

THE ASSET RECOVERY (AMENDMENT) BILL
(No. XXIV of 2012)

Explanatory Memorandum

The object of this Bill is to make amendments to the Asset Recovery Act which, in the light of experience in its implementation, have been found to be necessary.

2. The Bill accordingly –

- (a) provides that applications under the Act may also be made in respect of unlawful activities carried out within 10 years before the commencement of the Act;
- (b) provides that, for the purpose of an application for a Confiscation Order, the burden of proving that any property or other benefit was not obtained or derived from an unlawful activity shall lie on the person in whose possession the property is found or to whom the benefit accrued, on a balance of probabilities;
- (c) makes better provision for the composition, functions and powers of the Investigative Agency;
- (d) provides that the Court may, instead of appointing an Asset Manager, require the person in whose possession property lies to look after it;
- (e) provides that the provisions relating to the registration of title to, or charges on, property which is the subject of a Restraining Order shall apply to property which is the subject of a Restriction Order;
- (f) provides that the Enforcement Authority may exercise powers to require the disclosure or production of material and customer information;
- (g) makes better provision for confidentiality and co-operation with public bodies; and
- (h) makes provision for related matters.

3. The opportunity has been taken to make certain minor corrections to the Act.

Y. N. VARMA
Attorney-General

12 October 2012

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ARRANGEMENT OF CLAUSES

Clause

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| 2. Interpretation | 17. Part V of principal Act amended |
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| 5. Section 4 of principal Act amended | 20. Section 47 of principal Act repealed and replaced |
| 6. Section 5 of principal Act amended | 21. Section 48 of principal Act repealed and replaced |
| 7. Section 7 of principal Act amended | 22. Section 50 of principal Act amended |
| 8. Section 9 of principal Act amended | 23. Section 51 of principal Act amended |
| 9. Section 14 of principal Act amended | 24. Section 59 of principal Act amended |
| 10. Section 17 of principal Act amended | 25. Section 63 of principal Act amended |
| 11. Section 19 of principal Act amended | 26. Section 66 of principal Act amended |
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| 14. Section 24 of principal Act amended | |
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A BILL

To amend the Asset Recovery Act

ENACTED by the Parliament of Mauritius, as follows –

1. Short title

This Act may be cited as the Asset Recovery (Amendment) Act 2012.

2. Interpretation

In this Act –

“principal Act” means the Asset Recovery Act.

3. Section 2 of principal Act amended

Section 2 of the principal Act is amended –

- (a) by deleting the definitions of “Customer Information Order”, “Disclosure Order” and “Production Order”;

- (b) by deleting the definition of “benefit” and replacing it by the following definition –

“benefit” –

- (a) means an actual or a potential advantage, gain, profit, benefit or payment of any kind that a person derives or obtains or is likely to derive or obtain, or that accrues or is likely to accrue to him;
- (b) includes the benefit that another person derives or obtains or is likely to derive or obtain, or that otherwise accrues or is likely to accrue to such other person, where the other person is under the control of, or is directed or requested by, the first person;

- (c) by deleting the definition of “customer information” and replacing it by the following definition –

“customer information” means –

- (a) information as to whether a person holds or has held an account at a financial institution solely or jointly with another person;
 - (b) information relating to any evidence obtained by the financial institution under or for the purposes of an enactment relating to money laundering; and
 - (c) such particulars, relating to the account or its holder as are, in the opinion of the Enforcement Authority, relevant;
- (d) in the definition of “gift”, in paragraph (b)(i), by deleting the words “the commission of an offence” and replacing them by the words “the carrying out of an unlawful activity”;
- (e) in the definition of “instrumentality”, by deleting the words “to commit an offence” and replacing them by the words “in connection with an unlawful activity”;
- (f) in the definition of “interest”, by repealing paragraph (b) and replacing it by the following paragraph –
- (b) a right, power or privilege, including the exercise of effective control, or making of a gift, in connection with the property;
- (g) in the definition of “proceeds”, by deleting the words “the commission of an offence” and replacing them by the words “an unlawful activity”;
- (h) by inserting, in the appropriate alphabetical order, the following new definitions –

“Ancillary Power” means a power referred to in section 47 or 48;

“Chief Investigating Officer” means the person designated as such under section 5;

“Official Receiver” has the same meaning as in the Companies Act;

- (i) by adding the following new definition, the full stop at the end of the definition of “Trustee” being deleted and replaced by a semicolon –

“unlawful activity” –

- (a) means an act which constitutes an offence or some other contravention of a law and which is done after the commencement of this Act;
- (b) includes acquiring possession of property or deriving a benefit, as a result of or in connection with an act referred to in paragraph (a), at any time not earlier than 10 years before the commencement of this Act.

4. Section 3 of principal Act amended

Section 3 of the principal Act is amended –

- (a) in subsection (1), by deleting the words “done after the commencement of this Act”;
- (b) in subsection (2), by deleting the words “after the commencement of this Act”;
- (c) by inserting, after subsection (2), the following new subsection –

(2A) For the purposes of sections 17 and 19, where it is found that a person was in possession of any property or has derived a benefit from an unlawful activity, and that he did not have a legitimate source of income sufficient to justify his interest in the property or the benefit derived by him, the onus shall, on a balance probabilities, lie on that person to show that the property was not obtained, or the benefit was not derived, from an unlawful activity.

- (d) by repealing subsection (5) and replacing it by the following subsection –

(5) An application to the Court or a Judge under this Act shall constitute civil proceedings and be determined on a balance of probabilities.

5. Section 4 of principal Act amended

Section 4 of the principal Act is amended, in subsection (3), by deleting the figure “33” and replacing it by the figure “34”.

6. Section 5 of principal Act amended

Section 5 of the principal Act is amended –

- (a) in subsection (1) –
 - (i) by deleting the words “such law officers as he may designate and”;
 - (ii) by inserting, after the words “corporation, may designate”, the words “, one of whom shall be designated by the Director of Public Prosecutions to be the Chief Investigating Officer”;
- (b) in subsection (2), by deleting the words “ where this is required” and replacing them by the words “under the supervision of the Chief Investigation Officer who shall submit the conclusions of the Investigative Agency to the Enforcement Authority”;
- (c) by adding the following new subsection –

(3) (a) No person shall, without the written authorisation of the Enforcement Authority, disclose to any other person any information or material which comes to his knowledge in the performance of his duties under this Act, except –

- (i) for the purpose of performing his functions under this Act; or
- (ii) where he is required to do so by a Court.

(b) Any person who contravenes paragraph (a) shall commit an offence.

7. Section 7 of principal Act amended

Section 7 of the principal Act is amended –

- (a) in subsection (1)(c), by deleting the word “gift” and replacing it by the word “donation”;
- (b) in subsection (2), by adding the following new paragraph, the full stop at the end of paragraph (f) being deleted and replaced by a semicolon –

- (g) fund such training or other capacity-building activity as may be required by the Enforcement Authority for the purposes of this Act.

8. Section 9 of principal Act amended

Section 9 of the principal Act is amended, in paragraph (a), by deleting the word “specified”.

9. Section 14 of principal Act amended

Section 14 of the principal Act is amended, in subsections (1) and (4), by inserting, after the word “Registrar-General”, the words “or other relevant authority”.

10. Section 17 of principal Act amended

Section 17 of the principal Act is amended –

- (a) in subsection (1) –
 - (i) in paragraph (a) –
 - (A) by inserting, after the word “derived”, the words “or likely to be derived”;
 - (B) by inserting, after the word “offence”, the words “or from any other unlawful activity which the Court finds to be sufficiently related to that offence”;
 - (ii) in paragraph (b), by inserting, after the word “obtained”, the words “or likely to be obtained”;
- (b) in subsection (3)(a), by inserting, after the words “relates was”, the words “, or is likely to be,”;
- (c) in subsection (5), by inserting, after the words “trial court”, the words “and to any other relevant evidence gathered in the course of an Investigation”;
- (d) by repealing subsection (7).

11. Section 19 of principal Act amended

Section 19 of the principal Act is amended –

- (a) in subsection (1) –
 - (i) by inserting, after the words “from an offence”, the words “or any other unlawful activity which the Court finds to be sufficiently related to that offence”;

- (ii) by inserting, after the words “the State”, the words “, within such time as it may determine,”;
- (iii) by deleting the words “from that offence”;
- (b) in subsection (2), by deleting the words “from the commission of an offence”.

12. Section 20 of principal Act amended

Section 20 of the principal Act is amended, in subsection (1) –

- (a) by inserting, after the word ”derived”, the words “or likely to be derived”;
- (b) by deleting the words “from an offence”;
- (c) in paragraphs (a), (b) and (c), by deleting the words “, as a result of the commission of the offence”;
- (d) by inserting, after paragraph (a), the following new paragraph –
 - (aa) the value of any dangerous drug found in the possession of the defendant or of another person on behalf of the defendant;
- (e) in subsection (4), by inserting, after the word “derived”, the words “or likely to be derived”.

13. Section 23 of principal Act amended

Section 23 of the principal Act is amended, in subsection (2)(b), by deleting the words “, or is found not to be criminally responsible”.

14. Section 24 of principal Act amended

Section 24 of the principal Act is amended, in subsection (2), by inserting after the words “until the”, the word “final”.

15. Section 27 of principal Act amended

Section 27 of the principal Act is amended –

- (a) in subsection (1)(a), by deleting the word “specified”;
- (b) in subsection (3), by inserting, after the words “a person”, the words “is not in Mauritius or”;
- (c) by inserting, after subsection (3), the following new subsections –

(3A) Notwithstanding subsections (1) and (2), the Enforcement Authority may apply to the Judge for an order that, instead of appointing an Asset Manager, the person in whose possession the property is found shall exercise the powers referred to in subsection (2)(b).

(3B) Section 14 shall apply to a Restriction Order, with necessary modifications, as it applies to a Restraining Order.

16. Section 35 of principal Act amended

Section 35 of the principal Act is amended, in subsection (3), by inserting, after the words “a person”, the words “is not in Mauritius or”.

17. Part V of principal Act amended

Part V of the principal Act is amended, in the heading, by adding the words “**AND POWERS**”.

18. Section 45 of principal Act repealed and replaced

Section 45 of the principal Act is repealed and replaced by the following section –

45. Exercise of Ancillary Powers

Notwithstanding any other enactment, the Enforcement Authority may, for the purposes of, or in connection with –

- (a) an application for, or the enforcement of, an Order under Part III or IV; or
- (b) an Investigation,

exercise an Ancillary Power.

19. Section 46 of principal Act amended

Section 46 of the principal Act is amended, in subsection (2)(a), by repealing subparagraph (i).

20. Section 47 of principal Act repealed and replaced

Section 47 of the principal Act is repealed and replaced by the following section –

47. Power to require production or disclosure

(1) The Enforcement Authority may, by written notice, require any person to produce or disclose any information or material, other than privileged

material or customer information, where there is reasonable ground for suspecting that –

- (a) any property in the possession or under the control of a person is proceeds, an instrumentality or terrorist property or the person has derived a benefit from any unlawful activity;
- (b) the person is in possession of the material which is required to be produced or disclosed;
- (c) the material is likely to be of substantial value to an application or an Investigation; and
- (d) it is in the public interest that the material be produced or disclosed.

(2) Where any material consists of information contained in a computer, the notice may require the person to produce or disclose it in a form in which it is accessible or can be taken away.

(3) Where any material is in the possession of a Ministry or Government department, the notice may require a public officer to comply with it.

(4) The notice may require the person to –

- (a) answer questions at such time and place as may be specified;
- (b) provide information or produce material at such time and in such manner as may be specified; or
- (c) permit the Enforcement Authority to have access to any document, register, record or electronic data containing the required information.

21. Section 48 of principal Act repealed and replaced

Section 48 of the principal Act is repealed and replaced by the following section –

48. Power to require customer information

(1) The Enforcement Authority may, by written notice, require a financial institution to provide such customer information as it may have relating to a person specified in the notice, in such manner and at such time as the Enforcement Authority may require, where there is reasonable ground for suspecting that –

- (a) any property in the possession or under the control of a person is proceeds, an instrumentality or terrorist property or the person has derived a benefit from any unlawful activity;
- (b) the customer information is likely to be of substantial value to an application or an Investigation; and
- (c) it is in the public interest that the customer information should be provided.

(2) Where any customer information is contained in a computer, the notice may require the financial institution to provide it in a form in which it is accessible or may be taken away.

22. Section 50 of principal Act amended

Section 50 of the principal Act is amended –

- (a) in the heading, by adding the words “**or other requirement**”;
- (b) in paragraph (a), by inserting, after the words “Ancillary Order”, the words “or a requirement under section 47 or 48”;
- (c) in paragraph (b), by inserting, after the words “Ancillary Order”, the words “or a requirement under section 47 or 48”.

23. Section 51 of principal Act amended

Section 51 of the principal Act is amended by deleting the words “the Customer Information Order or” and replacing them by the words “a requirement under section 47 or 48 or an”.

24. Section 59 of principal Act amended

Section 59 of the principal Act is amended by –

- (a) numbering the existing provision as subsection (1);
- (b) adding the following subsections –

(2) The Enforcement Authority may notify a public body in writing of the start of an Investigation with a view to mutual co-operation and sharing of information.

(3) Notwithstanding any other enactment, every public body shall, following a notification under subsection (2), provide the Enforcement Authority with such information as it may require for the exercise of its functions and powers under this Act.

(4) In this section, “public body” means the Commissioner of Police, the Financial Intelligence Unit, the Financial Services Commission, the Independent Commission against Corruption, the Mauritius Revenue Authority, the Registrar of Companies and such other public body as may be prescribed.

25. Section 63 of principal Act amended

Section 63 of the principal Act is amended –

- (a) in subsection (1)(a), by inserting, after the figure “15”, the words “; 22”;
- (b) in subsection (2), by inserting, after the words “Criminal Procedure Act”, the words “, the Community Service Order Act”.

26. Section 66 of principal Act amended

(1) Section 66 of the principal Act is amended, in subsection (1), by inserting, after the words “that Act”, the words “and of section 64(3)(k) of the Banking Act”.

(2) Subsection (1) shall be deemed to have come into operation on 1 February 2012.

27. Consequential amendment

The Banking Act is amended, in section 64(3)(k), by deleting the words “a Customer Information Order or an Account Monitoring Order made” and replacing them by the words “section 48 or an order”.
