

Episode 61

Eat the Frog: Dealing with the Too Hard Basket

Intro

This is Risk on Air by Lawcover, and today, how to avoid avoiding difficult files?

Julian: Welcome to Risk on Air.

I'm Julian Morrow, and today we are delving into the too hard basket, looking at the issues that arise when you avoid difficult files. And I'm very pleased to say that we're joined today by Lawcover's Legal Risk Manager, Glenda Carry.

Glenda, welcome.

Glenda: Thank you, Julian. Pleasure to be here.

Julian: It is great to have you, but I've got to say I'm feeling a little bit of post-traumatic stress because this resonates with me as a topic. I didn't practice as a solicitor for very long, and it's in the realms of ancient history now, but I certainly do remember a couple of files that were in this category. And I don't know if everyone's got them, but I feel like it is a not uncommon problem that practitioners can face.

Glenda: Absolutely, Julian. So the reason I'm talking about this topic today is because it resonates with me too.

Julian: All right, good. Okay, we've got something in common. That's a relief.

Glenda: And as you might know, I work with Practice Support Services at Lawcover. Part of that role involves me doing seminars. We do lots of seminars both in-house, but also we go out to the regions and we present in the CBD as well and lots online. And I wanted to talk to people about this because I knew it was something that I struggled with when I was in private practice, which I worked in private practice for about 10 years before I moved in-house. So I started telling people at the seminars stories about my time in practice and what I struggled with and what I realised is that I am not alone. Generally speaking, maybe 80, 90% of the people in the room put their hand up when I ask this question. There's a few that are a little reluctant to say it, but once you get talking about it, I think most people have had a too hard basket. So it's something we all struggle with.

Julian: Yeah, and it's an interesting expression, isn't it, too hard basket isn't it? Because it's not necessarily that it's too hard legally, but it's like there's some sort of blockage involved in your personal management of that particular file and I suppose, in a way, it's because at some point, psychologically, we're just avoiding it.

- Glenda:** I think it is an avoidance mechanism. I've been thinking about kind of what I think are probably the top three reasons that this happens, both from my own experience, but also from chatting with practitioners as well. And I think one of the top reasons that this happens is because it's something that's going to take you quite a bit of time to deal with. And you're looking at your to-do list for that day and you're thinking, well, this is going to take me 3 hours to do this, but hey, there's five other things I have to do, and I can get all five of those done, and I can, we like to tick off boxes.
- Julian:** So the scale of how much time it's going to take in the day makes it seem like, potentially in the short term, the less efficient thing to do, but then if you do it day after day after day, then you've got a problem.
- Glenda:** And that's the thing. We create habits around that, and we start doing it day after day after day. So that's one of the things. The other thing is perhaps the relationship with the client. So it might be a difficult client. It might just be a client that you don't get along with. So you avoid dealing with the file because that will mean dealing with them. And I think the third one probably is lack of knowledge. Not quite sure what to do so I will think about that one later and then what happens is later never comes. And because sometimes people don't do their best work later, they do the best work in the morning. There's lots of people who that applies to. And then they're getting to the more difficult matters in the afternoon, and they just don't have the bandwidth for that. So they then say, okay, I can't deal with that now. It's half three, I'm too tired, I can't face it so I'll deal with that tomorrow.
- Julian:** Rinse and repeat, yes.
- Glenda:** Rinse and repeat, do the exact same thing the next day. And then as you said, then you get this mental block and that block just grows and grows and grows and all of a sudden, the file starts to become a monster over time.
- Julian:** One of the biggest challenges in terms of managing risk is blind spots, because by definition, they're the things that you aren't focusing on.
- So, Glenda, if we were looking for sort of telltale signs, what might be some indications of a file that has been subconsciously put into the too hard basket, even though we don't necessarily think of it that way? How can we spot ourselves falling into this trap?
- Glenda:** Well, if you're dealing with hard copy files, it's often the file that just keeps sitting there. So it might be the file that's been sitting on your desk for a long time or it could be the file that you've put on the ground that you're trying not to see, so you're actually physically avoiding it as well. Online, if you're using electronic files, that's probably a little bit easier to avoid that file. So if it's the file that you know that you're just making excuses that you're not getting to. If clients are calling and you're avoiding their phone calls, that's another indication. If the other side are calling and you're avoiding their phone calls. So avoidance, avoidance in all its different ways is really a key thing. And sometimes you just get that feeling as well in the pit of your stomach, that gut feeling, and you know really that there's something going on here. You're procrastinating for a reason.
- Julian:** So let's look at some examples of how this can happen and also the consequences in terms of legal risk. If you are the person responsible for a file, which we might say is drifting, what are the ramifications of that?

- Glenda:** They can be incredibly significant. Delay will kick in. So when delay kicks in, then we've got some serious issues. You could miss a hearing date. You could miss a statute of limitations. You might show up and just not be prepared for hearing. You might not brief counsel in time, you may miss various deadlines. So you're straying into this area then of there could be a claim against you. But not only that, there also could be a complaint to the Office of the Legal Services Commissioner, because if you're avoiding a file and avoiding the client, then there's a good chance that client is going to get pretty upset with you over time. So you could have a double whammy. You could have a complaint to the Office of the Legal Services Commissioner and a claim and in terms of the relationship with that client, that's probably going to be in tatters. And we know that it's so much more important to hang on to clients than to try and continuously get new clients just from a marketing and a cost perspective. So we want to build good relationships with clients, and that's not going to happen in those scenarios.
- Julian:** And we know that a large number of complaints about the work that lawyers have done essentially come down to communications issues. What are some of the problems that arise when the issue with the communication is the lack of it? What risks are you exposing your client to by not being in that regular or required contact?
- Glenda:** So it's kind of the opposite of the squeaky wheel idiom. So it's always the case that the squeaky wheel generally will get the grease. And by the client not following up or assuming that no news is good news, which I can see why clients would do that as well, it's kind of taking the pressure off the solicitor to deal with that file. So if you have a mental block about a file and you have a client who's kind of leaving you alone, you can see how that would drift into the too hard basket.
- Julian:** Yeah, so sometimes avoidance might be because of the constancy of the communications from the client, but sometimes it's the other way around. It's the fact that they're not necessarily following up, and then you've got avoidance on both sides of the relationship, and that's not going to work well.
- Glenda:** No, that's definitely not going to work well. And we need to be aware when that's happening. And a great way to do that is to do file reviews, because that's something that will remind you what you have in the cabinet or the things that you're not looking at. So if you are doing regular file reviews and regular peer reviews, that can be something that can really help with stopping that file to drift into the too hard basket.
- Julian:** So that involves, where possible, having another person involved in the process of it in a way they can be the circuit breaker when you might not be able to break the circuit yourself.
- Glenda:** Absolutely. File reviews is something that we often speak about in terms of supervision, you know, supervisor or supervisee, keeping an eye on the files by actually randomly selecting a file for review. But it's not just that. I think it has its place with peer review as well. Obviously, supervisors have obligations to supervise, but for the practitioner who's working the file, if they're struggling with that file and they find themselves procrastinating, sending that file for a peer review to one of your colleagues to have a look at can really help with getting that file moving. So an inactive file can be a problematic file. We need to know why the file is inactive and giving it to somebody else to have a look at, to maybe have a chat about or come back to you with their thinking on it can really help that file to move along.

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Glenda: And what I did with peer reviews in particular is I would do a memo about where it was at, what I was stuck on, and then send it for file review. And then when you got the response from the other practitioner, it helped us to, help me to move the file along.

Julian: Is that something that a sole practitioner can avail themselves of in some way as well?

Glenda: It is, but it's a bit harder. So as a sole practitioner, if you have other people in the office, obviously they won't be principals, but you can easily have some very experienced people, and they could have a look at the file for you. What you couldn't do as a sole practitioner is send that file to another practitioner because obviously there could be issues with confidentiality, conflicts and lots of other things as well. So it's a bit harder for sole practitioners. But sometimes they can just have a chat with a friend as well about a hypothetical scenario. So there's ways and means around it, but it's certainly not as easy, especially if you're the only person in the practice.

Julian: So what we're dealing with is a situation of avoidance, you've flagged the consequences that can arise, what should we be thinking about in terms of how to fix these issues? How do you break the circuit?

Glenda: And that can be the hard part because that requires a bit of self-reflection, a bit of accountability. Well, first of all, admission and then a bit of accountability. And it's easy to find excuses as to why that file hasn't moved ahead. But when we sit down and really navel gaze, it becomes pretty clear to us that we've let it slip into the too hard basket and that we're really struggling with it.

So the first thing is to be aware and acknowledge that, yeah, I'm doing that, I have a habit of doing that. And then to look at what strategies could we use in terms of good file management. Because a lot of this comes down to systems and having good file management systems.

So there's a few I thought might be worth talking about today. And these are the ones that I used. And the first thing was really knowing when I'm at my best. I had never thought about when I do my best work. Am I a morning person? Am I an evening person? I just never thought about that. And I realised that what I was doing was I was doing my busy work in the morning, you know, ticking off all the boxes, the quick things I could get out the door. And then I was getting to my harder tasks in the afternoon and then I just didn't have the bandwidth. 3:30, forget about it. I cannot do hard things at 3:30 in the afternoon. So I realised that was a big part of my problem. So I became aware that, yeah, this is a thing and that I'm clearly a morning person. So I shifted around and I forced myself to do my harder work first. So that often meant setting out time where I wouldn't read the mail as soon as it came in or the emails as soon as they came in. I would focus on the difficult matter in the morning. And what I found was, and this was really helpful, it was never as bad as I thought it was going to be. So this thing I thought was going to take me 3 hours and was going to be a nightmare. It would really take me an hour and a half and wasn't too bad. So that was really good.

Julian: That's great.

Glenda: Because that prompted me to think about, okay, well, maybe I can do these too hard things. And I think there's a lot of people who are like that, but also a lot of people who are good in the evening. So it's about knowing.

Julian: And I suppose another thing to be aware of is that while we might be focused on short-term consequences, another incentive for dealing with the too hard basket is that it's unlikely that the consequences are going to remain the same over time. Things are going to get worse. Isn't that the case?

Glenda: Oh, absolutely. There is no good to come from leaving a too hard basket sit there. The only way that you're going to have any peace of mind and sleep well and feel good about yourself too is to deal with it. And it may be doing that first time management lesson. There's also other things that you can do as well.

So I came across the quote, 'Eat the frog first'. It's been attributed to Mark Twain. And that really resonated with me too. So the quote goes along the lines of, *'if you've got to eat a frog every day, it's best to do it first thing in the morning. And if you've got to eat 2 frogs, it's best to eat the ugliest one first'*. So that again, really resonated with me. And the third thing that I realised worked was the 'Eisenhower matrix'.

Julian: Yes! And what is the 'Eisenhower matrix'?

Glenda: Well it's a tool, first of all. It's a simple decision-making tool which helps us to prioritise tasks based on urgency and importance. So for anybody who likes to have to-do lists, and I'm one of those people. When you do a to-do list, it can be easy to pick the things you want to do off the to-do list rather than the things you should do. So this matrix helps us not to do that.

There's 4 quadrants to it based upon urgency and importance. So we've got the first quadrant, which is urgent and important. The second quadrant is not urgent, but important. The 3rd is urgent and not important, and the 4th is not urgent nor important. So we do our to-do list and the things on our to-do list, we pop them into whichever quadrant they belong in. And when we've done that, we look at quadrant one, urgent and important. And the strategy there is do it first. So it takes that decision out of our hands, like when will I do it? Well, there it is.

Julian: So the quadrant got to do it.

Glenda: Got to do it first. Second one is not urgent, but important, and we schedule that. It is important that they get scheduled and then they actually get done. The third one is the urgent and not important, usually urgent for somebody else. So the strategy there is to delegate it, you know, so if somebody else that can do this. And the 4th one is obviously the non-urgent, not important, and we don't do that. We eliminate that, or certainly during our working hours.

Julian: So the Eisenhower matrix, a good way of working out what exactly needs to be done and when. You mentioned delegation there, and I think earlier you referred to supervision. I was wondering, as a supervisor, are there things that you could do to try and edge towards the problem of the too hard basket for the person that you're supervising in a constructive way? Because a lot of the time it does take someone else to try and help you get beyond the blockage that you're facing.

Glenda: I think normalising this whole issue, talking about it and appreciating that it's quite common. I mean, I had never really spoken with other people about my too hard basket per se. You would in different ways, but not specifically.

- Glenda:** But the more I spoke about it, the more other people then started to laugh in the room and they're like, yep, that's me as well. And, the room got talking about it and everyone was laughing, realising that everybody else had one as well. So I think normalising is making it not seem that there's something wrong or that you're not suited to the practice of law just because you have one of these. Sometimes lawyers have this type A personality and perfectionists and all of that kind of stuff. But the reality is we are human at the end of the day and that we do struggle with some of these things. So I think talking about in particular with employees and saying, look, you might find that you've a too hard basket and if you have, here's some strategies that you could use or what are you using already to help you deal with that? Or, you know, what do you think might work for you? Because different things work for different people. But just putting the conversation out there, normalising it and helping them put some strategies in place. And of course, having an open-door policy. So if somebody's struggling, that they feel more than confident to come in and put their hand up.
- Julian:** So not actually dealing with a file is a clear sign that you put it in the too hard basket. But are there potentially tells as well in what you are doing on the file? How can a file which has sort of slipped into the too hard basket change the substance of the lawyering that we're doing?
- Glenda:** Yeah, I think you might find yourself sending holding advice or holding phone calls, trying to kick the can down the road. So if you find yourself in that situation where you're providing some kind of minimal advice because you haven't looked at the file and you don't have substantial advice to give at this point, I think that's a red flag.
- Julian:** Yeah, so there's activity on the file, but it's not activity that's going to the heart of the legal problem that you've been asked to provide advice on.
- Glenda:** Yes, exactly. And over time, that's going to become problematic. So that's when we would really look at the matrix and realise that we need to schedule this. So we would look at it as being maybe not urgent, but over time will become urgent, but important. So we would schedule that and say, okay, look, I don't have the answer today. I appreciate I haven't looked at this. I do need to. So I'm going to schedule that to make sure that it doesn't slip into the first box, which is the urgent and important, because that tends to be more firefighting. And we don't want to spend all our time firefighting. It's very stressful.
- Julian:** There's nothing worse than chasing your tail. And I suppose in the end, the result that you're going to get is just not going to be the same if your whole approach to a file is reactive and defensive rather than finding a proactive, clear solution that's been driven by the quality of your professional advice.
- Glenda:** Yeah, absolutely. And sooner or later, that's all going to come apart in any event, and it's going to be very stressful. So having good file management skills is part of that not happening. Having good time management skills and being aware of the habits that we have developed and looking at how we might change those habits, which is going to take time, but it all starts with awareness.
- Julian:** Yeah, and you clearly were quite frank with yourself in approaching these issues and were conscientious about it. Does it work? Can you break the back of it and actually remove all things from the too hard baskets, Glenda?

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Glenda: This is over 10 years on. I'm still learning. Every day is a school day. I don't know that we ever perfect this, but I think I'm certainly more conscious of it. I'm certainly more aware of when something is slipping into the basket. I smile because I recognise, yep, there I go again. I don't know that we ever get there, but certainly the more steps that we take will avoid the kind of issues that we see at Lawcover arising from these kind of things. But also, I think, will make us better lawyers and give us some peace as well because we're not going to be struggling.

Julian: Sounds very appealing. Glenda Carry, thank you so much for joining us on Risk on Air.

Glenda: Pleasure, Julian. Thank you for having me.

Outro

Thanks for listening to Risk on Air. Join us for the next episode to stay up to date on current risks in legal practice.