



Fair Work
Commission

How to get your Agreement approved with a minimum of fuss

Presentation to ALERA SA

4 May 2022

Presented by

Commissioner Platt

13/05/2022

Disclaimer

- Agreement approvals are governed by the provisions of Part 2-4 of the Fair Work Act 2009
- The suggestions detailed in this presentation of how to approach common problems are the author's and may not accord with that of other Commission Members, Full Benches or the Federal Court!
- If a particular issue is important to you – seek competent legal advice.



What will we cover today

Overview of Agreement (AG) processing in the FWC

Pre-approval issues

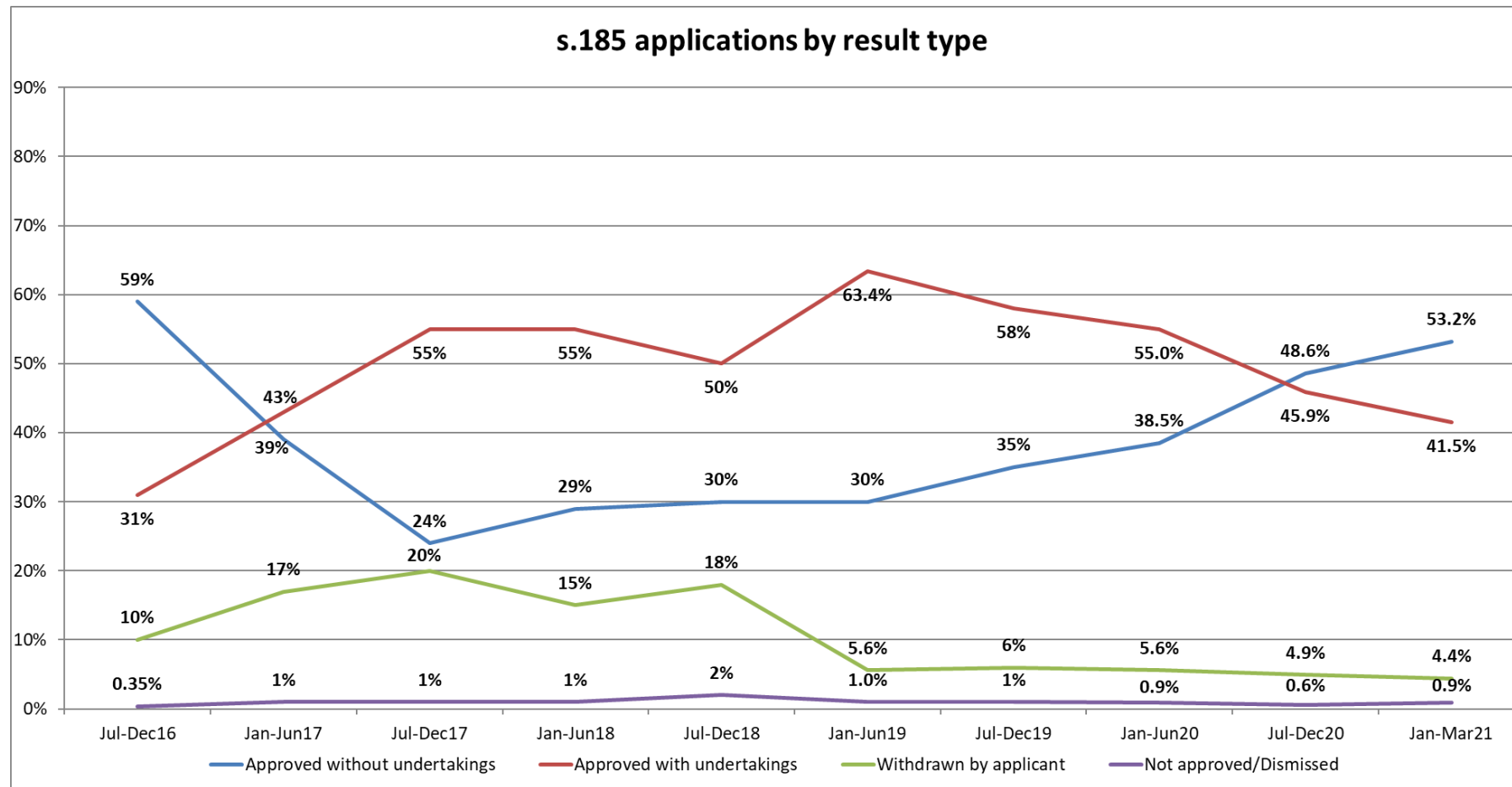
NES Issues

BOOT issues

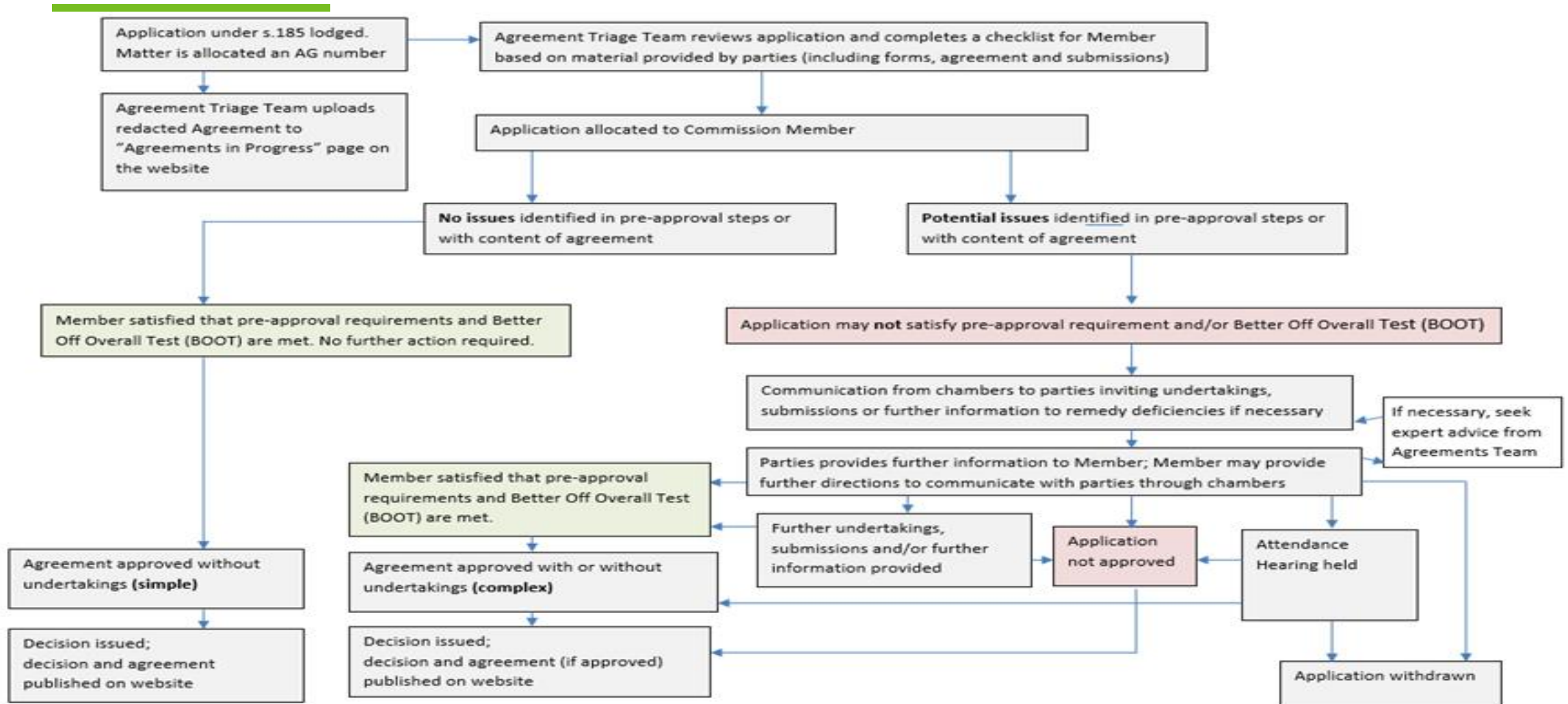
How to fix problems

Resources

Agreement Approval Trends



Triage Process



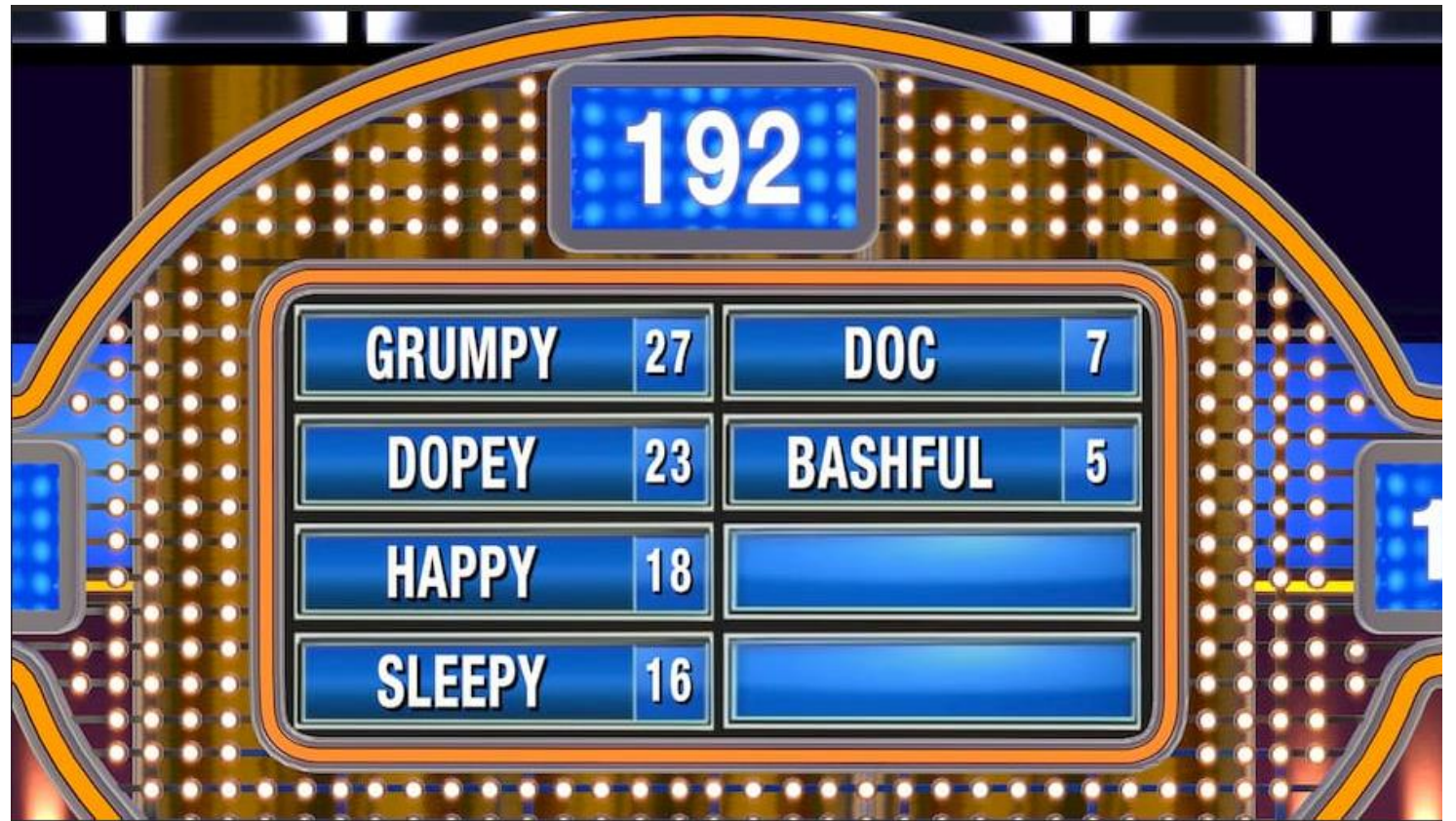
Approval Timelines

s.185 applications for approval	Target: 50% finalised	Target: 95% finalised	1 July 2021 – 31 March 2022	
			Actual performance	
Simple application (approved without undertaking; no follow up required)	10 working days	20 working days	86%	94%
Complex application (approved with undertaking, required follow up with parties, contested, or listed for conference/hearing)	20 working days	45 working days	74%	98%

Median calendar days from lodgement to approval	2017–18	2018–19	2019 – 20	2020-21	1 July 2021 – 31 March 2022
Agreement approved without undertakings	32 days	30 days	17 days	14 days	12 days
All agreements approved (with & without undertakings)	76 days	79 days	33 days	21 days	15 days

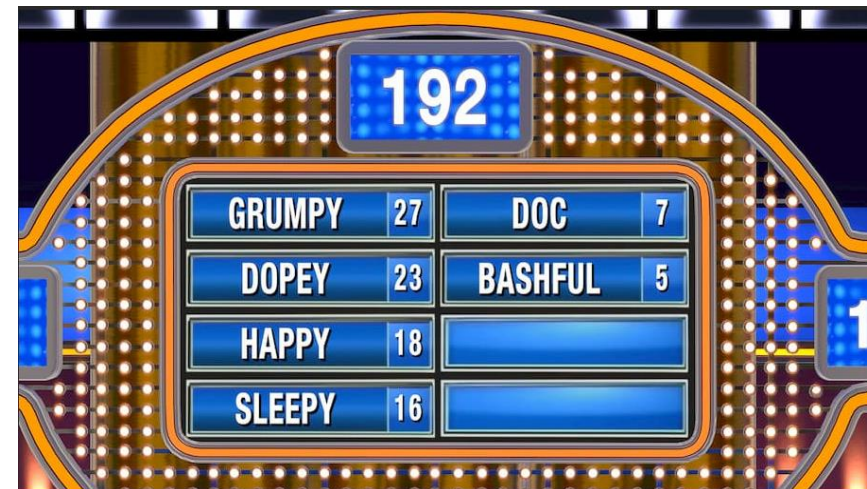
Its IR Family Feud Time!

Our researchers have examined our extensive database to determine the most common Agreement issues – your task is to guess the top 5 in each area.



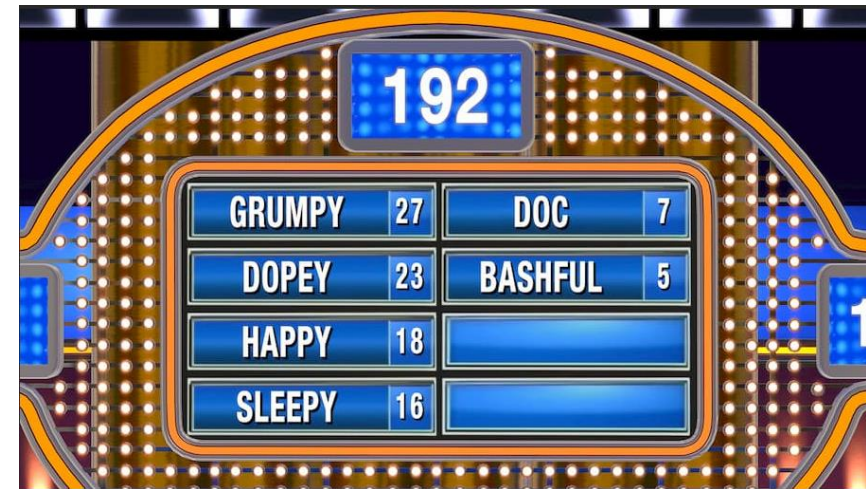
Pre-approval issues

- NERR (s.173,174)
- Explanation of terms and effect of Agreement - *One Key Workforce Pty Ltd v CFMEU* [2018] FCAFC 77
- Access to Award/Agreement (s.180(2) - and see ss.186(2)(a) & s.188(1)(a)(i))
- Duration of Access Period
- Voting by Casuals who didn't work (Kmart)



NES Issues

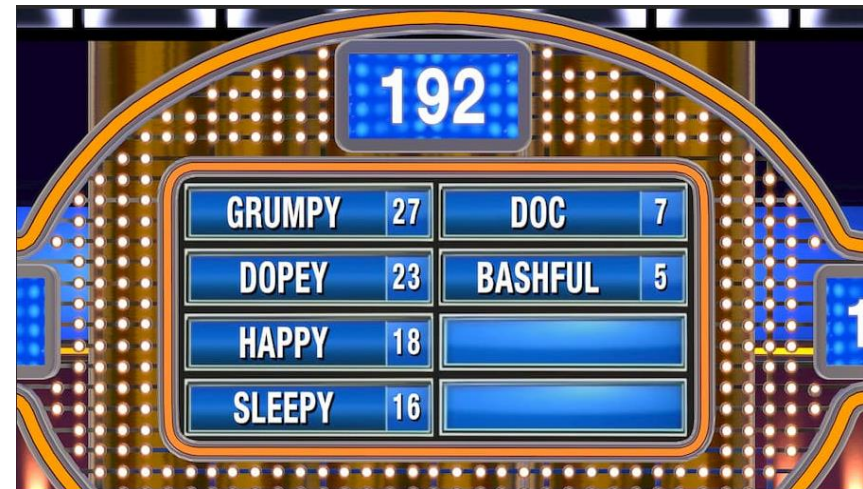
- Definition of shift work must be for purpose of NES
- Agreement terms can't be inferior to he NES
 - Sick Leave advice before commence of shift (s.107)
 - Public Holidays substituted by majority agreement (s.115(3))
 - Narrower definition of 'immediate family' (s.12)
- Flexibility and Consultation terms to mirror effect of Act (s.202,203,205)
- Unlawful deductions (s.424, 426)



Top 5 – BOOT Issues

Note: Onus is on the Applicant to satisfy FWC that BOOT is met (s.193)

- Accuracy of Translation structure if not using Award Classifications
- Impact of more flexible Hours of Work provision (esp. expanding spread of hours) and its impact on penalties/overtime
- Impact of modified Part time provisions on Overtime
- Reduction or Removal of relevant penalties/allowances
- Casual loading on top of Penalties (unless wages cover it)



How to fix problems – Undertakings and S.118(2)

Note: Only the Applicant can make Undertakings (s.190) – only the FWC has to be convinced

- Commission can allow errors to be fixed (such as numbering) (s.586)
- Cannot make substantial changes or create financial detriment (s190(3)) – such as rewrite Agreement or add volumes of material missed out
- Undertaking needs to be in proper form and distributed to BR's (s.190(4),(5))
- Public Interest can be used to fix BOOT failure (s.189) (rare)
- s.118(2) Minor Procedural or Technical error - Re Huntsman and others [2019] FWCFB 318
- Some matters can't be fixed (ie major defects in NERR, Genuine Agreement) – options include withdrawal of Application or argue your case at a Hearing.

FWC Resources to assist you

- [Date calculator](#) - a tool to identify the legislative timeframes
 - [NERR maker](#) - allows employers to generate the correct document on plain paper
 - [Making compliant agreement applications](#) - identifies common issues in agreements and approval applications
 - [Enterprise Agreement Making Benchbook](#)
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Questions
