



Facilitation payments

This is a case study for business owners on how to identify and respond to a request for a facilitation payment.

Scenario

Helen produces textiles in a medium-sized business called ClothCo. She recently decided to pursue an export strategy to South East Asia. Her employee, Sam, is asked to travel overseas to provide prospective, international buyers with samples. The schedule is tight, so Helen asks Sam to do his best to meet all prospective buyers as quickly as possible.

“I had an odd experience at Customs after my plane landed. When I reached the front of the queue, the customs officer told me inspection of the samples would take a long time, but I could avoid the inspection if I paid an additional import fee of \$50 in cash. He said that I would also be able to avoid future delays if I paid a similar small cash charge every time I brought samples into the country. I was concerned that if I was delayed, I would miss my connecting flight and disrupt the trip schedule, so I just paid the \$50.”

When Sam returns from this trip, he tells Helen:

Helen is confused. Sam’s samples were carefully prepared and ready for inspection pursuant to consular guidance. She also remembers researching import obligations and did not read about any ongoing, additional fees. Helen is worried the customs officer in the foreign country requested the \$50 as a bribe. She is concerned this trip and any future trips will place the business and its staff at risk of breaching anti-bribery laws in both Australia and abroad.

Prevent: What could ClothCo have done to prevent this situation?

If Sam has paid a bribe, this conduct could attract considerable penalties for both the business and the individuals involved, including imprisonment, under both Australian and foreign anti-bribery laws.

ClothCo should have ensured that Sam was:

- Fully briefed and trained on what to do in this situation;
- Empowered to say ‘no’ to paying the fee without being concerned about internal pressure to meet the deadline at any cost; and
- Made aware of the risks of paying the fee, which could constitute a bribe.



This would have reduced the risk that Sam or ClothCo may have breached any Australian or foreign anti-bribery laws.

The steps below outline the procedures ClothCo could have taken to reduce the risk of this situation occurring, which would also have assisted Sam to assess and respond to the situation appropriately.

Step 1: Implement a policy prohibiting facilitation payments

Prohibiting facilitation payments is the best approach to mitigating compliance risks and avoiding liability under Australian and foreign anti-bribery laws. One way of effectively prohibiting such payments is to ensure this prohibition is clearly stated under an anti-bribery and corruption compliance program.

If Helen's business had a policy in place, then Sam would have been better informed about what was expected of him and he could have been empowered to just say 'no'. Read more [here](#).

The risks of not having such a policy are wide-reaching:

- Both Sam and the business may be at risk of committing an offence. In Australia, it is a crime to provide, offer or promise an illegitimate benefit to a foreign public official in order to obtain or retain a business advantage that is not legitimately due.
- There is a limited defence. In some situations a minor payment made to 'speed up' routine government processes, together with a documentary record, may satisfy the facilitation payments defence. However, it is very difficult to distinguish between a facilitation payment and a bribe. The Australian government strongly discourages any facilitation payments at all and many organisations also prohibit facilitation payments. It is a very narrow defence and there are very specific procedural requirements that must be met. Businesses should not assume this defence is available to them.
- There may be consequences in other jurisdictions. A payment that meets the narrow definition of a 'facilitation payment' under Australia's laws may still be a bribe under the laws of the country where the payment is made (and where the defence may not be available at all).

Step 2: Undertake a risk assessment before engaging local agents and traveling offshore

A risk assessment on each destination will inform you about the applicable laws, tariffs, permits and documents required prior to entry and to do business in that place. This due diligence can often be conducted online and through industry networks. Read more [here](#).

It will also assist you to conduct appropriate due diligence on any local intermediaries you may need to engage. See the [Conducting thorough due diligence](#) case study.

Because Sam was going to a place where there was a higher risk for foreign bribery, ClothCo could have given him additional training on bribery and corruption risks and informed him of what signs to look out for, alongside a refresher on what to do in this scenario.

Step 3: Educate staff to recognise all suspicious payments, no matter their size

Staff should be trained to recognise all suspicious payment requests and payments, including small payments that are intended to speed up or secure routine government actions.



This includes payments made in situations where staff consider they would already be entitled to such action. For instance, where a staff member is asked for an additional payment for visa processing when they are confident they have already satisfied the necessary preconditions for the visa and paid the advertised fee. Read more [here](#).

Expense claims which cannot be justified or lack documentation (such as an official receipt) may also indicate suspicious payments.

Step 4: Educate employees on what they should do if they receive a suspicious payment request

An employee asked to make a suspicious payment should know how to resist paying it. Businesses are responsible for training their staff for this situation.

Businesses should provide mandatory, tailored training that educates employees to do the following (which will be subject to each scenario):

- When first asked for a payment, an employee should:
 - clarify the requested payment and question its legitimacy;
 - refuse to make the payment without a valid reason; and
 - ask to speak with the official's supervisor.
- If the employee is pressed to make the payment, then the employee should:
 - state the payment will only be made if an official receipt is provided (which must be recorded in the business's accounts with a relevant description); and
 - if refused a receipt, refuse to make the payment, accept the consequences of not doing so and report what has happened to their employer.
- If the employee is threatened with violence to make the payment:
 - the employee should not refuse payment if faced with threats of violence and should report the incident as soon as possible to their employer and the Australian diplomatic mission.

Detect: What can ClothCo do to detect suspicious payments, including facilitation payments?

It is good that Sam raised the issue with Helen as it gives Helen and her business the opportunity to address the situation before any further requests of a similar nature are made to Sam or other staff. This is indicative of a 'speak up' culture. Another way that ClothCo may have detected the facilitation payment is by having effective monitoring or audit processes in place.



Step 5: Empower whistleblowing and speaking up

Whistleblower policies are mandatory in Australia for public and large propriety companies to ensure that whistleblowers are protected. Smaller businesses will also benefit from implementing a whistleblower policy and process as all companies regulated by the *Corporations Act 2001 (Cth)* are required to comply with the whistleblower protection laws. Doing so will encourage staff to raise concerns without fear of reprisal, foster compliance and assist in preventing serious compliance issues.

Whether a policy is in place or not, whistleblowers can be legally protected from adverse actions against them. A policy that is consistent with that protection makes good compliance sense. Businesses can reinforce a safe-to-speak-up culture by:

- Having a whistleblower policy and providing communication and training that encourages employees to raise concerns and provides clear guidance about how to do so; and
- Having a confidential whistleblowing mechanism which is promoted internally.

Information on implementing a whistleblowing policy can be found in the [Implementing a whistleblower policy](#) case study.

Step 6: Maintain effective audit processes

Regular monitoring and/or auditing of a business's anti-bribery and corruption compliance program provides a valuable opportunity to assess the effectiveness of elements of the program. For instance, these processes can determine whether policies and processes are being followed, so that the business can have confidence that the program is embedded within day to day operations.

Address: What should ClothCo do to address this situation?

Step 7: Take active steps to understand why a suspicious payment was paid and consider seeking legal advice

Upon becoming aware of a suspicious payment, a business should:

- **Complete an internal investigation** to determine what happened and whether this has happened before (to make sure it is not, or about to become, a systemic issue);
- Ensure **compliance with the record keeping requirements** for the facilitation payment defence;
- **Update or implement relevant anti-bribery and corruption policies and procedures.** Ensure staff are trained on how to respond to requests for suspicious payments, are empowered to say 'no' and know how to report any concerning conduct to their business;
- Where it appears the situation may have breached Australia's anti-bribery laws (because, for example, it appears unlikely that the payment was a genuine facilitation payment), organisations should **seek legal advice** to consider whether it is appropriate to report the matter to law enforcement or implement further measures to address the situation. Further measures can include suspending or terminating the business relationship while further investigations are undertaken. See the [Investigating an internal complaint](#) and [Responding to contact by an authority](#) case studies;



- **Maintain oversight.** The business should check all other export plans and ensure a risk assessment is made for higher risk activities, together with appropriate due diligence as part of a robust anti-bribery and corruption compliance program; and
- **Maintain or implement audits.** Ensure that the business's auditors are alert to similar suspicious transactions going forward.

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