



Facilitation payments – just say ‘no’



What are facilitation payments?

These are customary, unofficial minor payments to secure or speed a routine government action. They are colloquially as “speed money”, “grease payments” or “oiling the wheels”.

Examples

- Passport clearance at frontiers
- Access to the ‘fast lane.’
- Help speed up issue of documents
- Port entry for vehicles
- Release of goods from customs
- Loading and unloading cargo
- Obtaining services such as telephone, power, water, mail collection
- Processing work permits
- Planning permissions

Such payments occur in Australia, just with formal documentation and official approval.

Is there a distinction between a facilitation payment and a bribe?

Technically yes, under current Australian law.

Under Division 70 of the Criminal Code Act 1995 (Commonwealth), it is a crime to directly or indirectly provide, offer or promise a benefit to another, where the benefit is not legitimately due, with the intention of influencing a foreign public official to obtain/retain business or obtain or retain a business advantage not legitimately due.

The two defences are that the conduct concerned was permitted or required by a written law that governs the conduct of the foreign public official OR that the conduct amounted to payment of a facilitation payment. Unfortunately, there is no Australian case law or guidance on these defences.



No not really.

Such payments are difficult to distinguish from bribery. Even if you prove that a benefit constitutes a legitimate facilitation payment defence under Australian law, you may be liable for bribery under the local laws that govern the foreign public official.

Such payments are questionable from the point of view of business ethics. They are banned in most OECD countries.

What is Austrade policy on facilitation payments?

Austrade's policy position is that facilitation payments represent a significant risk at a number of levels. So avoid them.

Austrade officers will not be involved in or arrange the making of facilitation payments except in extreme or extenuating circumstances and only if the legal requirements of the defence under Australian and local laws are observed and satisfied.

Why not say yes?

Those who make such payments may expose themselves to criminal prosecution or other penalty in the country of the foreign public official or other applicable offshore laws. The corrupt foreign public official may at any time inform local authorities to avoid being prosecuted themselves. They also risk further demands for higher payments.

What are the elements of the facilitation payment defence?

To rely on the facilitation payment defence, there are three elements to prove. *If all three cannot be proven, the defence is not available.*

- the value of the benefit was of a minor nature. Is that assessed relative to the size and wealth of the payer, or the recipient?
- the benefit was paid for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature.
- as soon as practicable afterwards, the person made a signed record of the payment. Consider carefully if a signed record is an admission of guilt under local or other law.

What payment records are kept?

Under the Australian Criminal Code, the signed record of payment includes all of the following features:

- the value of the benefit concerned
- the date on which the conduct occurred
- the identity of the foreign public official in relation to whom the conduct occurred
- if that foreign public official is not the other person, the identity of that other person
- particulars of the routine government action that was sought to be expedited or secured by the conduct
- the person's signature or some other means of verifying the person's identity

The above records go beyond what is required for tax. The Income Tax Assessment Act 1936 (Commonwealth) permits companies to claim facilitation payments as deductions and the minimum needed by Australian Taxation Office to understand the features of a transaction is its date, amount and character.



How do I say no?

Resist paying

Request to speak to a supervisor

Document any payments

Get legal advice

Report the request for payment to Australian Federal Police

Get Austrade involved.

How does Austrade assist?

- Raising the issue with senior officials
- Calling for an investigation, possibly leading to prosecution
- Pursuing international initiatives to strengthen anti-corruption efforts in key markets
- Lobbying third party countries to adjust their legislation.

Hypothetical

An Australian exporter arrives in a new country, samples in hand, ready to meet prospective clients, open a new market and launch a successful business.

At the customs booth, the official says \$200 must be paid to allow samples into the country.

The Australian is pretty sure this is incorrect. But also sure that if the \$200 is not paid, the long-awaited meeting with the new supplier might be missed, making the whole trip a failure.

What would you do?

- A) Pay the \$200 from your own cash and never mention this to anyone
- B) Pay the \$200, request a written receipt and report it to your company upon your return
- C) Refuse to pay, request to see the supervisor and ring ahead to say you will be a bit late.



If you answered 'C', Austrade gives you an elephant stamp.

What does the future hold?

The overwhelming international trend is against facilitation payments. At Austrade **we [have a zero tolerance approach/we just say no/do everything to avoid them]** and we like to think that our customers do the same. The poor ethical behaviour of one business can muddy the waters for all Australians doing business in another country. Together let's gradually stamp out the corrosion of corruption.