Australian Government

Australian Trade and Investment Commission

ANTI-BRIBERY: Austrade guide to the meaning of 'adequate procedures'

Proposed '*failure-to-prevent*' bribery laws will have a direct impact on Australian business. But obligations may be met if a business has in place 'adequate procedures' to address this risk.

Background

The *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017* (**Bill**) is currently before the Senate in Commonwealth parliament.

The Bill will amend the *Criminal Code Act 1995* (Cth) (**CCA**) and the *Director of Public Prosecutions Act 1983* (Cth) to, among other things, introduce a new corporate offence under s 70.5A of the CCA of 'failing to prevent bribery of a foreign public official' (**Proposed Offence**).

The Proposed Offence makes corporations[1] liable for the actions of the corporation's associates, if their associates have bribed a foreign public official (under s 70.2 of the CCA, and the amended s 70.2 of the Bill).

However, a corporation will not be liable for the Proposed Offence if it can prove that it had *adequate procedures* in place to prevent its associates from commissioning the offence (under s 70.5A(5)).

The Proposed Offence is similar to an offence in the UK found under s 7 of the UK Act. There is no similar provision in the US legislative scheme, although US courts have considered what will constitute 'adequate procedures' in comparable contexts.

This guidance may help business understand and comply with their new obligations with respect to preventing bribery under the Bill. Part of the Guide will be dedicated to explaining what Businesses can do to be given the best chance of being able to demonstrate to a Court that it had 'adequate procedures' in place to prevent the commission of an offence under s 70.2.

The Bill

The Bill will amend the CCA and the *Director of Public Prosecutions Act 1983* (Cth) to, among other things:[2]

- introduce a new corporate offence of failure to prevent bribery of foreign public officials by an 'associate'; and
- implement a Commonwealth Deferred Prosecution Agreement scheme which will enable the Commonwealth Director of Public Prosecutions to invite a person that has engaged in serious corporate crime to negotiate an agreement and to comply with a range of specified conditions.

[1] The proposed Bill covers body corporates that are either constitutional corporations or incorporated or taken to be incorporated in a Territory.
[2] See, http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22legislation%2Fbillsdgs%2F5951668%22

The offence of failing to prevent bribery in the Bill currently states:

A person (the ***first person***) commits an offence if:

Offence

(a) The first person is a body corporate:

- that is a constitutional corporation; or
- that is incorporated in a Territory; or
- that is taken to be registered in a Territory under section 119A of the *Corporations Act 2001*; and

(b) An associate of the first person:

- commits an offence against section 70.2; or
- engages in conduct outside Australia that, if engaged in in Australia, would constitute an offence (the ***notional offence***) against section 70.2; and

(c) The associate does so for the profit or gain of the first person.

Exception

Subsection (1) does not apply if the first person proves that the first person had in place adequate procedures designed to prevent:

- the commission of an offence against section 70.2 by any associate of the first person; and
- any associate of the first person engaging in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2.

Section 70.2 under the Bill states:

A person commits an offence if:

The person:

- provides a benefit to another person; or
- causes a benefit to be provided to another person; or
- offers to provide, or promises to provide, a benefit to another person; or
- causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

- the first-mentioned person does so with the intention of improperly influencing a foreign public official (who may be the other person) in order to obtain or retain business or an advantage (whether or not for the first-mentioned person).

'Associate' is defined under the Bill as:

A person is an *associate* of another person if the first-mentioned person:

- is an officer, employee, agent or contractor of the other person; or
- is a subsidiary (within the meaning of the *Corporations Act 2001*) of the other person; or
- is controlled (within the meaning of the *Corporations Act 2001*) by the other person; or
- otherwise performs services for or on behalf of the other person.

United Kingdom – UK Act

The UK Act commenced in 2010 and is the primary UK law on bribery. Section 7 of the UK Act establishes an offence for a failure of a commercial organisation to prevent bribery, and relevantly provides:

Failure of commercial organisations to prevent bribery

A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending;

- to obtain or retain business for C, or
- to obtain or retain an advantage in the conduct of business for C.

But it is a defence for C to prove that C had in place adequate procedures designed to prevent persons associated with C from undertaking such conduct.

The Ministry of Justice in the UK (**Ministry**) has published guidance about procedures that relevant commercial organisations can put in place to prevent bribery (**UK Guidance**). The UK Guidance outlines six broad principles that encourage organisations to adopt a risk-based approach to managing bribery risk which is specific and proportionate to the risks faced by the individual organisation. The six guiding principles are:[3]

- Proportionate procedures,
- Top-level commitment,
- Risk assessment,
- Due diligence,

[3] See, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

- Communication (including training); and
- Monitoring and review.

The Ministry acknowledges that no policies or procedures are capable of detecting and preventing all bribery. A risk-based approach will serve to focus the effort where it is needed and will have the most impact.[4]

US – legislative framework

The US does not have a directly comparable provision to s.70.5A(5) of the Bill or s.7 of the UK Act.

However, US cases have considered the meaning of 'adequate procedures' in in the context of preventing bribery, with reference to s.13(b)(2) of the *Securities Exchange Act* of 1934, which provides:

Every issuer which has a class of securities registered pursuant to section 12 of this title and every issuer which is required to file reports pursuant to section 15(d) of this title shall;

- make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer;
- devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that transactions are executed in accordance with management's general or specific authorization;
- transactions are recorded as necessary (I) to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements, and (II) to maintain accountability for assets;
- access to assets is permitted only in accordance with management's general or specific authorization; and
- the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any differences; and
- notwithstanding any other provision of law, pay the allocable share of such issuer of a reasonable annual accounting support fee or fees, determined in accordance with section 109 of the Sarbanes-Oxley Act of 2002.

Case law – US and UK

Relevant UK and US case law which has considered the question of whether corporations had 'adequate procedures' in place to prevent bribery within a table at **Annexure A**. These

[4] See, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf page 7.

cases identify a number of common factors which UK and US Courts have considered important when determining what constitutes adequate procedures to prevent bribery.

Summary

Decisions in the UK and US have considered what constitutes 'adequate procedures' to prevent the commission of a bribery offence and these cases provide useful guidance within the Australian context.

In the UK, a number of cases have considered the corporate offence of failing to prevent bribery under s 7 of the *Bribery Act 2010* (UK) (**UK Act**). We have summarised the following relevant UK decisions, including the findings in relation to whether 'adequate procedures' were in place in **Annexure A** to this advice:

- *R v Skansen Interiors Ltd*, unreported, Southwark Crown Court (2018);
- *R v Sweett Group pls*, unreported;
- *Serious Fraud Office v Rolls-Royce plc (Rolls-Royce Energy Systems Inc*), 2017 WC2A 2LL;
- *Serious Fraud Office v Standard Bank plc* (now known as ICBC Standard Bank), 2015 WC2A 2LL; and
- *Serious Fraud Office v XYZ Limited*, 2016 WC2A 2LL.

In the US, the *Foreign Corrupt Practices Act 1977* (15 U.S.C. § 78dd-1, et seq.) (**US Act**) does not have a provision which expressly prohibits the failure to prevent bribery. However, there have been US cases that have held companies liable for failing to prevent bribery under other Acts.

Summarised below are relevant US decisions, including the findings in relation to whether 'adequate procedures' were in place in **Annexure A** to this advice.

- *Securities and Exchange Commission v. Archer-Daniels-Midland Company*, Civil Action No. 2:13-cv-02279 (C.D. Ill.); and
- *Securities and Exchange Commission v. Oracle Corp.*, Civil Action No. CV-12-4310 CRB (N.D.Cal. August 16, 2012).

The findings from these UK and US cases, combined with the anti-bribery guidance materials from the UK, the US, and the International Standards Organisation (**Guidance Materials**),[5] identify that the following factors are relevant to determining whether or not a company has taken 'adequate steps' to prevent the commission of a bribery office by their associates:

- **A 'culture of compliance' and genuine engagement with anti-bribery obligations –** corporations need to demonstrate that there is a culture of compliance within their organisation in relation to anti-bribery controls, and that

[5] These are, respectively, the Ministry of Justice (UK), The Bribery Act 2010 Guidance; the US Department of Justice and US Securities and Exchange Commission, A Resource Guide to the US Foreign Corrupt Practices Act; and International Standard Organisation, Anti-bribery management systems - requirements with guidance for use – ISO 37001.

these controls are subject to the Board's cooperation and oversight. In addition, a corporation needs to demonstrate that its board, staff and workers are genuinely engaged with anti-bribery policies and procedures, and that policies and procedures are accessible and understood. It is not sufficient for policies or procedures to simply have been created. There must be evidence that the corporation has taken steps to implement the policies or procedures and that they have been consistently communicated to employees and others, including people external to the corporation if the context requires.

- **Quality of policies and training –** it is not enough to have anti-bribery policies in place and to offer training, if the content of the policies and the training is not of a good enough quality, not clear enough or tailored to the specific context of the organisation or not reinforced effectively. Corporations need to do more than simply drafting pro-forma policies in order to have 'adequate procedures' in place.

- **Dedicating a role to focus on compliance with anti-bribery obligations** - in order for a corporation to demonstrate that it is genuinely committed to anti-bribery obligations, and has adequate procedures in place, a person or team should be designated an anti-bribery compliance role within the corporation – even if the corporation is small.

- **Record keeping** – corporations should keep a record of all steps they have taken towards compliance (this will assist if an allegation is ever made against a corporation that they have inadequate). The US cases in particular indicate that maintaining accurate records of transactions and assets, thereby making it easier to pick up on improper conduct, will indicate a corporation is more likely to have adequate procedures in place.

- **Recognition of higher risks in some jurisdictions** – if corporations are operating in jurisdictions that have more significant bribery risks, this should be factored into the corporation's anti-bribery approach, in order for the corporation to be considered to have 'adequate procedures'.

- **Subsidiaries** – Both UK and US cases indicate that parent companies may be liable for bribery related actions of their subsidiaries. These cases also identify that subsidiaries will not be able to rely solely upon their parent company's anti-bribery procedures. Both subsidiaries and parent companies need to take responsibility for their own anti-bribery procedures, policies and strategy.

- **Independent reports** – the cases indicate that it might be a valuable exercise for corporations to engage an independent third party to evaluate the corporations' operations and compliance with anti-bribery obligations. However, a corporation must be willing to respond to the findings of the independent report. If a report shows problems with the corporation's approach to anti-bribery obligations – and the corporation does not attempt to remedy the issues – this will indicate that a corporation does not have adequate procedures in place.

- These factors should be considered when implementation effective procedures to prevent foreign bribery in the course of business.

Annexure A: Summary of UK and US case law regarding 'adequate procedures' to prevent bribery by associates

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
UK Cases		
***R v Skansen Interiors Ltd*, unreported, Southwark Crown Court (2018)**	***Facts*** ▪ Skansen Interiors Ltd (**SIL**), the defendant, was a small refurbishment company mainly operating in London. Its parent company, Skansen Group, employs approximately 30 people. ▪ The former managing director of SIL allegedly made two payments of £10,000, and offered to pay a further sum of £29,000, to a former project manager at a real estate company to secure contracts to refurbish offices in London. ▪ Following an internal investigation, SIL self-reported the wrongdoing to the National Crime Agency, dismissed the managing director and the head of commercial, and cooperated fully with the investigation. ▪ Despite SIL's self-reporting and cooperation, the Crown prosecuted SIL under section 7 of the UK Act, together with the	Arguments by the prosecution, along with subsequent comments by the Serious Fraud Office's (**SFO's**) Joint Head of Bribery and Corruption identified the following matters that enforcement agencies look for when considering the meaning of 'adequate procedures' under s 7 of the UK Act: *(a) Responsibility for compliance and support from the top* (i) Compliance teams must be seen to be working and be subject to the Board's cooperation and oversight. (ii) This is consistent with the guidance materials from the UK and ISO, which emphasise the top-level management must be demonstrably committed to preventing bribery.[6] (b) *Dedicated anti-bribery compliance function* (i) The prosecution in this case noted that SIL

[6] See International Standard Organisation, 'Anti-bribery Management Systems – Requirements with Guidance for Use', ISO 37001, First Edition, 2016, 5 (**ISO Guidelines**); and The Bribery Act 2010 Guidance (**UK Guidance**), p 29.

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	former managing director and the recipient of the payments. ▪ Both individuals pled guilty. SIL argued that its procedures were adequate for a company of its size and nature. The jury disagreed and found SIL guilty. ▪ This is the first contested 'failure to prevent' case since the UK Act came into force in 2011. ***Judgment*** ▪ The Court held that SIL had inadequate procedures, and convicted SIL of failure to prevent bribery. ▪ SIL was given an absolute discharge and no penalties were imposed. The conviction will not be registered on the corporation's record.	had not designated anyone with an anti-bribery compliance role. This case indicates that, even small companies, with no compliance function, are expected to assign such a responsibility to an employee. (ii) This is consistent with the ISO Guidelines, which provide that: ▪ all organisation should have an anti-bribery compliance function (or team), whose size with depend on the size of the organisations and in the case of small organisations, may consist of one person; ▪ the compliance team or person must be adequately competent and independent; and ▪ their primary function must be to oversee and implement the anti-bribery management system.[7]

[7] ISO Guidelines at 5.3.2.

(c) *Implementation of policies is key*

(i) SIL argued that the nature and size of the business meant that it did not require sophisticated policies and procedures.

(ii) SIL did have policies in place which emphasised the need to deal with third parties in an ethical, open and honest manner. However, SIL was unable to prove that its staff had read the policies or that they had been reminded periodically of their existence and requirements.

(iii) The Court's finding on this point is consistent with both the UK Guidelines and the ISO Guidelines, which emphasise that it is not enough for policies to exist – active engagement, communication and training will be required, and that in particular:

- anti-bribery policies and procedures must be embedded and understood throughout the organisation; and
- training will generally be required for employees.[8]

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
		(d) *Document compliance and keep records of all steps taken:* (i) The enforcement authorities will want to see what steps were taken to embed a culture of compliance within a corporation. (ii) SIL had no records of any compliance discussions or steps taken. *(e)* *Monitoring and review:* (i) Corporations should periodically review their policies and procedures to ensure they are still fit for purpose. (ii) The prosecution relied on the fact that SIL was unable to show what (if any) steps it had taken when the UK Act came into force in 2011, or that it had used the commencement of the Act as an opportunity to remind staff of the company's ethical policy and expectations.

[8] See for example ISO Guidelines, 7.2.2.1 and 7.4.1; Ministry of Justice, The Bribery Act 2010 Guidance (**UK Guidance**), p 29.

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
		(iii) This finding is consistent with both the UK Guidance and ISO Guidelines, which make it clear that organisations should monitor and review anti-bribery procedures and make improvements where necessary;[9] and that reviews must undertaken at planned intervals and audits conducted by an independent team or individual.[10]
***R v Sweett Group plc*, unreported**	***Facts*** ▪ Sweett Group's (**Sweett**) subsidiary, Cyril Sweett International Limited, secured a contract for the construction of a hotel in Abu Dhabi by making corrupt payments to board members of corporations related to the deal. ▪ Sweett was charged with an offence of failing to prevent bribery under the UK Act. Sweett pled guilty, admitting it did not have adequate anti-bribery policies and procedures in place. ***Judgment*** ▪ Sweett was convicted on 19 February 2016 for failing to prevent bribery under section 7	▪ Sweett was unable to rely on the statutory defence of having adequate procedures in place to prevent the bribery occurring. One of the main reasons it could not demonstrate 'adequate procedures' was because KPMG had produced a number of reports for Sweett calling for better internal governance, but Sweett had done little to respond to KPMG's concerns. ▪ The case illustrates that it might be valuable for a corporation to engage an independent consultant to evaluate operations or anti-bribery procedures, but only if the corporation is willing to take action in the event that such a report reveals deficiencies in the corporation's operations.

[9] UK Guidance, p 31.
[10] See ISO Guidelines, see A.2.2.

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	of the UK Act. It was not offered a Deferred Prosecution Agreement (**DPA**) (an alternative to a prosecution where settlement is reached without a conviction being recorded) by the SFO. ▪ In sentencing, the Judge applied the Sentencing Council Guidelines on Fraud, Bribery and Money Laundering Offences,[11] and: o characterised the offence as 'category A' (high culpability), in light of the facts that: ▪ the bribery payments were made over a sustained period; ▪ Sweett ignored concerns put to it by an accounting firm it engaged to provide independent reports on its operations; and ▪ Sweett deliberately misled the SFO by alleging that the payments were legitimate payments for a finder's fee; and o held that the penalty should be calculated with reference to the basis of the profit received by the relevant corporation, with a maximum of 300% of that	▪ The case further emphasises that simply having policies in place will not be sufficient. What is required is a demonstrable commitment to anti-bribery from the top of an organisation through to its employees. This is consistent with the UK Guidance and ISO Guidelines. ▪ Much of the commentary surrounding this case has emphasised that Sweett failed to cooperate with the SFO and that this backfired for them, in the sense that Sweett was not offered a DPA by the SFO. Although this is not strictly relevant to an analysis of the meaning of 'adequate procedures' in this context, in our view it might be a relevant consideration to include in the Guide.

[11] Accessible at https://www.sentencingcouncil.org.uk/publications/item/fraud-bribery-and-money-laundering-offences-definitive-guideline/.

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	profit. The Court held that because Sweett eventually cooperated with SFO and implemented some steps to improve its operations, the lowest percentage should be applied in this case (namely, 250%). ▪ Sweett was sentenced and ordered to pay a total of £2.25 million in respect of a fine, confiscation and costs awarded to the SFO.	
***Serious Fraud Office v Rolls-Royce plc (Rolls-Royce Energy Systems Inc),* 2017 WC2A 2LL**	***Facts*** ▪ Rolls Royce was found to have engaged in a bribery scandal between 1989 and 2013. The activities spanned 7 countries over 24 years, and involved bribing government officials in a number of countries to secure orders. ▪ There were twelve counts articulated by the SFO. Count one, for example, involved Rolls Royce paying over $US2 million and gifting a car to an intermediary (an agent to the office of the President of Indonesia) to secure a contract for aircraft engines. Comparable bribes were engaged in by Rolls-Royce and its employees in Thailand, India, Russia, Nigeria, and China. ▪ The SFO and Rolls-Royce entered into a DFA on 17	▪ This case did not directly consider the meaning of 'adequate procedures' as it involved a DPA rather than a prosecution and Rolls Royce did not make a defence. However, Sir Brian Leveson quoted from *SFO v XYZ Ltd* (discussed below) in identifying relevant sentencing considerations which include : ▪ the importance of incentivising the exposure and self-reporting of corporate wrongdoing; ▪ the history (or otherwise) of similar conduct; ▪ the attention paid to corporate compliance prior to, at the time of and subsequent to the offending;

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	January 2017 amounting to £497,252,645 (comprising disgorgement of profits of £258,170,000 and a financial penalty of £239,082,645) plus interest. ▪ Rolls Royce had a Code of Business Conduct which included a prohibition on payment or receipt of bribes; a Global Code of Business Ethics which specifically dealt with bribery and corruption (which had numerous supporting policies).[12] ▪ In 2009, Rolls-Royce engaged one of the Big Four accountancy firms to conduct an independent review on Anti-Bribery. Some concerns were identified including that the department responsible for intermediaries did not have a compliance function. After the review, Rolls-Royce created more comprehensive policies and ensured that one team had responsibility for compliance with anti-bribery obligations. ***Judgment*** ▪ It was held that this case involved 'the most serious breaches of the criminal law in the areas of bribery and corruption (some of which implicated senior management and, on the face of it, controlling minds of the company).[13] ▪ A discount of 50 per cent was applied to the penalty given the 'extraordinary cooperation' of	▪ the extent to which the entity has changed both in its culture and in relation to relevant personnel; ▪ the impact of prosecution on employees and others innocent of any misconduct'. ▪ Sir Brian Leveson identified a number of aggravating features of Rolls-Royce's conduct being that: ▪ the conduct involved senior Rolls-Royce employees; ▪ the failure on the part of Rolls-Royce to instil within the wider business a culture of compliance especially in jurisdictions all of which could objectively be seen as having a high corruption index perception; ▪ training was minimal and sporadic; ▪ the offending was persistent and spanned from 1989 until 2013;

[12] At [26].
[13] At [4].

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	Rolls-Royce and the 'willingness to enter a DPA'.[14]	▪ the conduct displayed elements of careful planning in large value contracts; ▪ the conduct involved offences relating to the bribery of foreign public officials, commercial bribery and the false accounting of payments to intermediaries; ▪ the offences were multi-jurisdictional, numerous and spread across Rolls-Royce's defence aerospace, civil aerospace and energy businesses; and ▪ the offences have caused and/or will cause substantial harm to the integrity/confidence of markets. ▪ The Court emphasised that, although Rolls Royce had made 'some effort to put bribery prevention measures in place',[15] the efforts were inadequate in the context of the type of organisation and the areas where it was operating. This again emphasises the need

[14] Ibid at 121.
[15] At [102].

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
		for corporations to be able to demonstrate a genuine commitment to their training and compliance functions, consistent with the other cases cited in this Advice as well as the UK, US and ISO guidance materials.
SFO v Standard Bank **[2016] Lloyd's Rep. FC Plus 122**[16]	***Facts*** ▪ This case concerned the payment of a bribe by persons associated with Standard Bank (namely, Stanbic Bank Tanzania Limited and/or Bashire Awale and/or Shore Sinae) to Tanzanian government officials to secure a mandate to act as lead managers for a sovereign note issuance.[17] ▪ There was no allegation of knowing participation in an offence of bribery by the Standard Bank or any of its employees. The offence pertained only to an allegation of inadequate systems.[18] ▪ Lord Justice Leveson at Southwark Crown Court, sitting at the Royal Courts of Justice, approved the SFO's application for a DPA in this case.[19] ***Judgment***	▪ While Standard Bank did have some systems in place, they were adequate because: – the policy was 'unclear' and 'not reinforced effectivity'; and – the training which did 'not provide sufficient guidance about relevant obligations and procedures' in situations where two entities within the banking group were involved in a transaction, and the other entity engaged a third party consultant.[21] ▪ As a result, Standard Bank was unable to rely on the defence under s 7(2) of the Bribery Act because the procedures were found to be inadequate. ▪ This case indicates that corporations' policies and training must be specifically targeted to the particular transactions they are involved in, as well as being accessible, clear and demonstrably used by employees in order to be considered 'adequate

[16] [2016] Lloyd's Rep. FC Plus 122, 5.
[17] At [10].
[18] At [11].
[19] Ibid, at [5].
[21] Ibid, at [11].

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	▪ Lord Justice Leveson indicated that relevant factors in awarding a DPA included: a) the promptness of the self-report; b) the fully disclosed internal investigation and cooperation; c) the agreement for an independent review of anti-corruption policies; and d) that Standard Bank is now differently owned. ▪ It was held that Standard Bank did have some systems in place, but that they were not adequate because: – the policy was 'unclear' and 'not reinforced effectivity'; and – the training which did 'not provide sufficient guidance about relevant obligations and procedures' in situations where two entities within the banking group were involved in a transaction, and the other entity engaged a third party consultant.[20]	procedures'. This point is emphasised in both the UK Guidance and ISO Guidelines.
***Serious Fraud Office v XYZ Limited*, 2016 WC2A 2LL**	***Facts*** ▪ XYZ Limited (**XYZ**) was a small to medium enterprise and subsidiary of ABC Companies LLC (**ABC**), a registered corporation in the United States.	▪ This case did not directly consider the meaning of 'adequate procedures'. However, the Court noted that despite the fact that ABC had provided anti-bribery related services to XYZ – including a compliance manual and internal auditing – XYZ

[20] Ibid, at [11].

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	▪ Prior to 2012, XYZ (by its own admission) did not have adequate compliance provisions in place. ▪ In late 2011, ABC implemented its global compliance programme within XYZ, and as a result, a number of concerns came to light about the way some contracts had been secured by ABC. XYZ engaged a law firm to undertake an independent investigation.[22] ▪ The investigation revealed that, during 2004 – 2012, a group of employees and agents of XYZ were involved in the systemic offer and payment of bribes to secure contracts in foreign jurisdictions. This was self-reported by XYZ to SFO.	acknowledged that it did not have adequate compliance provisions in place (and the Court impliedly agreed).[23] ▪ Sir Brian Leveson identified the issue as: > at what level of criminality is it necessary to allow the SME to become insolvent and to what extent is it appropriate to mitigate the financial penalty, knowing that the SME is only able to make any substantial payment with the support of the substantial company of which the SME is a wholly owned subsidiary?[24] ▪ Sir Brian Leveson noted the full cooperation of XYZ, and that the bribing mechanism was not particularly sophisticated or suggestive of a corporate cover-up.[25] ▪ Sir Brian Leveson explained that 'evidence that a parent company has set up a subsidiary as a vehicle through which corrupt payment may be made so that the company can be abandoned in the event that the payment comes to light is likely to lead to prosecution of the parent company under section 7(1) of the Bribery Act … A pre-existing

[22] Ibid, at [11].
[23] Ibid, at [10].
[24] Ibid, at [4].
[25] https://www.sfo.gov.uk/download/xyz-final-redacted/?wpdmdl=13285 at 15-16.

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
		plan to behave corruptly through the subsidiary would obviously be treated as a seriously aggravating factor'.[26] ▪ This case demonstrates that a subsidiary cannot rely on the anti-bribery mechanisms put in place by its parent company, and that it will be held liable for bribery-related offences if it does not have its own adequate procedures in place.
US CASES		
Securities and Exchange Commission v Archer Daniels-Midland Company, Civil Action No. 1:13-cv-02279 (C.D.III)	***Facts*** ▪ Archer-Daniels-Midland Company (**ADM**), a large agricultural processing company, was charged by the Securities and Exchange Commission (**SEC**) for failing to prevent payments made by foreign subsidiaries (**Subsidiaries**) to government officials in Ukraine between 2002 – 2008.[27] ▪ ADM indirectly controlled the Subsidiaries, through owing 80 percent of shares. ▪ The charges were made under the *Securities Exchange Act* of 1934, for ADM's failure to: a) keep records which accurately and fairly reflect transactions and dispositions of the assets of the	▪ This case emphasises the significant responsibility of a parent company. A parent company must not only have sufficient anti-bribery compliance policies and practices in place within its own company, but it must have the same in place for its subsidiaries. ▪ This is consistent with the UK Act and the Bill, both which provide that a company will be liable for actions of its associates (which include subsidiaries). ▪ Further, the ISO Guidelines and the UK Guidance emphasise that anti-bribery policies and procedures must be communicated not only internally, but also externally (where relevant).[28]

[26] Ibid.
[27] See SEC Complaint, Case No. 2:13-cv-2279, dated 20 December 2013; United States District Court Central District of Illinois, Final Judgment, dated 21 January 2014.
[28] See ISO Guidelines at 5 and 7.4.1; UK Guidance at p 23.

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	organisation (s 13(b)(2)(A)); and b) devise and maintain a system of internal accounting controls to detect and prevent the illicit payments (s 13(b)(2)(B)). ▪ The Subsidiaries, located in Germany and Ukraine, paid $21 million in bribes in order to secure certain value-added tax refunds. The payments were covered up by the Subsidiaries who recorded them as legitimate business expenses. ▪ ADM did not prevent or detect the improper payments. ▪ ADM entered into a non-prosecution agreement with the SEC, and agreed to pay more than $36 million to settle charges against it. One of the ADM subsidiaries was charged with criminal charges and agree to pay almost $18 million in fines.	
Securities and Exchange Commission v. Oracle Corp. **Civil Action No. CV-12-4310 CRB (N.D.Cal August 16 2012)**	▪ Oracle Corporation (**Oracle**), a California based enterprise software company and provider of computer hardware and services, was charged with failing to prevent its wholly-owned subsidiary, Oracle India, from using company money to make payments to fraudulent Indian vendors from 2005 – 2007.[29]	▪ The SEC's complaint in this case highlights the importance of independent audits being undertaken by companies. This sentiment is mirrored in the ISO Guidelines, which emphasise the importance of audits being conducted by independent persons;[30] and the UK Guidance which suggests that organisations may wish to include within their bribery prevention policies 'financial and

[29] See SEC Complaint, Case No. CV-12-4310, dated 16 August 2012; United States District Court Central District of Illinois, Final Judgment, dated 16 August 2012.
[30] See 9.2.

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	▪ The charges were made under the same provisions as the Archer Daniels case, namely under the *Securities Exchange Act* of 1934, for Oracle's failure to: a) keep records which accurately and fairly reflect transactions and dispositions of the assets of the organisation (s 13(b)(2)(A)); and b) devise and maintain a system of internal accounting controls to detect and prevent the illicit payments (s 13(b)(2)(B)). ▪ Money was set aside by employees of the Indian subsidiary and kept in unauthorised funds, and eventually paid to fake vendors in India. The subsidiary created fake invoices for some of the transactions. ▪ SEC alleged that Oracle had breached the FCPA by failing to maintain adequate books and records and internal controls which would have prevented the improper use of funds. In particular, it was alleged that Oracle failed to maintain internal corporate policies, or to audit third party payments made by the subsidiary.	commercial controls' including auditing.[31] ▪ Additionally, the settlement took into account Oracle's cooperation with the SEC's investigation; its firing of misbehaving employees; and the fact it actively worked to enhance its compliance program. These were all considered positive factors that reflected well on Oracle.

[31] See p 22.

Case name/citation	Facts	Findings/discussion regarding adequate procedures to prevent bribery
	▪ As a result of an internal investigation, Oracle terminated a number of Oracle India employees (based on their involvement with the improper funds), and revised its compliance policies. ▪ This matter was settled without Oracle admitting or denying SEC's allegations, and Oracle agree to pay a $2 million civil penalty.	