

**RACING PENALTIES APPEAL TRIBUNAL**

**DETERMINATION**

**APPELLANT:** ALAN KENNEDY

**APPLICATION NO:** A30/08/789

**PANEL:** MR P HOGAN (PRESIDING MEMBER)  
MR J PRIOR (MEMBER)  
MR W CHESNUTT (MEMBER)

**DATE OF HEARING:** 21 JUNE 2016

**DATE OF DETERMINATION:** 28 JUNE 2016

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**IN THE MATTER OF an appeal by Mr Alan KENNEDY against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 26 April 2016 imposing a suspension of six months for a breach of Rule AR81A(1)(b) of the Rules of Thoroughbred Racing.**

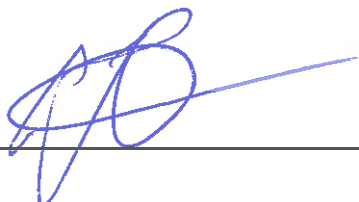
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Mr T F Percy QC with Mr G Yin of D G Price and Co. represented Mr A Kennedy

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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By a unanimous decision of the members of the Tribunal, the appeal against conviction under Rule AR81A(1)(b) is upheld.



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**PATRICK HOGAN, PRESIDING MEMBER**



**RACING PENALTIES APPEAL TRIBUNAL**

**REASONS FOR DETERMINATION OF MR P HOGAN  
(PRESIDING MEMBER)**

**APPELLANT:** ALAN KENNEDY

**APPLICATION NO:** A30/08/789

**PANEL:** MR P HOGAN (PRESIDING MEMBER)  
MR J PRIOR (MEMBER)  
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**IN THE MATTER OF an appeal by Mr Alan KENNEDY against the determinations made by the Racing and Wagering Western Australia Stewards of Thoroughbred Racing on 26 April 2016 imposing a suspension of six months for a breach of Rule AR81A(1)(b) of the Rules of Thoroughbred Racing.**

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**Introduction**

1 This Appeal is against conviction and penalty.

2 On 26 April 2016, the Racing and Wagering Western Australia ("RWWA") Stewards of

Thoroughbred Racing found the Appellant guilty of an offence against Rule AR81A(1)(b) of the Rules of Thoroughbred Racing. On 6 May 2016, the Stewards imposed a suspension of six (6) months.

3 Rule AR81A is in the following terms:

***“AR 81A.***

*(1) Any rider commits an offence and may be penalised if -*

*(a) a sample taken from him is found upon analysis to contain a substance banned by AR.81B;*

*or*

*(b) he refuses or fails to deliver a sample as directed by the Stewards, or tampers with, adulterates, alters, substitutes or in any way hinders the collection of such sample or attempts to do any of those things.”*

**The background facts**

4 The Appellant is a licensed jockey. On Thursday, 14 April 2016, he rode trackwork at the Lark Hill Training Complex. On the day before, namely Wednesday 13 April 2016, the Stewards had decided that a urine specimen should be taken from him if he attended to ride trackwork on the next day, 14 April 2016. Whether or not the Appellant knew of that previous decision is irrelevant, but it is unlikely that he did. The Appellant certainly knew the facts leading up to the Stewards' decision, because they were all facts personal to him.

5 In May 2011, the Appellant had been suspended for providing a urine sample which showed the presence of methylamphetamine. In September 2015 he had been suspended for providing a breath sample in excess of 0.02%. Earlier in the year, at Bunbury trials, the Appellant had been requested to do a urine sample but left and returned to Perth and provided the sample later in the day(T28). On Wednesday 13 April, the Appellant was taken off his only ride at the Pinjarra races by the trainer, Mr Pearce. The Appellant's explanation for not turning up to work that day, as relayed to the Stewards was that he had been wasting and had slept in. The Appellant had in fact not turned up for work on the Monday, Tuesday or Wednesday, according to Mr Pearce.

6 The Stewards presumably were suspicious. On the Wednesday, after the Appellant had been taken off his ride, Senior Steward Mr Brown discussed the matter with Chief Steward Mr Lewis. The decision was made that if the Appellant turned up to ride trackwork at Lark Hill the next day, 14 April 2016, a urine specimen should be taken. The mechanism for putting the decision into operation was described by Senior Steward Brown at T8:

*“....it was decided that if Mr Kennedy was to arrive at Lark Hill training complex the following*

*morning to ride track work that a urine specimen should be taken. I phoned Track Manager, Mr Alan Taylor that evening to advise him that if Mr Kennedy was to arrive at the track on Thursday morning the 14 April to direct him that he would be required to give a urine sample prior to leaving and then to phone me immediately.”*

7 The Appellant went to trackwork and rode two horses. The Stewards were not present at Lark Hill. Mr Taylor duly rang Senior Steward Brown. Mr Taylor’s evidence about what he said and did in relation to the Appellant is set out at paragraph 14 below. In the end result, a urine specimen was not taken.

8 Senior Steward Mr Brown and Chief Steward Mr Lewis interviewed the Appellant at Lark Hill on the Wednesday, 14 April 2016, after the relevant events had taken place. The Appellant was stood down. The Stewards opened an inquiry, and the hearing took place at Ascot on 20 April 2016. The Appellant was charged with the offence against AR81 A(1)(b). The particulars are set out at T31:

*“So the particulars of the charge are that after being directed by Lark Hill Trackwork Official Mr Alan Taylor who was acting on authority of Senior Steward Mr Chris Brown to provide a urine sample at Lark Hill Trackwork on the morning of Thursday, 14 April 2016 you left the track without providing a sample which in the opinion of the Stewards constitutes a failure to deliver a sample as directed. Do you understand the charge?”*

9 The Appellant pleaded not guilty.

10 The question for the Stewards’ at the inquiry was whether the offence had been made out. The question in issue in this appeal is whether the Stewards were correct in finding that any of the elements of the offence at all had been made out.

11 For the reasons which follow, I am of the opinion that none of the elements of the offence have been made out.

### **The Stewards reasons for conviction**

12 The Stewards reasons were delivered by letter dated 26 April 2016. It is useful to repeat them in full here, as they serve to also set out the undisputed facts:

*The Stewards Panel have now completed their deliberations and in doing so have applied the Briginshaw standard when arriving at our decision being the higher standard of proof as required in serious matters such as this.*

*From the evidence presented at the inquiry, it was established and acknowledged by you that a clear direction was given to you by Mr Taylor requiring you to provide a urine sample to Mr Brown*

*for the purposes of routine drug testing prior to leaving the Lark Hill Training Complex, Mr Brown was not present when the direction was given but had delegated his authority to issue such direction to trackwork official, Mr Alan Taylor and he then immediately proceeded to attend in order to arrange the collection of the sample and was due to arrive at the training complex within a short period of time.*

*Despite acknowledging the direction issued by Mr Taylor and his subsequent assurance that Mr Brown's arrival was imminent, you decided not to wait for him and left the track without providing a sample as specifically directed at the time. The account of times given by Mr Brown in his report as read into the inquiry show that Mr Taylor was correct in his advice that Mr Brown's arrival was imminent and in fact he did arrive not long after your departure from the track and the panel believes that it was reasonable and incumbent on you to remain and provide the urine sample to Mr Brown as directed. In taking this course of action you denied Stewards the opportunity to take a sample at the selected and specific time.*

*No approval was given for you to leave the track nor did you seek any authority to do so. Further, you made no attempt to contact the Stewards via mobile phone and contact was only made several hours after despite the best efforts of Mr Brown who attempted to reach you via mobile phone on numerous occasions, It was the intention of the Stewards to have you provide a sample as soon as possible after your arrival at the Lark Hill Training Complex given what had transpired the previous day. Mr Brown had already established that you had slept in and did not arrive for work at the property of Trainer Ben Pearce causing him to make application to the Stewards for you to be substituted by another rider at the Pinjarra race meeting on Wednesday, 13 April 2016. It was for this reason that Stewards decided that a urine sample should be taken from you as soon as possible and this particular morning provided the first available opportunity and consequently you were expected to provide a sample at that time and permission would not be granted for you to leave until a sample was provided.*

*As a licensed jockey who has provided numerous urine samples in the past, you are well aware that the provision of a urine sample is a strict requirement. Complying with the direction of the Stewards was your immediate and first obligation so that it could be dealt with prior to leaving to attend to other work responsibilities that morning particularly in light of your pre-arranged work schedule where you were committed to work at the private property of another trainer which ultimately required your attendance at that location until well after the official closure time for the Lark Hill Training Complex.*

*Stewards and track officials are present during early morning trackwork and rider drug testing must therefore be undertaken and completed during that time and it was entirely wrong of you to leave based on your own assumption that the Stewards would be available to collect a sample when and if you decided to return. This was not a direction given at a race meeting where riders*

*remain on course to fulfil their riding engagements and are under the supervision of Stewards and provide a sample when able either through the day or at the completion of their commitments and are required to remain on course until a sample is given. Stewards do permit riders at trackwork to provide a sample either through the morning between their work commitments or after finishing. A sample is always expected to be delivered within these times and similarly to a race meeting, trackwork riders are also required to remain on course and not leave until a sample is given. Being a direction at trackwork there were no race riding pressures or other factors that are known to cause difficulty and delay riders in providing a sample due to the effects of wasting and dehydration which and therefore you could have provided a sample in a timely manner had you followed the direction as required,*

*The provision, collection and sealing of urine samples are well known to you and it is a relatively straight forward process that would have not resulted in any significant delay or interruption to your morning and if you were in a hurry as was communicated to Mr Taylor as an explanation for your departure then you could have used your initiative and contacted the trainer to let them know that you were delayed and informed them of the reason which would have redeemed the situation rather than deciding to leave and cause yourself to be left open to question by the Stewards.*

*There was nothing more Mr Taylor could have done to have you remain at the track and he did everything possible to have you comply by approaching you immediately on becoming aware of your exit from the course when he observed you walking towards your car after the direction was given. Mr Taylor even went as far as providing an assurance that Mr Brown was soon to arrive yet you still decided to leave which this panel finds is unacceptable in all of the circumstances,*

*Your explanation given during the inquiry that you were feeling anger and embarrassment from the events of the morning and previous day provides no comfort to the Stewards that you actually intended to remain and provide the sample as directed and we are left to speculate why you acted in such a manner. This belief is strengthened by your original comment to Mr Taylor when you stated you were leaving to go to the nearby property of Trainer Sharon Miller which was later changed when informing Mr Brown it was because of anger and embarrassment that caused your hurried departure. As a senior rider you should have been able to face these emotions and not let them interfere with your professional obligations to provide a sample at the time the direction was made and in the opinion of the Stewards they do not justify your departure from the track and subsequent failure to provide a sample at the directed time.*

*The justification put forward for your actions is entirely unacceptable when all of the circumstances are considered and the Stewards believe they amount to a failure to provide a sample as directed. Such directions are given for very good reason and they must never be compromised by riders making flippant excuses or applying stalling tactics to avoid complying*

*with a lawful and reasonable direction.*

*Although you did return to the track, this was only after phone calls were made to you and prior to the eventual contact some hours later the Stewards did not know of your whereabouts with several hours elapsing from the time the direction was given. It was consequently decided that you should attend an interview with Mr Brown so that your formal explanation could be provided. After Mr Brown made me aware of the explanation you provided during his questioning of you I decided that the matter should proceed to a formal Inquiry and you were then stood down from riding and after taking all of the factors into account it was decided that a urine sample should not be taken as every opportunity had been afforded to you at the relevant time to comply with the direction.*

*Although you did later undertake your own drug testing, the sample was not supervised or collected by the Stewards and analysed at the ChemCentre as in accordance with the official policy of Racing and Wagering Western Australia and therefore the result was not given any weight in these deliberations.*

*For all of the above reasons, the Stewards find you guilty of the charge."*

### **The evidence of Mr Taylor**

13 Mr Taylor is the Track Manager at the Lark Hill Training Complex. The complex is owned by RWWA, and Mr Taylor is an employee of RWWA. He is not a Steward. Mr Taylor gave his evidence at the interview at Lark Hill on Thursday 14 April. What he said is at T9 of the transcript of that day's proceedings. Mr Taylor did not give evidence at the hearing at Ascot on 20 April 2016, but what he said was related second hand by Senior Steward Brown at that hearing. The end result was that the inquiry proceeded along the lines of the Appellant conceding that a direction had been made to provide a sample and then giving various explanations so as to excuse his actions. Further, the Stewards went on to consider the Appellant's "post offence conduct" as evidence of guilt. All of that, including the Appellant's concessions, was irrelevant because none of the elements of the offence had been made out. To borrow a phrase from the civil and criminal law, there was "no case to answer".

14 What Mr Taylor said at T9 of 14 April 2016 at Lark Hill was:

*"Right, this morning Alan Kennedy arrived just to ride trackwork for Vaughn Sigley. As he was walking into the stable stalls area at Lark Hill I advised him that he was required to give a sample this morning and that the Stewards would be coming down to take a sample, Steward being Chris Brown. Anyway I observed him and he rode trackwork for Vaughn Sigley, he rode two horses trackwork and then he, after working the second horse he, he tried to exit the stables to his car*

*and I walked around past the horse floats and I said "Alan don't you forget that you have to give a sample, the Steward's on his way he'll be here in about two minutes" and he said "Oh I've got go and work horses for Sharon Miller" and I said, well I said "it is not going to take long, a couple of minutes to wait for the Steward", he said "no no I'm in a hurry I've got to work horses" and I said "alright you're going to Sharon Miller's" I said, "we can be in contact with you on your mobile or Mrs Miller on her mobile to get you back here if required" he said "yes that's okay". And that's the last conversation that I had with him."*

### **The elements of the offence**

#### ***fails to deliver a sample as directed by the Stewards***

15 Mr Taylor is not a Steward. The Stewards recognized this during the hearing and in their reasons, and took the view that Senior Steward Brown had delegated his authority to Mr Taylor. The Stewards had taken this position as early as the Wednesday evening 13 April 2016, when the decision was made that *"a urine specimen should be taken"* and that Mr Taylor should be asked to deliver the message.

16 In my opinion, the Stewards cannot delegate their powers. Stewards' powers are set out in the Rules between AR.8 and LR 10. There is nothing which gives the Stewards power to delegate their own powers. The Stewards purported delegation in this case cannot be made valid by AR.8A(1)(z), because their direction or order was made to Mr Taylor, not the Appellant. In any event, it is inconceivable that the Rules contemplate anyone other than a Steward exercising the powers given to them.

#### ***fails to deliver a sample as directed by the Stewards***

17 In my opinion, the direction given to the Appellant was not one to deliver a sample, but rather wait. What Mr Taylor said was:

*"...I advised him that he was required to give a sample this morning and that the Stewards would be coming down to take a sample, Steward being Chris Brown."*

18 As a matter of fact, Mr Brown was not there, and the direction therefore amounted to a direction to wait. There is nothing in the Rules giving the Stewards power to require a person to wait.

#### ***fails to deliver a sample as directed by the Stewards***

19 In my opinion the facts show that The Appellant did not fail in what was required of him by Mr Taylor. Mr Taylor said:

*"....I advised him that he was required to give a sample this morning..."*



20 The Appellant, having left and being uncontactable, returned before 10.30 am. Self- evidently, he returned in the morning. The Appellant had returned to provide the sample he had been requested by Mr Taylor to provide to the Stewards.

21 The facts also show that as the Appellant was on his way to his car, and not complying with Mr Taylor's request to remain there was an interchange between the two of them. The Appellant was not giving up easily:

*"...he said "no no I'm in a hurry I've got to work horses" and I said "alright you're going to Sharon Miller's"...." I*

22 By saying "alright", Mr Taylor was arguably withdrawing or at least delaying his requirement that the Appellant wait for the Stewards.

23 Finally, it appears that the whole of what Mr Taylor had said up to the end of his speaking to the Appellant was conditional, by use of the word "if", so that the whole of his requirement to the Appellant amounted to nothing. Mr Taylor said:

*"we can be in contact with you on your mobile or Mrs Miller on her mobile to get you back here if required"*


### Observations

24 These reasons should not be taken as criticism of Mr Taylor for his words to the Appellant on the day. He is not a Steward and was faced with a difficult legal situation as the Appellant was leaving the track.

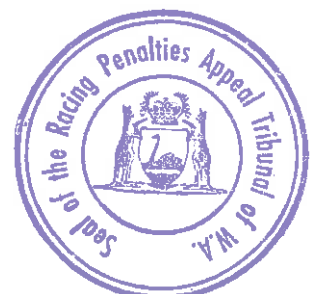
### Conclusion

25 For all of the above reasons, I would allow the appeal against conviction.

26 As there is unanimity on the appeal against conviction, there is no need to consider the appeal against penalty.



**PATRICK HOGAN, PRESIDING MEMBER**



**RACING PENALTIES APPEAL TRIBUNAL**

**REASONS FOR DETERMINATION OF MR J PRIOR (MEMBER)**

**APPELLANT:** ALAN KENNEDY

**APPLICATION NO:** A30/08/789

**PANEL:** MR P HOGAN (PRESIDING MEMBER)  
MR J PRIOR (MEMBER)  
MR W CHESNUTT (MEMBER)

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Mr T F Percy QC with Mr G Yin of D G Price and Co. represented Mr A Kennedy

Mr R J Davies QC appeared for the Racing and Wagering Western Australia Stewards of Thoroughbred Racing.

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I have read the draft reasons of Mr P Hogan, Member.

I agree with those reasons and conclusions and have nothing further to add.

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*John Prior*

**JOHN PRIOR, MEMBER**



**RACING PENALTIES APPEAL TRIBUNAL**

**REASONS FOR DETERMINATION OF MR W CHESNUTT (MEMBER)**

**APPELLANT:** ALAN KENNEDY

**APPLICATION NO:** A30/08/789

**PANEL:** MR P HOGAN (PRESIDING MEMBER)  
MR J PRIOR (MEMBER)  
MR W CHESNUTT (MEMBER)

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**WILLIAM CHESNUTT, MEMBER**

