I just front up. I know what you're edging towards. I told you, I have not touched any of her horses. Well, no, that's not true either. I help her work horses'*. (SB bottom of page 280 and top of page 281.)

- (b) Text from Ms Tormey to Glenn Douglas 17 November 2018. *'Are you free around in the morning at 10:30?'*. Glenn Douglas replied *'I have to leave for Melbourne at 10. Is that too early?'*. Ms Tormey replied: *'Yeah, that's okay, doesn't matter. Yeah, it's something I was just checking'*.

The stewards ask Glenn Douglas does that ring a bell? Mr Douglas replied: *'Nuh'*. (SB page 281 line 24.)

He also stated: *'I have not touched her horses. I don't know how clear I can make that, in that aspect. Yes, I have helped her with the horses when she needs me'*. (SB page 281 line 38.)

- (c) Text from Ms Tormey to Glenn Douglas 22 November 2018, prior to her horses' race at Melton on 23 November 11:08am. Ms Tormey: *'Can you please come and visit at 2:30 tomorrow?'*. Glenn Douglas replied: *'Absolutely'*.

The stewards stated: *'And so she asked you to come 2:30; the horse was in at 6:43, so again, that four-hour window'*.