Lease deposits may be treated as unclaimed money under Banking Act amendments

By GARY NEWTON *and* JACKIE CHEUNG

Changes to the Banking Act will make it possible for deposits held in relation to commercial leases to be treated as unclaimed money and transferred ASIC.

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Frequently, solicitors and real estate agents hold deposits and security money for clients in relation to long-term arrangements such as commercial leases. The deposit might be placed in a bank account for five years earning interest and then, upon expiry of the lease arrangement, the parties might direct the solicitor or the agent to withdraw the invested funds. Unfortunately, as a part of a recent government initiative, such deposits may now be treated as unclaimed money by the Treasury and be transferred to the Australian Securities and Investments Commission (ASIC). In effect, these legislative changes will affect accounts which are inactive for prolonged periods of time and will impose an additional procedure by which unclaimed money can be retrieved.

To minimise the possibility of deposits and security money being treated as unclaimed, it is advisable for solicitors to notify their clients of these legislative developments and implement contractual or other forms of arrangements where additional withdrawals and deposits to long-term bank accounts are authorised. Alternatively, they should advise account holders to consult their bank with respect to arrangements that can be made to prevent funds in specific accounts being treated as unclaimed. In the event that money is transferred over to ASIC, parties must contact the commission and lodge a claim for such funds to be returned.

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The Act

The *Treasury Legislation Amendment (Unclaimed Money and Other Measures) Act 2012* (Cth) (the Act) amends the *Banking Act 1959*, to provide for new arrangements for unclaimed moneysheld by authorised deposit-taking institutions (ADIs). The Act is anticipated to move $760 million into the Commonwealth government's general consolidated revenue fund in the 2012-13 financial year.

In amending s.69 of the *Banking Act*, the period of inactivity before funds in bank accounts are treated as unclaimed is reduced from seven years to three years. Once accounts reach the three-year period of inactivity, the ADI must transfer the funds to ASIC. As bank accounts maintained for the sole purpose of holding deposits or security bond money in commercial transactions generally remain inactive, they are susceptible to being classed as unclaimed. Further, it is important to note that payment of fees or the receipt of interest accrued on the funds during the invested term is not considered to be a withdrawal or deposit to render the account active.

The Act also provides for the payment of interest on the unclaimed money, an initiative the government has never previously offered. The amount of interest and the method of calculating the interest will be determined by regulations (which are yet to be released).

Exceptions to the three-year inactivity period

Under reg.20 of the Banking Regulations, accounts held as security, set off or escrow will only be assessed as unclaimed if they are inactive for a period of at least seven years. Therefore, accounts held as security for a loan or another financial obligation or, for set-off or account combination purposes, or in escrow for a contract, will become unclaimed if no deposits and no withdrawals are made for a period of at least seven years. It is important to note however, that the seven-year inactive period will only apply to the accounts under reg.20 where the authorised deposit-taking institution holding the account restricts the ability of the account-holders to make deposits and withdrawals. For example, the Explanatory Statement of the Banking Amendment Regulations 2013 (No. 1) (Explanatory Statement) clarifies that accounts not restricted by the bank will be subject to the three-year inactive period.

The effect of the legislation on commercial leases

Although there are no legislative requirements for security deposits and bonds under a commercial lease, such leases typically provide for a bond to be held in the lessor's solicitor or agent's trust account.

As the funds held in such accounts are held under a lease arrangement as security against loss arising from the tenant failing to comply with any of the terms or conditions of the tenancy agreement, it is unlikely to amount to a security or set-off for a "loan"

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or other "financial obligation" under the regulations. Particularly as the examples provided in the Explanatory Statement focus on contracts for the provision of services and obligations to secure a financial loan, the nature of the examples suggests that a bond will not be governed. Unless a lease amounts to a "contract" under the regulations, a bond under a commercial lease will not be an escrow account for the purposes of the *Banking Act*. However, in circumstances where money is held by agents, the unclaimed monies provisions under the *Property, Stock and Business Agents Act 2002* (NSW) (and *Unclaimed Money Act 1995* (NSW) if the amendments under the Property, Stock and Business Agents Amendment Bill 2012 are proclaimed) will apply.

For an account to be subject to a seven-year inactive period, it must be a security, set-off or escrow account and must secure "financial obligations", a "loan" or be "in escrow for a contract". Thus, as a lease arrangement does not specifically fall within these definitions, security deposits and bonds will likely be governed by the amendments to the Act, and a three-year inactive period will apply in assessing unclaimed money. □