

REPUBLIC OF VANUATU

BILL FOR THE PROCEEDS OF CRIME (AMENDMENT) ACT NO. OF 2017

Explanatory Note

This Bill amends the Proceeds of Crime Act [CAP 284] (the Principal Act) primarily to give effect to Vanuatu's FATF Action Plan to meet FATF Recommendations*. A brief explanation of the key amendments is set out below.

Enforcement of Act

The responsibility for enforcement of the Principal Act is being transferred from the Attorney-General to the Public Prosecutor. The Public Prosecutor also becomes the Administrator for the purpose of managing and disposing of proceeds of crime assets. Regulations will in time prescribe more comprehensive measures to manage and dispose of such assets.

Money laundering offence

The Bill repeals the existing definition of "money laundering offence" and substitutes an updated offence to meet FATF requirements, including increased penalties.

Serious offence and foreign tax evasion offence

The Bill repeals the existing definition of "serious offence" by adding a third limb (in addition to paragraphs (a) and (b)) that provides for a "foreign tax evasion offence". "Foreign tax evasion offence" is defined to be conduct that:

- amounts to a criminal offence under the law of a foreign jurisdiction that involves a breach of duty relating to a tax imposed under the law of that country (whether or not the tax is imposed in Vanuatu), and
- would be regarded by Vanuatu courts as an offence of fraudulent evasion of tax for which the maximum penalty is imprisonment for not less than 12 months, had the conduct occurred in Vanuatu.

The Penal Code (Amendment) Bill creates a domestic fraudulent evasion of tax offence so as to provide the dual criminality necessary for this new third limb of the definition of "serious offence". Together, the "foreign tax evasion offence" and the new domestic "fraudulent evasion of tax offence" will enable Vanuatu to prosecute for laundering in Vanuatu the proceeds of a foreign tax evasion offence. They also provide a basis for dual criminality for mutual legal assistance, which addresses FATF requirements in relation to mutual legal assistance for foreign tax offences.

Freezing directions

The Bill inserts a new Part 2A providing for freezing directions.

This is a new power for the Commissioner of Police to temporarily freeze accounts held with financial institutions to prevent persons from moving money held in accounts before a restraining order can be obtained. A freezing direction lasts for not more than 28 working days. A new definition of “financial institution” satisfies the FATF definition.

If the Commissioner of Police requires more time to obtain a restraining order from a Court, the Commissioner of Police can issue a new freezing direction (which is administrative and therefore an efficient process).

*The Financial Action Task Force (FATF) is an independent inter-governmental body that develops and promotes policies to protect the global financial system against money laundering, terrorist financing and the financing of proliferation of weapons of mass destruction. The FATF Recommendations are recognised as the global anti-money laundering (AML) and counter-terrorist financing (CTF) standard.

Minister of Justice and Community Services



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An Act to amend the Proceeds of Crime Act [CAP 284], and for related purposes.

Be it enacted by the President and Parliament as follows-

1 Amendments

The Proceeds of Crime Act [CAP 284] is amended as set out in the Schedule, and any other item in the Schedule has effect according to its terms.

2 Application of amendments

- (1) The amendments made by the Schedule to this Act apply:
 - (a) to conduct that takes place on or after this Act commences; and
 - (b) to property, regardless of whether criminal or other conduct relevant to the property occurred before, on or after this Act commences.
- (2) To avoid doubt, in the application of the amendments paragraph (a) relates only to conduct and paragraph (b) relates only to property.

3 Commencement

This Act commences on the day on which it is published in the Gazette.

SCHEDULE

AMENDMENTS OF THE PROCEEDS OF CRIME ACT [CAP 284]

1 The whole of the Act

Delete “Attorney General” (wherever occurring), substitute “Public Prosecutor”

2 Subsection 2(1) (definition of “account”)

Repeal the definition, substitute

““account” means any facility or arrangement in which a financial institution does any of the following:

- (a) accepts deposits of currency;
- (b) allows withdrawals of currency;
- (c) pays negotiable or transferable instruments or cheques or payment orders drawn on behalf of any person, or collects negotiable or transferable instruments or cheques or payment orders on behalf of a person,

and includes any facility or arrangement for a safety deposit box or for any other form of safe deposit or cash management trust;”

3 Subsection 2(1) (definition of “currency”)

Repeal the definition, substitute

““currency” includes:

- (a) the cash of Vanuatu or of a foreign country that is designated as legal tender and which is customarily used and accepted as a medium of exchange in the country of issue; or
- (b) monetary instruments that may be exchanged for money, including cheques, travellers cheques, money orders and negotiable instruments in a form in which title passes on delivery; or
- (c) a precious metal or precious stone; or

- (d) such other monetary instruments specified by the Minister by Order; or
- (e) currency in electronic form including debit cards, credit cards, pre-paid mobile phones and any other electronic device with a stored value;”

4 Subsection 2(1) (definition of “financial institution”)

Repeal the definition, substitute

““financial institution” means any person or unincorporated entity that conducts in Vanuatu one or more of the activities listed below:

- (a) acceptance of deposits and other repayable funds from the public, including private banking; or
- (b) lending, including, but not limited to, consumer credit, mortgage credit, factoring (with or without recourse), and financing of commercial transactions, including forfeiting; or
- (c) financial leasing other than with respect to arrangements relating to consumer products; or
- (d) the transfer of money or value; or
- (e) issuing and managing the means of payment, including, but not limited to, credit and debit cards, cheques, traveller’s cheques, money orders and bankers’ drafts and electronic money; or
- (f) issuing financial guarantees and commitments; or
- (g) trading in:
 - (i) bearer negotiable instruments; or
 - (ii) foreign exchange; or
 - (iii) exchange, interest rate and index instruments; or
 - (iv) transferable securities; or

- (v) commodity futures trading; or
- (h) participation in securities issues and the provision of financial services related to such issues; or
- (i) individual and collective portfolio management; or
- (j) safekeeping and administration of currency, bearer negotiable instruments or liquid securities on behalf of other persons; or
- (k) investing, administering or managing funds or money on behalf of other persons; or
- (l) underwriting and placement of insurance, including insurance intermediation by agents and brokers; or
- (m) money and currency changing;”

5 Subsection 2(1) (definition of “foreign serious offence”)

Repeal the definition, substitute

““foreign serious offence” means:

- (a) an offence against a law of another country that, if the relevant act or omission had occurred in Vanuatu, would be an offence against the laws of Vanuatu, for which the maximum penalty is imprisonment for at least 12 months; or
- (b) an offence prescribed by the regulations.”

6 Subsection 2(1) (definition of “property”)

Repeal the definition, substitute

““property” means assets of every kind, whether tangible or intangible, corporeal or incorporeal, moveable or immovable, however acquired, including:

- (a) currency and other financial assets; and
- (b) an enforceable right of action: and

- (c) legal documents or instruments in any form, including electronic or digital, evidencing title to, or an interest in, such assets, including but not limited to bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, drafts and letters of credit,

whether such assets are situated in Vanuatu or outside Vanuatu, and includes a legal or equitable interest, whether full or partial, in any such assets;”

7 Subsection 2(1) (definition of “serious offence”)

Repeal the definition, substitute

““serious offence” means:

- (a) an offence against a law of Vanuatu for which the maximum penalty is a fine of at least VT 1 million or imprisonment for at least 12 months; or
- (b) an offence against a law of another country that, if the relevant act or omission had occurred in Vanuatu, would be an offence against the laws of Vanuatu, for which the maximum penalty is imprisonment for at least 12 months; or
- (c) a foreign tax evasion offence.”

8 Subsection 2(1) (Insertion of new definitions)

Insert the following definitions in their correct alphabetical positions

““dispose of property” means disposing of property by sale or other means;

“foreign tax evasion offence” means conduct that:

- (a) amounts to an offence against a law of foreign country; and
- (b) relates to a breach of a duty relating to a tax imposed under the law of the foreign country (whether or not that tax is imposed under a law of Vanuatu); and
- (c) would be regarded by the courts of Vanuatu as an offence of fraudulent evasion of tax for which the maximum penalty is imprisonment for at least 12 months, had the conduct occurred in Vanuatu;

“Minister” means the Prime Minister;

“unincorporated entity” means any unincorporated group, organization or legal arrangement, including an unincorporated partnership;”

9 Section 11

Repeal the section, substitute

“11 Money-laundering

- (1) A person who engages in money-laundering is guilty of an offence punishable on conviction by:
 - (a) if the person is a natural person - a fine not exceeding VT 50 million or imprisonment not exceeding 25 years, or both; or
 - (b) if the person is a body corporate - a fine not exceeding VT 250 million.
- (2) A person engages in money-laundering if the person:
 - (a) acquires, possesses, receives or uses property, or engages directly or indirectly in an arrangement that involves property, that the person knows or ought reasonably to know to be proceeds of crime; or
 - (b) converts or transfers property that the person knows or ought reasonably to know to be proceeds of crime; or
 - (c) conceals or disguises the true nature, source, location, disposition, movement, ownership of or rights with respect to property that the person knows or ought reasonably to know to be proceeds of crime; or
 - (d) removes property from Vanuatu, or brings property into Vanuatu, that the person knows or ought reasonably to know to be proceeds of crime.
- (3) If a person has committed an offence that generates proceeds of crime, nothing in this Act prevents the person from being convicted of a money

laundering offence in respect of those proceeds of crime under subsection (1).

- (4) Nothing in this Act requires a person to be convicted of an offence that generates proceeds of crime before the person can be convicted of a money laundering offence in respect of those proceeds of crime under subsection (1).
- (5) Knowledge required as an element of an offence in subsection (1) may be inferred by objective factual circumstances.
- (6) Subsections (1) and (2) apply in relation to any type of property, regardless of its value.
- (7) A person commits an offence if he or she:
- (a) attempts, conspires or incites to commit the offence of money laundering; or
 - (b) aids, abets, counsels or procures the commission of money laundering; or
 - (c) in agreement with another, takes part in the commission of money laundering.
- (8) A person who carries out an act under subsection (7) commits an offence punishable on conviction by:
- (a) if the person is a natural person - a fine not exceeding VT 50 million or imprisonment not exceeding 25 years, or both; or
 - (b) if the person is a body corporate - a fine not exceeding VT 250 million.”

10 After PART 2

Insert

“PART 2A-FREEZING DIRECTION

13. Scope and duration of freezing direction

- (1) The Commissioner of Police may issue a direction to a financial institution or any other person that property must not be disposed of or dealt with by any person if the Commissioner of Police is satisfied that:
 - (a) there are reasonable grounds to suspect that some or all of the property:
 - (i) is tainted property; or
 - (ii) may be used to satisfy a pecuniary penalty order or a foreign pecuniary penalty order, whether or not an application for a pecuniary penalty order or a foreign pecuniary penalty order has been made; and
 - (b) consideration is being given by the Public Prosecutor for an application for a restraining order or an interim restraining order to be made concerning the property.
- (2) A direction may apply to all or part of that property.
- (3) A direction is effective for 28 days from the date of its service on the financial institution or person.

14. Application for a direction

- (1) A police officer may make an application to the Commissioner of Police for a direction under section 13.
- (2) An application must be made using the prescribed form.
- (3) A police officer who makes an application for a direction must not be the same officer who issues such a direction.
- (4) The Commissioner of Police must keep and maintain an up-to-date register of all applications for directions in either electronic or written format.

14A. Exemption from liability

- (1) The Commissioner of Police or his or her officers, employees or agents are not liable for any action, suit or civil proceedings for anything done or omitted to be done in good faith and with due diligence in the exercise of their functions under this Part.
- (2) No action, suit or civil proceedings lie against any person in relation to any action taken by that person or that person's directors, employees or agents acting in the performance of their duties:
 - (a) in good faith in compliance with a direction under section 13; or
 - (b) in the mistaken but genuine belief that such action was required in compliance with such a direction.
- (3) Despite subsection (1) or (2), any person may be prosecuted for an offence of money laundering or terrorist financing under this Act or any other Act.

14B. Request for living expenses

- (1) The owner of property that is subject to a direction under section 13 may in writing request the Commissioner of Police to revoke or vary the direction to enable the owner of the property to access the property or part thereof for the purpose of the owner's reasonable living expenses (including the reasonable living expenses of the owner's dependents, if any).
- (2) A request made under subsection (1), must be accompanied by the following information in relation to the property:
 - (a) the owner's interests in property; and
 - (b) the owner's liabilities; and
 - (c) the source and amount of the owner's current and anticipated income.

14C. Non-compliance with a freezing direction

- (1) A person who disposes of or deals with property that is the subject of a direction under section 13 commits an offence punishable on conviction:
- (a) for an individual - a fine not exceeding VT 25 million or an amount equivalent to the value of the property which is the subject of the direction if greater than VT 25 million, or imprisonment for a term not exceeding 15 years, or both; or
 - (b) for a body corporate - a fine not exceeding VT 125 million or an amount equivalent to the value of the property which is the subject of the direction if greater than VT 125 million.
- (2) Despite subsection (1), any person may be prosecuted for an offence of money laundering or terrorist financing under this Act or any other Act.

14D. Issuing false directions

- (1) Any person, other than the Commissioner of Police or his or her delegate, who knowingly:
- (a) issues or purports to issue a direction under section 13; or
 - (b) issues or purports to issue a variation or revocation of a direction under section 13; or
 - (c) serves a direction which has not been made by the Commissioner of Police or his or her delegate under section 13, or a variation or revocation of such a direction,
- commits an offence punishable on conviction by the penalty referred to in subsection (2).
- (2) The penalty is:
- (a) for an individual - a fine not exceeding VT 15 million or an amount equivalent to the value of the property which is the subject of the direction, variation or revocation if greater than VT 15 million, or imprisonment for a term not exceeding 5 years, or both; or

- (b) for a body corporate - a fine not exceeding VT 75 million or an amount equivalent to the value of the property which is the subject of the direction, variation or revocation if greater than VT 250 million.

14E. Interaction of a direction with a restraining order

A direction under section 13, including any variation, ceases to be in force to the extent that the property to which it relates is covered by a restraining order from when the restraining order comes into effect.

14F. Variation and revocation of a direction

- (1) If the Commissioner of Police determines that a direction made under section 13 is no longer necessary, either in whole or in part, he or she must revoke or vary the direction to the extent that it is no longer necessary.
- (2) A variation or revocation under subsection (1), must be made in writing and is effective on and from the date of its service on the financial institution or person to which it relates.
- (3) If the Commissioner of Police grants a request under section 14B, to revoke or vary a direction under section 13, either in whole or part, he or she must revoke or vary the direction to the extent necessary to allow the owner of the property to have access to reasonable living expenses.
- (4) A variation or revocation under subsection (3), must be made in writing and is effective on and from the date of its service on the financial institution or person to which it relates.

14G. Service of direction

- (1) A direction under section 13, and a revocation or variation of such a direction, must be served:
 - (a) as soon as is reasonably practicable and in any event within two days after the date that it is issued; and
 - (b) by ordinary service in accordance with the Rules of the Court.

- (2) A direction under section 13, and any variation or revocation of a direction, must be served on:
- (a) the financial institution or person to which the direction relates;
and
 - (b) the owner of the property concerned.”

11 Paragraph 51(2)(b)

Repeal the paragraph, substitute

- “(b) a restraining order made in reliance on this subsection ceases to have effect 28 days after it comes into force.”

12 Sections 53, 66, 74, paragraphs 55(2)(d) and 68(2)(d)

Repeal the provisions.

13 Section 84

Repeal the section, substitute

“84. Appointment of Administrator

- (1) The Public Prosecutor may by instrument appoint a person to administer property that is:
- (a) forfeited under this Act; or
 - (b) subject to a restraining order under this Act; or
 - (c) subject to the custody or control of the Administrator as a result of any other action taken under this Act.
- (2) The Administrator must administer the property in accordance with the asset management provisions prescribed by the regulations.”

14 After section 86

Insert

“86A Public Prosecutor not required to give undertaking

Despite any other Act, Regulation, Rule or law, the Public Prosecutor shall not be required to give an undertaking for damages or costs, or both, in respect of any proceedings undertaken by or on behalf of the Public Prosecutor under this Act or any part of such proceedings, including:

- (a) an application under this Act; and
- (b) the making and execution of any Order under this Act.”

15 EXISTING CRIMINAL PROCEEDINGS

- (1) This provision applies to a criminal prosecution if the criminal prosecution:
 - (a) is for a criminal offence against the *Proceeds of Crime Act* [CAP 284] as in force before the commencement of this Act; and
 - (b) had commenced but had not been finally determined before that commencement.
- (2) The criminal prosecution is to continue on and after the commencement of this Act as if the amendments to the *Proceeds of Crime Act* [CAP 284] made by this Act had not been made.
- (3) For the purposes of this provision, a criminal prosecution commences when a person is charged.