

# Worrall Moss Martin News

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Expert advice  
and solutions



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## What Happens to My University Debt When I Die?

Recent reports indicate that tens of thousands of Australians at retirement age have amassed more than \$1.2 billion in university debts that they are unlikely to repay.<sup>(1)</sup>

The ABC has reported that over the past 25 years the Federal Government has written off the student debts of 9,000 people who have died, at a cost to taxpayers of \$80 million. A further 18,000 people with student debts are expected to die over the next 10 years.<sup>(2)</sup>

**What is a HELP Debt?** A HELP debt includes unpaid HECS-HELP, FEE-HELP, VET FEE-HELP, OS-HELP, SA-HELP and VET Student Loans.

**How is a HELP Debt Repaid During Life?** A student's HELP debt is repayable through the tax system once they earn above the compulsory repayment threshold.

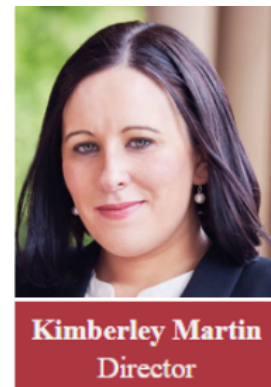
The compulsory repayment threshold is different each year: the compulsory repayment threshold for the 2019-20 income year will be \$45,881.00.

The more a person earns, the rate at which they repay the HELP debt



**Kate Moss**  
Director

increases. The 2019-20 repayment percentage rate starts at 1% and increases to 10%.



**Is a HELP Debt Repaid on Death?** Although various governments have proposed amending the legislation to enable them to recover HELP debts from students who have died, those proposals have been rejected.

Currently, other than the compulsory HELP repayments for the period before their death, which is required to be paid as part of the deceased person's final tax return, a HELP debt is cancelled when the person dies.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning and estate administration. Please contact Kate Moss or Kimberley Martin if you have any questions about the matters set out in this article.

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(1) Department of Education, *Higher Education Loan Program (HELP)* (D19/1216, 2 January 2019)

<<https://docs.education.gov.au/documents/help-data-january-2019>>.

(2) Natasha Robinson and Michael McKinnon, 'Documents reveal the Government looked at recovering HELP loans from deceased estates', *ABC News* (Web page, 14 June 2019) <<https://www.abc.net.au/news/2019-06-14/foi-reveals-student-loans-deceased-estate-recovery/11203258>>.

## Is It Really a "Gift"?



**Hannah Boxall**  
Lawyer

Pre-death gifts can be a complex matter for Executors to deal with when administering an estate.

Mrs Katharine Howard-Olsen, the wife of Australian artist Mr John Olsen, died on 23 December 2016. The administration of Mrs Howard-Olsen's estate made news headlines when Mr Olsen challenged the validity of a pre-death gift made by Mrs Howard-Olsen to her daughter, Ms Karen Mentink.

**The Facts:** Mrs Howard-Olsen was diagnosed with melanoma in 2012. In June 2016, Mrs Howard-Olsen was admitted to hospital and underwent brain surgery. After being discharged, Mrs Howard-Olsen returned to the family home she shared with Mr Olsen. Ms Mentink also moved into the family home, and assumed the role of primary carer for Mrs Howard-Olsen.

The evidence adduced at trial indicated that from the time of the surgery in July until her death in December, Mrs Howard-Olsen was often confused, anxious, and impulsive. On 11 October 2016, Ms Mentink took Mrs Howard-Olsen to the bank. Mrs Howard-Olsen transferred \$2.2 million dollars to Ms Mentink. The transfer was not completed by Ms Mentink under a Power of Attorney.



**Peter Worrall**  
Director

Mrs Howard-Olsen executed her last Will on 15 October 2016 and made a Codicil to that Will on 2 November 2016. Mrs Howard-Olsen's last Will and Codicil were significantly more favourable to Ms Mentink than the previous Wills that Mrs Howard-Olsen had made. The last Will and Codicil were admitted to Probate on 22 May 2017. During the administration of the estate the pre-death "gift" of \$2.2 million dollars was discovered.

Mr Olsen made an application to the Supreme Court of New South Wales seeking, amongst other things, a declaration that the "gift" was invalid as a result of unconscionable conduct and/or undue influence by Ms Mentink.

**The Law:** In order to establish unconscionable conduct, Mr Olsen had to prove to the Court that Mrs Howard-Olsen had a special disadvantage; that Ms Mentink knew of that special disadvantage, and took advantage of it; and that it was unconscionable in the circumstances.

**The Decision:** Judge Sackar of the New South Wales Supreme Court decided in favour of Mr Olsen, holding that Mrs Howard-Olsen's decision to make the "gift" to Ms Mentink was the result of unconscionable conduct and/or undue influence by Ms Mentink.

Judge Sackar reasoned:

1. Mrs Howard-Olsen had a special disadvantage due to her illness which left her "physically and psychologically frail", confused, vulnerable, and wholly dependent on Ms Mentink;
2. Ms Mentink knew of the special disadvantage. Ms Mentink had been her mother's primary carer for the last 5 months of her life, and had witnessed her periods of confusion;
3. Ms Mentink took advantage of Mrs Howard-Olsen's condition by:
  - persuading her mother to make changes to her Will, and actively facilitating those changes being made; and
  - influencing her mother to make the "gift" to her; and
4. Ms Mentink's conduct was unconscionable in the circumstances as the changes to her mother's Will, and the making of the "gift", only benefited her.

Judge Sackar said that:

*"The mere fact that the defendant seemed solely concerned with identifying whether there was any personal tax liability as a result of the gift, and not whether her mother was in a fit position to gift the money, nor whether her long-term step-father knew of and was agreeable to the gift, or whether any legal professional should be consulted, shows a degree of selfishness and utter self-indulgence on her part. She was in my view plainly ignoring her mother's vulnerability and instead was focused on her own material gain."*

Judge Sackar ordered Ms Mentink to repay \$2,203,328,67, interest of \$369,089.37, and Mr Olsen's

costs of the litigation.

**Further Matters:** Ms Mentink has filed a notice of intention to appeal Judge Sackar's decision, and has until late January 2020 to file her appeal.

Worrall Moss Martin Lawyers has a dedicated estate administration team that are able to provide expert advice to beneficiaries and Executors, to assist them to navigate the administration of an estate where pre-death gifts have been made.

## National Enduring Power of Attorney Register

On 29 November 2019, federal, state and territory attorneys-general agreed to a mandatory national register of Enduring Power of Attorney documents. (1) A detailed proposal for the register and plans for further stages of reform, including better access to justice, will go to a meeting in early 2020.

**What is a Power of Attorney?** A Power of Attorney is a legal document where a person (or a company) appoints another person (or people or an institution) to act on their behalf in financial and related matters. It is an agency appointment, where the person giving the Power of Attorney records their choices about matters including who should act as their attorney, the circumstances in which they can act, and the extent (and limits) on the attorney's powers. The person granting a Power of Attorney is called the "donor". The person (or persons) appointed by the Power of Attorney to act for the Donor is called the "attorney".

Granting a Power of Attorney does not take away the donor's power to act for themselves while the donor retains capacity to make their own decisions. Capacity is determined in part by the law, and in part by medical evidence. For example, the donor can operate their bank account one day, and then ask their attorney to do their banking the next day. There can also be a trigger mechanism put in place for when the attorney begins to act under the Power of Attorney, for example when the donor loses mental capacity.

The key legislation applying to the making and the use of Powers of Attorney in Tasmania are the *Powers of Attorney Act 2000* (Tasmania) and the *Guardianship and Administration Act 1995* (Tasmania). These statutes also limit how an attorney can act. Other states and territories in Australia have their own legislation governing Powers of Attorney.

**What is an "Enduring Power of Attorney?"** An Enduring Power of Attorney is made where the donor intends for the powers granted to the attorney to continue if the donor becomes incapable, either temporarily or permanently, of giving instructions or managing their own affairs, for example, because of mental incapacity.

The term "Enduring" means the Power of Attorney continues (endures) beyond the time that the donor loses capacity. Because it endures, in some other jurisdictions it is known as a "Lasting Power of Attorney". A donor is able to decide whether or not to make their Power of Attorney "Enduring". If one of the main purposes of putting the document in place is to appoint a decision maker in the event of incapacity, then the appointment should be an enduring one. These are the



**Kimberley Martin**  
Director



**Peter Worrall**  
Director

most common types of Power of Attorney.

**What are the Current Rules about Registering an Enduring Power of Attorney?** In

Tasmania, an Enduring Power of Attorney is only effective once it is registered. Registration is undertaken through the Land Titles Office, and a state register is maintained. A donor wishing their Enduring Power of Attorney to be used when required should register the document following its completion.

Currently, registration of an Enduring Power of Attorney is not compulsory in any other state or territory. In some states and territories, even without the proposed reforms, an Enduring Power of Attorney is required to be registered for dealings that involve land.

**Proposals and Arguments "For" and "Against" a National Register:** The proposal for the introduction of a "national online register of enduring documents, and court and tribunal orders for the appointment of guardians and financial administrators"(2) was first put forward by the Australian Law Reform Commission in 2016. During 2018/19, the Commonwealth Government budget recorded an intention to work with states and territories to create a national register for Enduring Powers of Attorney.

The campaign for reform has been backed by the Australian Banking Association, the Seniors Rights Service, Elder Abuse Action Australia, the Older Persons Advocacy Network, National Seniors, and the Council on the Ageing. Worrall Moss Martin Lawyers is also a supporter. Key arguments that support the introduction of a national register include that:

- it will help protect vulnerable (in particular the elderly) people from financial abuse;
- it will enable lawyers, banks and others to check the authenticity of an instrument or to track one down and would also send the signal that these are documents to be taken seriously; and
- other jurisdictions, including England and Wales, Scotland and Ireland all have compulsory registration of enduring documents.(3)

Key arguments against the introduction of a national register include that:

- the burdens of a mandatory registration system may outweigh its benefits;
- in practice it may not be effective to prevent elder abuse;
- it may discourage the use of enduring documents leading to "an increase in the inappropriate misuse of elderly persons' money" and more court and tribunal financial management orders being made; and
- the uploading of enduring documents onto a register raises privacy concerns.(4)

**Where to Next?** What the national register will look like, and how registration on a national basis will be implemented is yet to be outlined.

Having an expertly drafted, current and suitable Enduring Power of Attorney in place is one of the most important steps that a person can take to provide for the proper management of their financial affairs in the future.

Worrall Moss Martin Lawyers has specialist skills and experience in estate planning, including advice about and preparation of Enduring Powers of Attorney and review of existing Enduring Powers of Attorney against the client's current circumstances and requirements, and to advise whether it is adequate, or whether (and how) it can be improved. Registration of existing documents can be arranged where required and appropriate.

Please contact Ashleigh Furminger, Casey Goodman, Peter Worrall or Kimberley Martin if you have any questions about Powers of Attorney as these four lawyers at Worrall Moss Martin Lawyers have the ability to assist you, whether you are a person seeking to make a Power of Attorney, or you are in the position of being an Attorney for somebody else.



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- (1) Paul Osborne, "Register helps stem elder financial abuse" (29 November 2019) *The Australian*.
- (2) Australian Law Reform Commission, "Registration of enduring documents", (Web Page, 2019) Proposal 5-1  
<<https://www.alrc.gov.au/publication/elder-abuse-dp-83/5-enduring-powers-of-attorney-and-enduring-guardianship/registration-of-enduring-documents/>>.
- (3) Ibid.
- (4) Ibid.

## Our Lawyers



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## Further Information

### Our Website

A wealth of information in relation to estate and commercial matters can be found at our website [www.pwl.com.au](http://www.pwl.com.au)

### Contributions

Contributions and suggestions from Worrall Moss Martin News readers are always appreciated. Email us at [info@pwl.com.au](mailto:info@pwl.com.au)

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