

# Facilitation payments and New Zealand's anti-bribery laws

## Overview

The Ministry of Justice has prepared the following guidance to help your business understand New Zealand's laws on facilitation payments, including the recent changes made in the Organised Crime and Anti-corruption Legislation Bill (the Organised Crime Bill). It outlines what facilitation payments are, the risks associated with making them, and practical advice on how to effectively eliminate their use. This document should be read in conjunction with 'Saying No to Bribery and Corruption – A Guide for New Zealand businesses' (see link on this website).

## What you need to know

- A 'facilitation' or 'grease' payment is a small payment made to a foreign public official to speed up a service to which the payer is already entitled. Examples include, payments relating to the issue of a permit or licence, or the provision of utility services.
- Under New Zealand law, such payments are not considered bribes, and are a narrow exception to the foreign bribery offence in [section 105C of the Crimes Act 1961](#).
- The Organised Crime Bill narrowed this exception even further by providing that the facilitation payments exception will not cover instances where the payment provides an undue material benefit to the person who makes the payment, or an undue material disadvantage to any other person.
- Facilitation payments will be *illegal* in almost all countries where they are made. Therefore, if you pay them, you will likely break the law in the foreign country where you are doing business.
- Further, any payment that is illegal in the country where it occurs will likely provide an *undue material benefit* to the payer, and therefore fall outside the scope of New Zealand's exception.

## Steps you need to take

- Using facilitation payments as a means of doing business holds substantial legal and reputational risks. As a matter of best practice, businesses should develop procedures and controls to prohibit their use.
- Businesses are strongly encouraged to employ practical measures such as training staff and conducting risk assessments to ensure they can operate effectively and efficiently without the use of these payments.

## New Zealand's facilitation payments exception explained

New Zealand law criminalises a wide range of bribery and corruption offences in both the public and private sphere (whether such acts occur in New Zealand or overseas). This includes foreign bribery, which is where an individual or company from New Zealand bribes a foreign public official in the course of an international business transaction.<sup>1</sup> Importantly, this includes bribes made through intermediaries. Therefore, businesses cannot avoid liability by making bribes through third parties such as foreign agents and related legal persons.

However, New Zealand's foreign bribery offence contains a narrow exception for payments made to a foreign public official for the sole or primary purpose of ensuring or expediting the performance of a "routine government action". These are commonly known as facilitation payments. To be legal, the value of the benefit must be small and the payment:

- must be for an action within the scope of the official's ordinary duties and
- must not involve a decision about awarding new business, continuing existing business, or the terms

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<sup>1</sup> [Section 105C of the Crimes Act 1961](#)

of new or existing business.

The Organised Crime Bill narrowed the foreign bribery exception even further and clarified that the payment must not provide either:

- an undue material benefit to the person making the payment, or
- an undue material disadvantage to any other person.

This will likely exclude payments that are illegal in the country where they are made, as an illegal payment will almost always provide an undue material advantage or disadvantage. However, the amendment clarifies that the payment of small sums of money in return for speeding up a function or service is legal, provided the payment does not otherwise influence the person or company's entitlement to that service.

### **Routine government action**

Examples include an action ordinarily and commonly performed by a foreign public official in:

- obtaining or granting a permit, license, or other official document to enable a person to conduct business in that jurisdiction
- the provision of utility services such as phone, power, and water
- loading or unloading cargo
- processing government papers, such as visas and work permits
- protecting perishable products, or commodities, from deterioration
- providing police protection or mail collection or delivery
- scheduling inspections associated with contract performance or related to the transit of good
- any conduct of a similar nature

### **Where facilitation payments end, bribes begin**

While the Crimes Act draws a distinction between facilitation payments and bribes, New Zealand lacks case law on where exactly this line is drawn. Defining 'small benefit' and 'routine government action' has proven problematic internationally and must be determined on the facts of each case.

Generally speaking, whether or not a payment falls within the exception in section 105C(3) of the Crimes Act depends on its purpose, rather than its size. For example, a small payment to a customs official to have your visa processed quicker may be a facilitation payment (provided you are entitled to the visa). However, a small payment to have an official ignore the fact that you don't have a valid visa would be a bribe. This is because you are not entitled to enter the jurisdiction without a visa, and there is therefore clear intent to influence a non-routine governmental action.

While it is the intent, rather than the value of the payment that is central to determining its character, businesses should be mindful that the benefit received must still be 'small.' What constitutes a 'small benefit' will depend on the circumstances of each case. However, a series of 'small' amounts accumulated over a period of time for seemingly small returns may ultimately amount to a bribe. Exceptional circumstances and substantial supporting evidence will likely be required to show that a payment falls within the exception.

Finally, while true facilitation payments are legal under New Zealand's foreign bribery framework, most other jurisdictions view these payments as bribes, including the United Kingdom (UK). Given the extensive jurisdictional reach of the UK Bribery Act 2010, New Zealand organisations that carry on even part of their business in the UK need to be cautious that they are not in violation of its foreign bribery law when operating outside of the UK.

## Key points for businesses

- Using facilitation payments as a means of doing business holds substantial legal risks and is a costly way of doing business.
- It is recommended that businesses make it their practice to openly and formally prohibit the use of facilitation payments of any kind.

## As a matter of best practice, do not make facilitation payments

In line with the OECD's 2009 Recommendation,<sup>2</sup> rather than criminalising facilitation payments, New Zealand authorities are instead encouraging businesses operating abroad to eliminate these payments as part of their wider fraud and corruption compliance programme.

## Facilitation payments are not an unavoidable 'cultural norm'

It is a widely held view that facilitation payments are a necessary means of doing business in certain jurisdictions. However, as already discussed, these payments are generally illegal and the justification that they are a necessary part of doing business abroad has lost credibility in recent times as countries such as China and India crack down on all forms of bribery.

## International move away from facilitation payments

Key international anti-bribery agreements are focussed on eliminating facilitation payments altogether. The [OECD Anti-Bribery Convention](#) encourages countries to prohibit or discourage their use, labelling them "corrosive" to economic development and the rule of law. The [United Nations Convention Against Corruption](#) does not draw a distinction between facilitation payments and bribes and the [Asia Pacific Economic Cooperation \(APEC\) Anti-Corruption Code of Conduct for Business](#) states that businesses should eliminate them.

## Facilitation payments are bad for business

In addition to the legal risks, making facilitation payments is poor business practice. While they may increase the immediate ease with which a business can conduct its operations, such payments promote a culture of corruption through the expectation that private benefits will be exchanged for access to government services. Long-term, this is detrimental to good business as it fosters an environment of acceptance, which may ultimately result in demands for larger payments or bribes.

Research conducted by Transparency International indicates that facilitation payments are harmful to an organisation's growth and productivity, and ultimately economically inefficient. One survey conducted by the European Bank for Reconstruction and Development found that the cost of these 'small bribes' made by small and medium sized firms amounted to 4 and 5 per cent of their annual revenues respectively.<sup>3</sup>

Further, permitting employees to make facilitation payments creates a double standard whereby employees are encouraged to engage in certain conduct in particular jurisdictions, but not others. For example, a facilitation or grease payment to a public official in New Zealand would simply be a bribe under our domestic anti-corruption laws. Therefore a business that encourages or enables facilitation payments undermines the message to its employees about compliance with all anti-bribery laws. This in turn may impact negatively on the reputation of both the individual business and New Zealand as a country with zero-tolerance for corruption.

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<sup>2</sup> Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

<sup>3</sup> [Evidence of the impact of facilitation payments](#) - Transparency International, 2013.

## Practical guidance on conducting business without facilitating payments

### Adopt a clear and decisive policy

The key to a successful anti-bribery strategy is a decisive public statement that the organisation does not pay bribes of any kind, including facilitation payments. To ensure an effective shift in corporate culture, it is important that this message is delivered to all employees, agents, intermediaries, suppliers, consultants, distributors, representatives, contractors, and joint venture partners (whether individuals or companies).

To eliminate the use of facilitation payments, New Zealand businesses should incorporate appropriate controls into their wider fraud and corruption programmes. The written policy should provide an assurance that employees and intermediaries will not be disciplined for any delays to business that occur as a result of a refusal to pay a bribe or facilitation payment.

### Exceptions for payments made under duress

The Government recognises that there are certain exceptional situations where payments may be made under duress, where there is a genuine risk to health or safety. In such circumstances, companies should include a well defined exception in their policies, in line with the legislative requirements which outlines:

- The *exceptional* circumstances in which the company permits facilitation payments.
- The approval process required to make a facilitation payment (for example, a company could require approval at either senior management or CEO level).
- The recording, reporting, and monitoring procedures (as outlined below).

### New record-keeping requirements

Any demands for facilitation payments (whether paid or not) should be recorded and reported to an organisation's legal or compliance officer/team. Further, businesses that continue to make facilitation payments (despite the risks) need to be aware that facilitation payments must now be correctly recorded in a company's accounts. Failure to do so may result in a director of a company being fined up to \$50,000.<sup>4</sup>

To ensure adequate record-keeping, it is recommended that businesses include the following minimum details.

- A description of the act that is alleged to constitute the facilitation payment (e.g. if it is a monetary payment, the amount)
- The date on which the facilitation payment was made.
- Identification details of the foreign public official (and any other person) to whom the facilitation payment was made.
- Particulars of the 'routine government action' that the facilitation payment sought to ensure or expedite.
- The value of the benefit received.
- The name and signature (or some other means of verification) of the person who made the facilitation payment.

Finally, businesses should be conscious that the simple act of recording a payment as a facilitation payment does not make it one. This is highlighted by instances in the United States where companies that recorded 'facilitation payments' were ultimately prosecuted under the bribery provisions in its Foreign Corrupt Practices Act.<sup>5</sup> When conducting an investigation, the Serious Fraud Office (SFO) will consider whether payments to foreign officials fall within the facilitation payments exception or simply disguise illegal conduct.

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<sup>4</sup> See clause 37 of the Organised Crime Bill.

<sup>5</sup> *A Resource Guide to the U.S Foreign Corrupt Practices Act*, 2012, p. 25

## Risk assessment

As part of a wider anti-bribery risk assessment, businesses should identify any high risk jurisdictions in which they operate to determine the likelihood that facilitation payments will be demanded.

Any risk assessment with respect to facilitation payments should be informed by interviews with employees on the ground. In its 2015 report, TRACE International notes that employees in the field understand the challenges better than the head office and are therefore able to better identify situations where a bribe is not necessary and alternative approaches to demands.<sup>6</sup> Detailed records of past payments will also enable companies to assess and address the risk in various jurisdictions.

## Training

Effective anti-bribery procedures must incorporate guidance on how to identify and respond to demands for facilitation payments. The [free online anti-corruption training module](#) produced in 2014 by Transparency International New Zealand and BusinessNZ, in partnership with the SFO, is an effective online anti-corruption training tool that covers the identification and potential responses to requests for small facilitation payments.

Training should be provided to both employees and intermediaries, and provide them with the necessary tools and confidence to refuse such payments. Staff should acknowledge in writing that they have participated in the training and will comply with the policy.

Businesses operating in high risk jurisdictions or sectors will require more comprehensive training. However, as a starting point, it is recommended that businesses instruct employees and intermediaries to use the following techniques when faced with a demand for a facilitation payment.

- Challenge the request and query what specifically the payment will cover.
- Question the basis for the payment (for example, if at border control, ask the official to show written confirmation of the requirement; for example, is a sign displayed?).
- Advise that you are aware that facilitation payments are generally illegal in the countries where they are made and that making the payment would breach your own organisation's policy, which expressly prohibits them.
- If it is an existing business relationship, explain that there has been a change in company policy and that payments will no longer be made.
- If the official continues to demand payment, request their identifying details and/or escalate the situation to the official's supervisor/manager.
- If the above steps fail and you feel compelled or under duress to make the payment, make it known that you want an official receipt for it.
- Seek legal advice on the lawfulness of the payment under local and New Zealand laws.
- If a receipt is not provided, advise the official that you will need to call the local embassy/consulate to let them know what is happening.

The key point here is that facilitation payments should only be made where all of the above options have been exhausted and there is no viable alternative. In the face of such opposition, the official may simply forgo the request and reconsider making similar demands in the future.

The following steps should be followed regardless of whether or not payment was ultimately made or a receipt provided:

- Report the incident in full to your organisation. It may then be able to avoid making such payments in the future by joining with other businesses and the local embassy/consulate to inform the local authorities of the practice.

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<sup>6</sup>TRACE International, [The High Cost of Small Bribes](#), 2015, p. 11

- Consider reporting the incident to the local embassy or consulate and to consult with local business forums to see if other organisations are receiving the same demands for payment.
- Consider reporting the incident to relevant local authorities.
- Maintain detailed and accurate records of all demands.
- Record payments made in company accounts.

### **Ongoing review**

For many organisations, moving away from the practice of making facilitation payments will be a gradual transition. However, a clearly articulated policy is the first step. Periodic review of recorded incidents will enable your organisation to develop its risk profile and refine its fraud and corruption policy with respect to facilitation payments.

### **Conclusion**

Making facilitation payments places employees, intermediaries, and businesses at considerable risk of breaching the laws of New Zealand and of foreign jurisdictions. The fine line between a legal facilitation payment and an illegal bribe can be difficult to distinguish. Further, organisations that allow such payments risk creating an environment that tolerates other unethical practices.

Facilitation payments perpetuate a cycle of corruption and are detrimental in the long-term to the businesses that make them, the communities in which they are paid, and to New Zealand's reputation as a 'corruption-free' country. To avoid the legal and reputational risks associated with facilitation payments, businesses are encouraged to develop clear policies, procedures, and training to eliminate their use. A clearly articulated message from senior management to employees and the wider market in which a business operates will go a long way to easing the transition and ensuring it maintains 'business as usual' without reliance on facilitation payments.