

**It's About Time:
The Role of Time in Protection Status
Determination Procedures under the
*Migration Act***

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Linda Kirk
Deputy Director and Sub-Dean
Migration Law Program
ANU College of Law
linda.kirk@anu.edu.au

A large graphic of a clock face with two hands, overlaid with the text 'IT'S ABOUT TIME' in a bold, sans-serif font. The background is a blue grid pattern.

**IT'S
ABOUT
TIME**

Barriers to Access to Protection

- Physical barriers eg border walls, boat turn-backs, excision zones, border controls
- Procedural barriers eg ‘enhanced screening’, ‘visa bars’, ‘fast track’ processes, limited access to legal representation
- Latter can be as effective as the former in impeding access to protection

Asylum Legacy Caseload amendments

- Changes to refugee definition
- Reintroduction of Temporary Protection Visas (TPV) and new Safe Haven Enterprise Visa (SHEV)
- New ‘fast track’ assessment process for the ‘asylum legacy caseload’
- Creation of new review authority: the Immigration Assessment Authority (IAA)

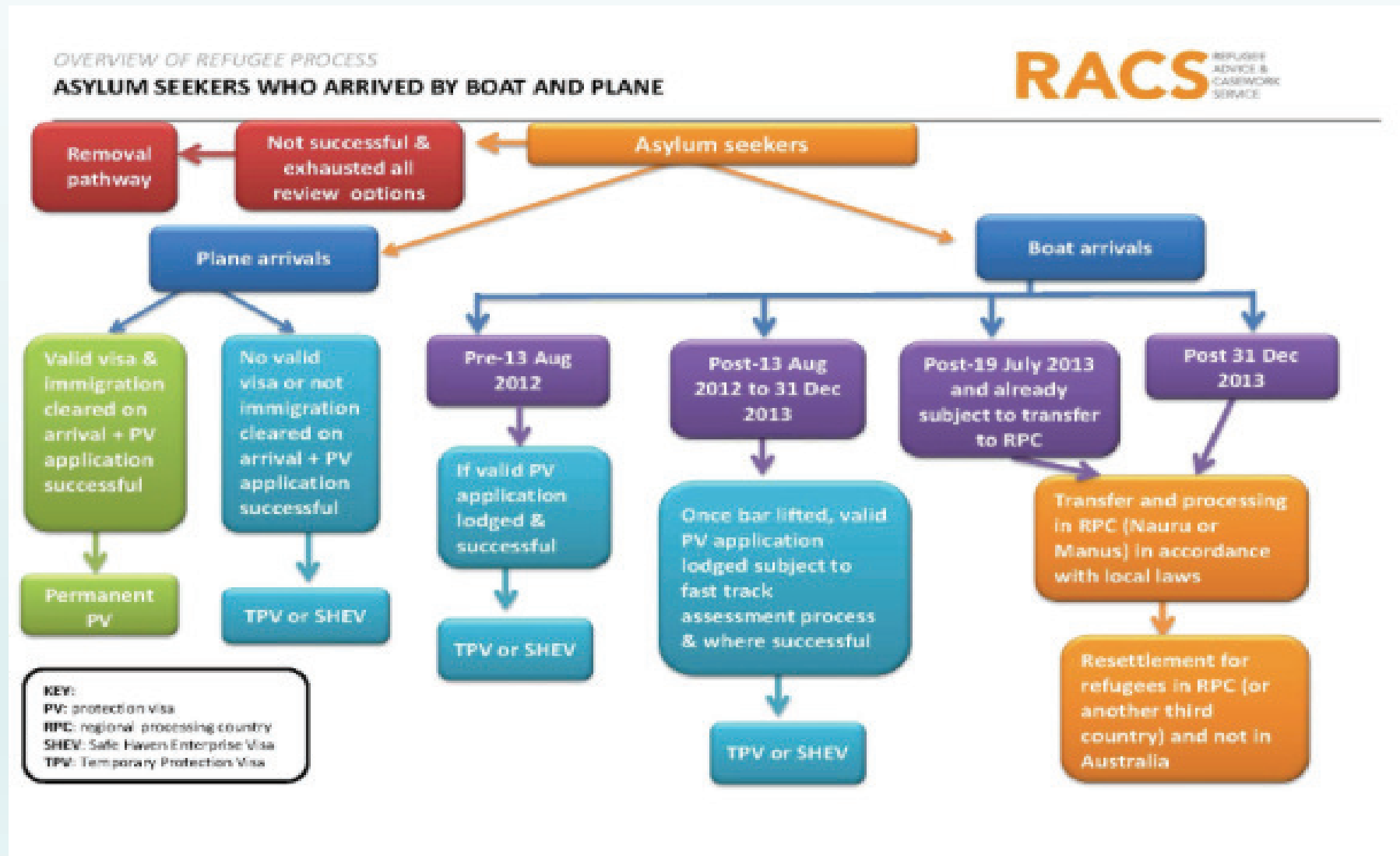
Asylum Legacy Caseload

- 2012-13 – more than 25,000 boat arrivals
- Detained in remote detention centres
- August 2012 – Expert Panel Report
- ‘No Advantage’ Principle
- Asylum-seekers brought to mainland
- Bridging visas (BV) without work rights
- Work rights added in December 2014

'No Advantage'



Protection Status Determination



Section 46A bar

- As UMAs, Asylum Legacy Caseload members are barred under s46A(1) of the *Migration Act* from making any kind of visa application.
- In July 2015 letters notifying them that the s46A(1) bar had been lifted by the Minister and that they can apply for a protection visa (PV).

Processing Timetable

13 AUG 2012

ALREADY INVITED

We have already invited people who arrived in Australia from 13 August to 31 October 2012 to apply for a visa. [Read More](#)

31 MAR 2013

01 APR 2013

CURRENTLY INVITING

We are currently inviting people who arrived in Australia from 1 November 2012 to 30 April 2013 to apply for a visa. [Read More](#)

30 SEP 2013

01 OCT 2013

SOON TO BE INVITED

We will soon be inviting people who arrived from 1 October to 31 December 2013 to apply for a visa. [Read More](#)

31 DEC 2013

TPV or SHEV

- Members of the Legacy Caseload are limited to apply for either a Temporary Protection Visa (TPV) or a Safe Haven Enterprise Visa (SHEV).
- Both are temporary visas and do not allow a later application for a permanent visa, and citizenship and family reunion are not available to holders of these visas.

Asylum Legacy Caseload Statistics

- The Asylum Legacy Caseload as at 30 June 2016 = **30,787**
- Processing of claims of the Legacy caseload commenced in late 2015
- Total number of applications lodged = 12,379 as at 30 June 2016
- Total as at October 2016 = **15,000.**
- 'Bar lift' letters sent now to all ALC
- *DIBP Annual Report 2015-16*

Asylum Legacy Caseload Statistics

- 6379 Fast Track PV applications have been lodged with DIBP – arrivals on or after 13 August 2012 to 31 December 2013 → Fast track assessment
- 6000 ‘regular’ PV applications have been lodged with DIBP – arrivals prior to 13 August 2012 → Regular assessment
- Figures as at 30 June 2016 – DIBP Annual Report 2015-16

Asylum Legacy Caseload Statistics

- As at 30 June 2016 **3411** applications (27%) had been finally determined of which:
 - 1552 TPVs and SHEVs had been granted (45%)
 - 1859 applications refused (54%)

Asylum Legacy Caseload Statistics

- As at October 2016 **6000** applications (50%) had a primary decision made
 - 2885 grants of TPV or SHEV
 - 2000 refused post merits review
 - 1000 refused and at merits review
 - 2000 assessed awaiting checks
 - 8,500 cases on hand

Asylum Legacy Caseload Statistics

- Total number of Legacy Caseload applicants whose claims had been finally determined = **20%** (October 2016).
- The Department estimates it will take at least three years to get through primary processing.
- Many have been waiting more than four years for their protection claims to be assessed.

Asylum Legacy Caseload Statistics

- 16,000 individuals have yet to apply for a PV who have received a 'bar lift' letter
- Approximately 13,000 have not engaged with the Department some 9-12 months after receiving the letter and are not known to any pro bono clinic in Australia
- Refugee Advice Casework Service (RACS)

The Fast Track Process

- Applicants invited to apply to DIBP for either a TPV or SHEV
- 60 days to submit application
- Interview with Department
- Application assessed against refugee and complementary protection criteria
- Refusal → referred to IAA

Why is the 'Fast Track' a Slow Process?

- Total number of PV applications finally determined = 20% (October 2016)
- Once 'bar lift' letters received by applicants they must gather all necessary documents included identity documents
- Also often need to lodge FOI request to obtain access to DIBP file
- Must complete detailed protection visa application form in English

Why is the 'Fast Track' a Slow Process?

- Limited access to legal advice
- Immigration Advice and Application Assistance Scheme (IAAAS) Scheme abolished in March 2014
- Withdrawal of Government funding to organisations such as Refugee Advice and Casework Service (RACS)
 - Waiting list of 700
 - Assistance provided to 5000 applicants in 2015

‘Excluded’ Fast Track Applicants

- An applicant is ‘excluded’ from IAA review where the Department assesses the asylum-seeker’s claims to be
 - ‘manifestly unfounded’, or
 - where the Department finds that they have effective protection in another country,
 - or where the asylum-seeker has provided a document which is suspected to be ‘bogus’ (without reasonable explanation).

‘Excluded’ Fast Track Applicants

- ‘Excluded’ FT applicants have access only to an internal Departmental review of the decision.
- ‘[i]t is the Government’s position that such persons should not have access to merits review because the nature of their claims is so lacking in substance that further review would waste resources and unnecessarily delay their finalisation’.
- EM to Asylum Legacy Caseload Bill 2014

Immigration Assessment Authority

- Established in April 2015 and in July 2015 it became a separate office within the AAT's Migration and Refugee Division
- Reviewers are public servants (APS officers) not independent statutory officers
- Senior Reviewer and 13 Reviewers
- President of the AAT and the Division Head of the Migration and Refugee Division of the AAT are responsible for its overall operation and administration.

Immigration Assessment Authority

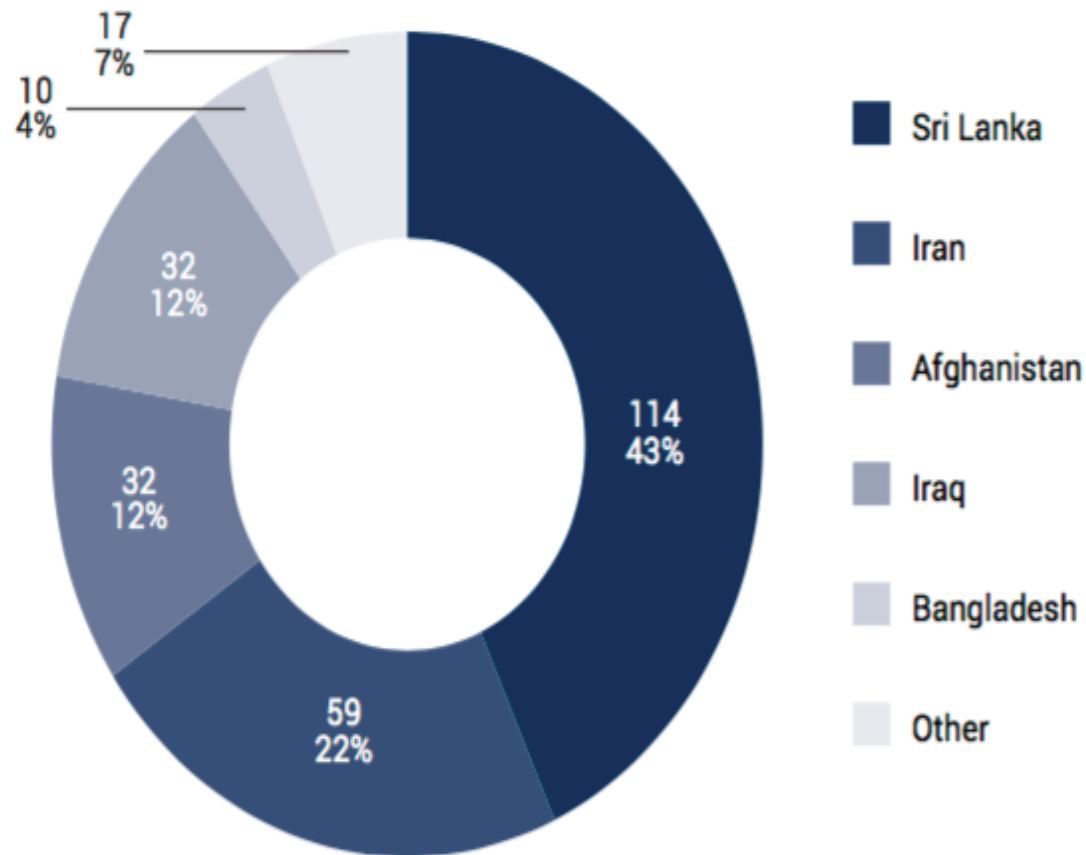
- DIBP refers negative decisions to IAA for a limited form of merits review
- Reviews are to be ‘efficient, quick, free of bias and consistent with Division 3’
- Reviews done ‘on the papers’.
- No obligation to hold a hearing or otherwise interview the applicant.
- No obligation to allow a fast track applicant to respond or correct adverse information raised.

Immigration Assessment Authority

- Only in ‘exceptional circumstances’ will the IAA accept or request new information or interview the applicant.
- New information is that which was not previously known or available at the time of the Department’s decision.
- Must be provided to the IAA within 21 days of the Department’s decision.

Immigration Assessment Authority

Chart 5.2 Referrals to the IAA by country of origin, 2015–16



Immigration Assessment Authority

- Cases referred to IAA from October 2015.
- As at October 2016
 - 374 reviews had been finalised
 - IAA affirmed the decision under review in 288 cases (**77%**)
 - Average time from referral to decision = **five weeks.**
- AAT Annual Report 2015-16
- RACS figures received from DIBP in October 2016

Comparison with MRD AAT

- MRD AAT is bound by a strict code of procedure and must afford procedural fairness to applicants.
- Provides a full *de novo* review that is ‘fair, just, economical, informal and quick’
- Cannot make a decision without holding a hearing unless the decision is favourable to the applicant.
- In the 2015-16 financial year the AAT finalised 3,600 protection visa cases
- AAT Annual Report 2015-16

UMA lodgments in MRD AAT

UMA lodgements

Country	Total	%
Sri Lanka	62	33%
Iran	38	20%
Vietnam	23	12%
Bangladesh	17	9%
Stateless	15	8%
Pakistan	12	6%
Afghanistan	11	6%
Burma (Myanmar)	4	2%
Somalia	3	2%
India	1	1%
Iraq	1	1%
Total	187	

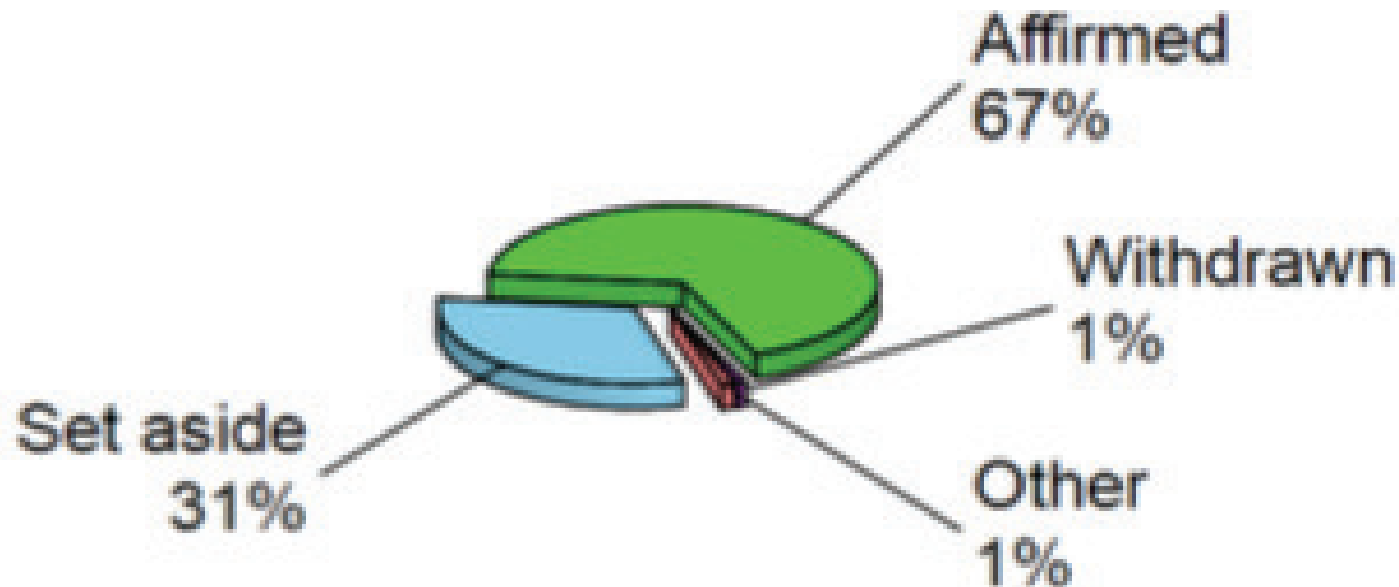
Decision Outcomes by Country

Country	UMA	non-UMA	Total		Set aside	
			Decisions	%	Decisions	%S/A
Malaysia	0	568	568	16%	9	2%
Sri Lanka	453	43	496	14%	100	20%
China	0	481	481	13%	48	10%
India	0	381	381	11%	14	4%
Pakistan	51	167	218	6%	59	27%
Bangladesh	119	91	210	6%	23	11%
Iran	138	30	168	5%	78	46%
Afghanistan	132	8	140	4%	93	66%
Fiji	0	128	128	4%	4	3%
Nepal	5	98	103	3%	1	1%
Egypt	0	87	87	2%	24	28%
Lebanon	0	84	84	2%	8	10%
Vietnam	39	17	56	2%	9	16%
Indonesia	0	42	42	1%	3	7%
Iraq	15	18	33	1%	20	61%
Stateless	20	13	33	1%	15	45%
Turkey	0	25	25	1%	9	36%
Jordan	0	24	24	1%	4	17%
Nigeria	0	23	23	1%	7	30%
Zimbabwe	0	23	23	1%	8	35%
Other	10	266	276	8%	51	18%
Total	982	2,617	3,599	100%	587	16%

70 cases were remitted on complementary protection grounds.

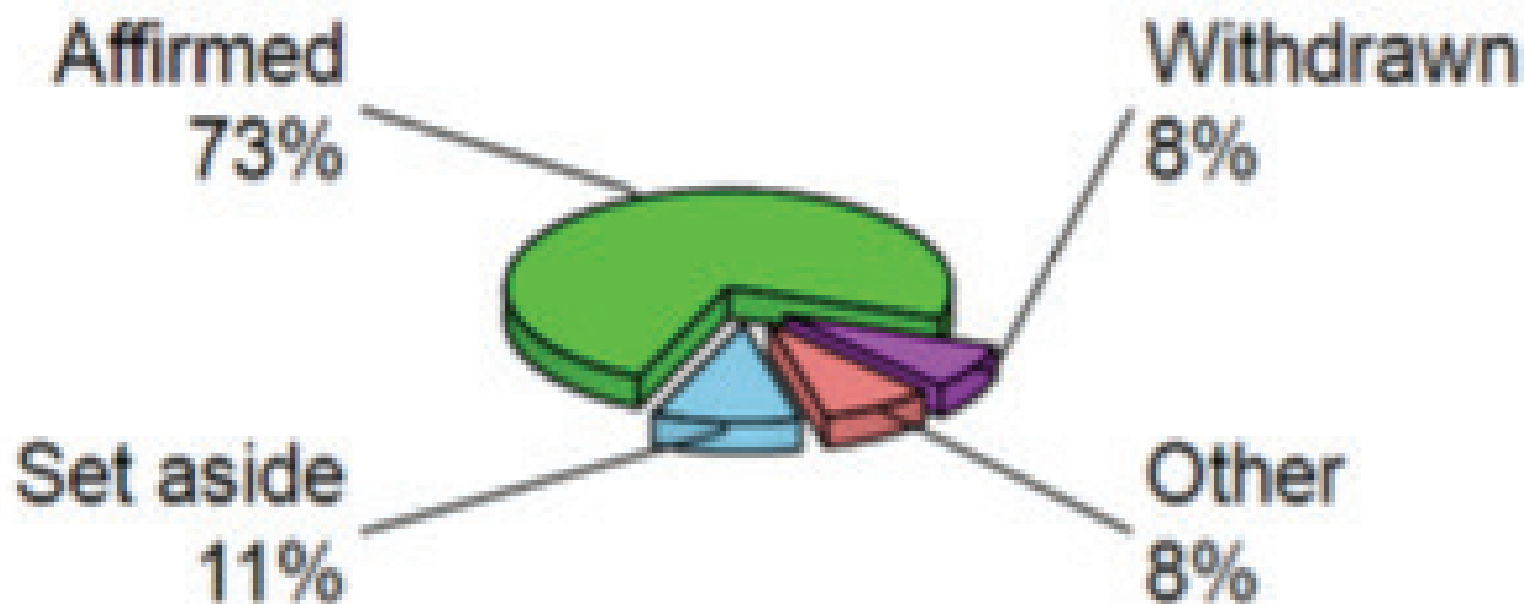
Decision outcomes - UMAs

Refugee outcomes - UMA



Decision outcomes - UMAs

Refugee outcomes - non-UMA



Time from lodgment to decision

- Time from lodgment to decision (average days):
 - UMA cases (983) = 572 days = **18 months.**
 - Non-UMA cases (2,617) = 349 days = **11.5 months**
 - * Time for decision in IAA = **five weeks**

Why do AAT decisions take so long?

- The MRD AAT has a huge backlog of cases.
- Whereas it decided 3,600 cases last year, and received 4,622 lodgments, it started the year with a backlog of 4,400 cases on hand.
- At the end of the 2015-16 it had a backlog (cases on hand) of 5,434.

Hearings – number and duration

- In 2014-15 the RRT arranged 5,080 hearings; and 3,494 hearings were completed or adjourned.
- The remaining hearings were postponed, rescheduled or did not proceed because the applicant did not attend.
- The average duration of a RRT hearing in the 2014-15 year was 144 minutes (approx. 2½ hours).

Representation

- In the MRT-RRT in 2014-15 (prior to amalgamation) applicants were represented in 68% of cases
- In cases where applicants were represented the set aside rate was higher
- Set aside rate of decisions in RRT :
 - applicant represented = 27%
 - applicant unrepresented = 9%
- MRT-RRT Annual Report 2014-15

Ministerial Direction No. 57

- Ministerial Direction No 57 of 2013 - the Refugee Division of the AAT must process protection visa applicants in the following order:
 - Those in immigration detention;
 - Those who came on a valid visa;
 - Boat arrivals
- MD No.57 was revoked on by IMMI 14/150 on 24/12/2014

Challenging IAA decisions

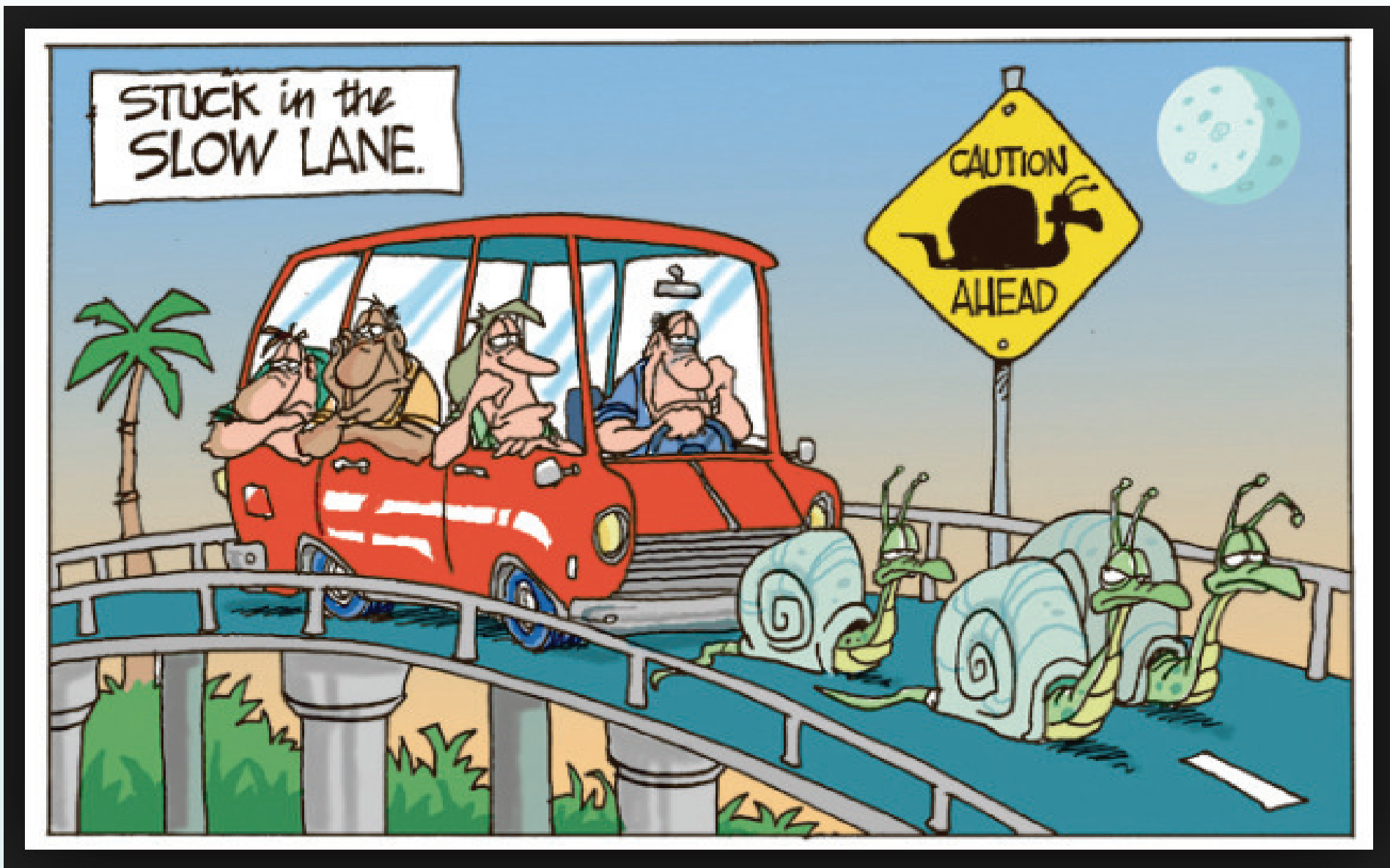
- Judicial review of the decision → Federal Circuit Court.
- Request Ministerial permission to lodge a second protection visa application under s48B if there is significant new information about the case which was not available at the time of the first application.
- Fast track applicants are unable to request Ministerial intervention under s417.

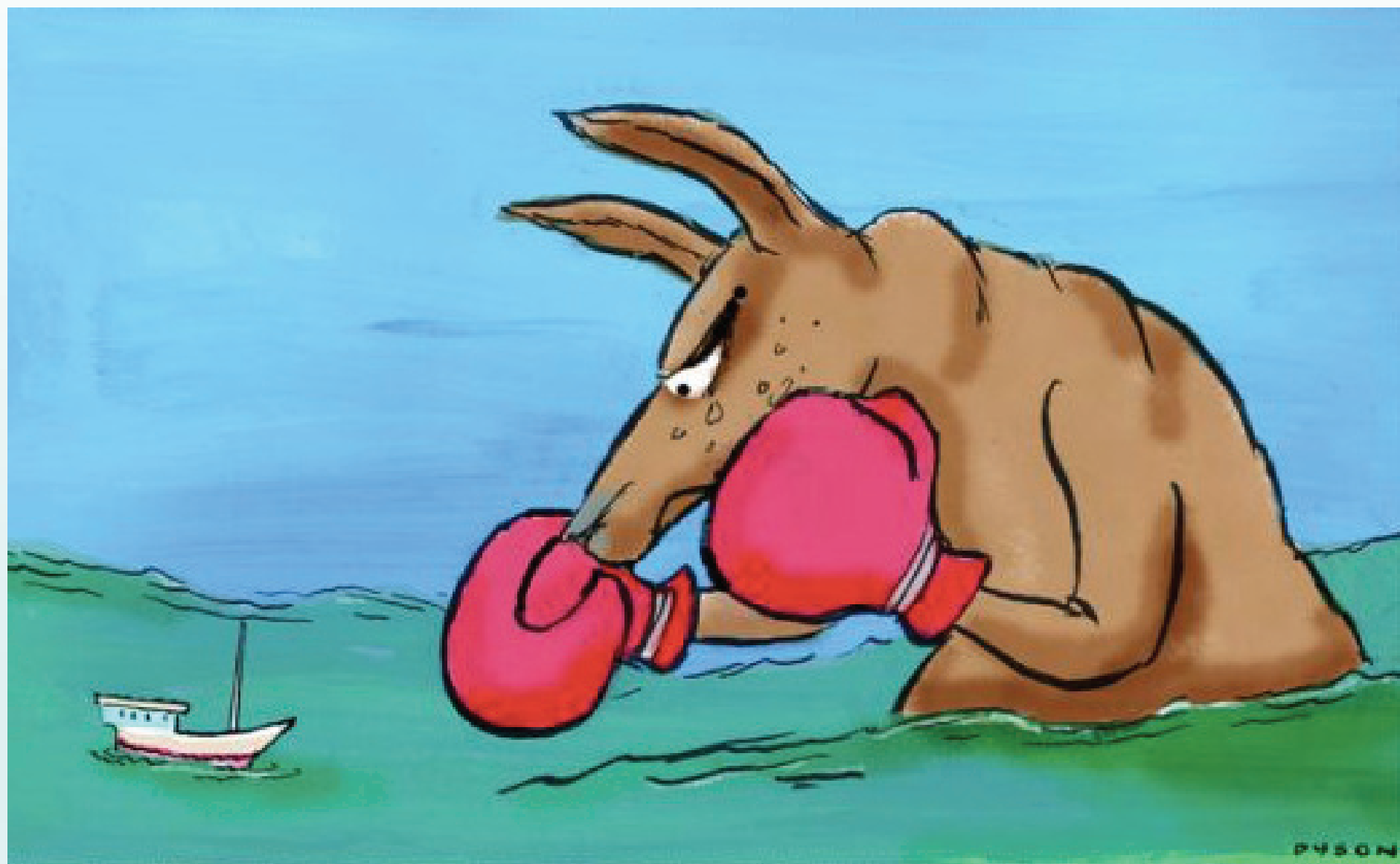
Judicial Review of IAA decisions

- Of the 130 decisions made in 2015-16, 45 judicial review applications have been lodged (at 30 June 2016)
- One judicial review application was finalised during 2015-16
- The matter was remitted to the IAA for reconsideration

AFK v Minister for Immigration and Border Protection [2016] FCCA 1826

- [I]t is to be noted that, generally, IAA reviews afford fewer rights to applicants than the reviews before the Administrative Appeals Tribunal which are available to applicants who are not irregular maritime arrivals. Sections 473DB(1) and 473DC(2) are examples of the new restrictiveness which is to be found in IAA reviews. It seems to me that s.473DA is intended to and does exclude the common law natural justice hearing rule from IAA reviews. I therefore find that the existence of the common law right which the applicant would wish to propound is not arguable (at para 12, Judge Cameron)







*For those who've come across the seas we've
boundless plains to share..."*

- Australian National Anthem



Thank you 😊



Questions?