

AusNCP Procedures

Procedures for dealing with Specific Instances brought forward under the OECD Guidelines for Multinational Enterprises

Version 1.0

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Introduction

1. The guide has been developed in consultation with the Oversight Committee that oversees the Australian National Contact Point (AusNCP) for the OECD Guidelines for Multinational Enterprises (the Guidelines).
2. The purpose of the guide is to explain the process for the AusNCP to consider complaints brought under the Guidelines. As the Guidelines make clear, the first objective of the Specific Instance process is to find a solution through conciliation or mediation. The AusNCP only undertakes an examination of the complaint if mediation fails to find a resolution. This guide explains what the AusNCP may do to decide whether to accept a case; how the mediation process works; the scrutiny process – should this prove necessary; and publication of the AusNCP’s decision.
3. Throughout this guidance “AusNCP” refers to the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises. Contact details for the AusNCP can be found at www.ausncp.gov.au
4. “Company” refers to the multinational enterprise against which the complaint is made.
5. “Guidelines” refers to the OECD Guidelines for Multinational Enterprises.
6. “Parties” refers to the complainant or complainants and the enterprise being complained against.
7. “Specific Instance” means a complaint that is submitted to the AusNCP concerning a company’s alleged breaches of the Guidelines. The terms “specific instance” and “complaint” are synonymous.
8. “Oversight Committee” means the Committee established to oversee the operation of the AusNCP and its implementation of the Guidelines.

Stages in the AusNCP process for considering specific instances

The stages involved in handling complaints

9. There are three key stages to the AusNCP's process for handling Specific Instances:
 - 9.1. Stage 1 – from receipt of complaint to Initial Assessment
 - 9.2. Stage 2 – from acceptance of a case to conclusion of mediation or examination
 - 9.3. Stage 3 – drafting and publication of Final Statement.

Timetable

10. The AusNCP will aim to complete each Specific Instance within a year of receiving the complaint. It will aim to complete Stage 1 within 3 months of a complaint, Stage 2 within a further 6 months and Stage 3 within a further 3 months.
11. Some degree of flexibility may be needed in relation to the timetable; for example, because of circumstances outside the AusNCP's control. In these circumstances the AusNCP will notify the parties, explain the reason and set out a revised timetable.
12. As set out above, the AusNCP is committed to the prompt resolution of each Specific Instance. Parties are urged to provide information promptly in order to adhere to the timetable. Failure to do so could result in the AusNCP making its decision in the absence of that information.

Who can make a complaint?

13. According to the Guidelines, any "interested party" can file a complaint. The complainant may be, for example, a community affected by a company's activities, employees or their trade union, or an NGO. A complainant may act on behalf of identified other parties.
14. The AusNCP will consider all complaints it receives provided the complaint and all relevant documents are submitted in English. However, the AusNCP will need to receive detailed information from the complainant in order to deal with the complaint. Therefore, complainants should have a close interest in the case and be in a position to supply information about it. They should also, in accordance with the principles of the Guidelines, have a clear view of the outcome they wish to achieve.

What are the grounds for making a complaint?

15. Complainants need to decide which chapters or paragraphs in the Guidelines they consider are being breached by the company and specify these in making their complaint. The AusNCP's determination of a complaint will be evidence based. Complaints falling outside the Guidelines will not be considered – nor will ineligible, frivolous or vexatious complaints.

What happens to information provided during the course of an examination?

16. One of the objectives of the AusNCP is to ensure that its process is transparent. Unless a good case is made to the AusNCP for information to be withheld from a party, all the information received by the AusNCP from the parties or any other person or organisation (whether during the course of a meeting or in writing) will be copied to all parties. The preferred course is to agree, where appropriate, conditions of confidentiality attaching to sensitive information.

Confidentiality

17. Information which is sent to the AusNCP will be treated confidentially by the AusNCP. The information provided by each party may be shared with any other party to the complaint during the process of assessment, but only with the consent of the party which provided the information. If any such information is provided, it will be on condition that it is kept confidential for the period of assessment.
18. Parties should be aware that information and documents provided to the AusNCP will be subject to the operation of the *Freedom of Information Act 1982* (FOI Act), and could be released under the provisions of that Act. The FOI Act sets out a process for ensuring the public's right to access documents held by government, but it does not prevent agencies from disclosing information outside that process.

Stage 1: From receipt of complaint to initial assessment

What will the AusNCP do when it receives a complaint?

19. Within 10 working days of receiving a complaint, the AusNCP will acknowledge receipt to the complainant.

On what grounds does the AusNCP decide whether or not to accept a Specific Instance?

20. In making its initial assessment of a Specific Instance, the AusNCP will consider the stated grounds of the complaint and the information it has received about the complaint, in order to decide:
 - 20.1. whether it falls within one or more of the Guidelines;
 - 20.2. whether the issue raised is material and substantiated; and
 - 20.3. whether there are any other factors which should be taken into account such as, but not limited to:
 - 20.3.1. the relevance of applicable law and procedures, including court rulings;
 - 20.3.2. how similar issues have been, or are being, treated in other domestic or international Specific Instances;
 - 20.3.3. whether consideration of the Specific Instance would contribute to the purposes and effectiveness of the Guidelines.

21. In making its initial assessment the AusNCP may determine to consult with the National Contact Point(s) of other OECD Guidelines for MNE's adhering country with a view to:
 - 21.1. seeking advice from the other NCP regarding the complaint;
 - 21.2. involving the other NCP in the complaint process;
 - 21.3. transferring the complaint to the other NCP if this is considered appropriate and agreed by the NCP's involved in the matter
22. In making its initial assessment the AusNCP may choose to consult with external experts

What happens next?

23. Having made an initial assessment the AusNCP may:
 - 23.1. forward the complaint to the company named in the Specific Instance complaint, with an invitation to send the AusNCP a preliminary response within 20 working days of the notification; or
 - 23.2. transfer the matter to another NCP advising the parties of this action; or
 - 23.3 not accept the complaint and advise the complainant appropriately and make an appropriate statement which will be published on the AusNCP website.
24. If the complaint is accepted the AusNCP may offer separate meetings to both parties. At the meetings the AusNCP will explain the process and answer any questions. The AusNCP may also use each meeting to begin its analysis of the complaint. At the meeting with the complainant the AusNCP will clarify the precise nature of the complaint. At the meeting with the company, it will ask for a response to the complaint.
25. Throughout the complaint handling process, both parties may have an opportunity to submit additional evidence and documentation
26. If appropriate, the AusNCP may seek comment/advice from experts or organisations that may bring particular knowledge and experience that will assist consideration of the complaint.

What does acceptance of the Specific Instance mean?

27. If the AusNCP decides to accept the complaint, this means that it considers that there is enough information to warrant further examination. It does not mean that it has concluded that the Guidelines have been breached.

What does refusal to accept a Specific Instance mean?

28. If the AusNCP does not accept a case it means that there is insufficient evidence of any breach of the Guidelines sufficient to warrant further examination or that the complaint is frivolous, vexatious or falls outside the Guidelines.

What if the parties reach a settlement before the AusNCP issues an Initial Assessment?

29. If the parties reach a settlement and the complaint is withdrawn before the AusNCP has issued an Initial Assessment, the AusNCP will close its file, and the identities of the parties will not be disclosed by the AusNCP except with the agreement of both parties. The AusNCP may issue a statement setting out the particulars of the matter without identifying the parties concerned.

What form does an Initial Assessment take?

30. The Initial Assessment, when issued, may include:
 - 30.1. the names of the parties if the case is accepted (the parties will not be named if the case is rejected);
 - 30.2. the substance of the complaint – including reference to those Guidelines alleged to have been breached;
 - 30.3. a statement of the nature of the complaint;
 - 30.4. a summary of the process the AusNCP has followed to date;
 - 30.5. the reasons for accepting or rejecting the complaint;
 - 30.6. notice of any parts or all of the complaint found to be outside the Guidelines, frivolous or vexatious; and
 - 30.7. an outline of the next stages in the AusNCP's determination.
31. A statement that acceptance of a complaint for further consideration does not mean that the AusNCP has determined at this stage that the Guidelines have been breached
32. Before issuing an Initial Assessment, the AusNCP will send a draft of the assessment to the parties, inviting their written comments within not more than 10 working days. When issuing the Initial Assessment, it will be at the AusNCP's discretion whether to take account of any comments received.

Stage 2: From acceptance of a case by the AusNCP to conclusion of mediation or examination

The Mediation Process: the role of mediation in resolving Specific Instances

33. The preferred outcome of any complaint is an agreement between the parties. When the AusNCP accepts a Specific Instance, it will discuss with the parties involved and offer its "good offices" with the objective of bringing both parties together to discuss the issues and come to a mutually agreed resolution without undue delay. Mediation can be viewed as an 'assisted negotiation' between the parties with the aim of reaching a settlement agreeable to both. The AusNCP will facilitate discussions and may make suggestions.

34. As with the Guidelines themselves participation in any mediation is voluntary. The published Final Statement will note where the parties refused to undertake mediation and will provide a summary of the reasons why mediation was not undertaken.
35. If the parties are unable to agree on mediation or mediation fails, then the AusNCP will conduct an examination of the case as set out below. Whilst mediation is continuing the complaint will not simultaneously be subject to further scrutiny.
36. The AusNCP and the parties will agree the most suitable approach to mediation.
37. If mediation is undertaken within the AusNCP process the mediation may be conducted by the AusNCP or by professional mediation contracted by the AusNCP. The final decision as to which course is to be taken rests with the AusNCP.

Mediation within the AusNCP process

38. In mediation conducted by the AusNCP, the AusNCP will at all times be neutral. The role of the AusNCP is to provide an opportunity for each party to discuss the issues raised by the complaint. The mediation is confidential. The AusNCP will make the only record of what happened during the mediation. This summary statement may be published as part of the final assessment.
39. When the AusNCP mediates in a case it will:
 - 39.1. agree the agenda with both parties before commencing the joint mediation session(s).
 - 39.2. chair and facilitate meetings with the parties either separately or together, and encourage both parties to exchange information, build trust and confidence, and ultimately find a process to resolve the issues.
40. There are three main stages to the mediation process:
 - 40.1. The AusNCP will meet both parties separately to prepare for the mediation. These meetings will explore the issues, explain the mediation process, and answer questions on the how the process will work.
 - 40.2. The AusNCP will bring both parties together in a meeting or meetings which will always commence with providing each party with a period of time to explain their views and will provide sufficient opportunity to clarify outstanding issues. The initial meeting may result in a settlement or will end by mapping out a process of on-going dialogue.
 - 40.3. At the end of a successful mediation process the parties, with the assistance of the AusNCP if they wish, will draft a Mediation Agreement and, if the full agreement is not to be published, a summary for publication. The AusNCP will issue a final statement outlining the issues, the parties, the relevant sections of the OECD Guidelines, and the outcome of mediation. The AusNCP may make a statement as to whether the provisions of the Guidelines may have been breached or not.
41. In cases where the AusNCP contracts an external mediator the AusNCP will prepare terms of reference to be agreed by both parties and the mediator. The mediator will be responsible for agreeing with the parties the methods and processes for mediation. The AusNCP will request an update of progress from the mediator every 2 months.

42. Should the mediation process fail, then the AusNCP will start to examine the complaint. In any case where the majority of key concerns of the complaint were mediated and where the parties are content for the AusNCP not to investigate the remaining issues, this will be written into the Mediation Agreement. The AusNCP will issue a final statement outlining the issues, the parties, the relevant sections of the OECD Guidelines, and the outcome of mediation. The AusNCP may make a statement as to whether the provisions of the Guidelines may have been breached or not.

Responsibilities of both parties in the AusNCP mediation process

43. Both parties enter into the mediation in the spirit of seeking to reach a resolution of the issues at hand. Parties are expected to adhere to the agenda and not raise issues not known to either the AusNCP or the other party beforehand.
44. It must be clear that the persons taking part in mediation have the authority to implement a proposed agreement. If the persons taking part are subject to higher authority within that party, this must be made clear from the outset.
45. Mediation procedures will be informal and confidential, in order to encourage open discussion. Mediation sessions will not therefore be minuted by the AusNCP. However a summary of the final conclusions from a meeting may be provided by the AusNCP to note progress made and for the purpose of informing any following meeting. Parties will agree to observe confidentiality except to the extent that it is necessary to seek professional advice or guidance from within their organisation. In these circumstances those consulted will be expected to observe confidentiality.

Mediation outside the NCP process

46. The filing of a complaint with the AusNCP may result in the parties asking to resolve any complaint amongst themselves. This would only proceed if agreed by parties to the complaint. At any stage, the parties may realise that they may be able to resolve the issues raised without further intervention by the AusNCP. If the AusNCP receives written notification from both parties that they wish to mediate outside the AusNCP process, the AusNCP will suspend the case. The AusNCP will request an update of progress every 2 months to determine whether the Specific Instance procedure needs to be reopened. If mediation outside the system is successful, the AusNCP will close the case. If this is achieved before the Initial Assessment is completed, a note closing the complaint without identifying the parties will be published. If this is achieved after the Initial Assessment stage, a Final Statement will be published explaining that the parties have achieved a mediated settlement outside the AusNCP process.

Examination Process

47. If mediation is refused or fails to achieve agreement, the complaint will return to the AusNCP for further analysis. The objective of this process is for the AusNCP to further consider the complaint in order to assess the complaint.
48. At the outset of this scrutiny the AusNCP may identify the steps it intends to take in order to proceed with any further examination and will notify both parties in writing of this.

49. The examination may involve the AusNCP collecting further information from the complainant or the company. It may also seek advice from other relevant government departments, Australian diplomatic missions or business associations, NGOs or other agencies. If appropriate it will seek informed independent opinion.
50. The examination may also involve further meetings between the AusNCP and the parties.
51. Unless a good case is made for information to be withheld, all the information and evidence received by the AusNCP may be shared with the parties.
52. The AusNCP may then review all the information it has gathered, and may make a statement as to whether the Guidelines have been breached.

Stage 3: Drafting and publication of the final statement

53. The AusNCP's Final Statement may include the following:
 - 53.1. details of allegation and those chapters/paragraphs of the Guidelines that it is alleged have been breached;
 - 53.2. details of the parties involved (i.e. complainant and the company);
 - 53.3. a summary of the process the AusNCP has followed;
 - 53.4. the outcomes of any mediation;
 - 53.5. the results of examination (if any), which will include rationale behind each conclusion;
 - 53.6. where appropriate, the AusNCP may make recommendations to the company so that its conduct may be brought into line with the Guidelines;
 - 53.7. where appropriate, a date by which both parties will be asked to submit to the AusNCP an update on measurable progress towards meeting any recommendations; and
 - 53.8. where the AusNCP has found examples of good company practice consistent with the Guidelines this information may also be included.
54. Once the AusNCP has drafted its Final Statement, it will be sent to the parties for checking, with a deadline of 10 working days for comments. The AusNCP may then incorporate any necessary factual changes before sending the finalised statement to the parties, together with information of how they can seek a review by the Oversight Committee if they consider that the process set out in this guidance has not been properly followed.
55. Any request for review will have to be made within 10 working days of the date the Final Statement is sent to the parties. This also applies for request by a complainant for review of a case where the AusNCP does not accept the case as a Specific Instance. At the end of this period the Final Statement will be published on the AusNCP website – www.ausncp.gov.au.

Follow up to final statements

56. Where the Final Statement includes recommendations to the company, it may specify a date by which both parties are asked to provide the AusNCP with a substantiated update on the company's progress towards implementing these recommendations.
57. The AusNCP will then prepare a Follow Up Statement reflecting the parties' response. The AusNCP will ask the parties to send factual comments on the Follow Up Statement within 10 working days. The AusNCP may then incorporate any necessary factual changes before sending the finalised Follow Up Statement to the parties and publishing the final Follow Up Statement on the AusNCP's website.

Superseded

Review Procedure – Specific Instance Complaints

Introduction

1. If you consider that the Australian National Contact Point (AusNCP), in coming to a final decision, has failed to treat you with appropriate fairness, you may request a review. This note explains what you should do. It sets out the procedure that has been put in place by the Oversight Committee to consider reviews and the possible outcomes of a successful review.
2. References to the AusNCP Published Procedure refer to the “AusNCP Procedures for dealing with specific instances brought under the OECD guidelines for multinational Enterprise”, which can be found on the website: www.ausncp.gov.au.
3. “You” refers to the person requesting the review and “we” refers to the secretariat to the Oversight Committee co-ordinating the review.

Initial Request for a Review

Who can request a review?

4. A review may only be requested by one of the parties to the complaint.

How do you request a review?

5. The covering e-mail or letter circulating the AusNCP final statement will normally include a paragraph which briefly sets out your right to request a review. A request for a review must be in writing but does not need to be in any specific format. It must identify the final statement to be reviewed and why you think it should be reviewed. All correspondence relating to a review request may be made by e-mail.

When can a review be requested?

6. A review may be requested where the AusNCP does not accept a Specific Instance in its initial assessment or following the conclusion of a complaint and the issue of the final statement to the parties.

What about time limits?

7. You have up to 10 working days from the date of the AusNCP final statement to ask (in writing) for a review of the decision.
8. You then have a further 10 working days from the date of requesting the review to provide full particulars of why you think that the AusNCP decision should be reviewed.
9. The review process will normally be completed within 75 working days of receipt of a request and we will promptly notify you and the other party to the complaint of the outcome.
10. We expect that time limits will normally be observed. Late applications will only be considered if there are good reasons why deadlines have been missed.

Consequences arising from a request for a review

11. In the event of a request for a review being received within 10 working days, a final statement may not be published until after the review is completed.

Reasons For a Review

What is the purpose of the review procedure?

12. The review process is intended to identify if there were any procedural errors in the AusNCP decision-making process and, if so, ensure they are corrected where possible.

In what circumstances should you consider requesting a review?

13. You might want to consider requesting a review if the AusNCP has failed to comply with the AusNCP Published Procedure. Examples of such failure might be:
 - 13.1. failure to issue a final statement in accordance with the timetable set out in the Published Procedure;
 - 13.2. failure by the AusNCP to give you an appropriate opportunity to be heard;
 - 13.3. failure to meet your reasonable requirements in relation to the treatment of your witnesses, confidential or other sensitive information.
14. You may also consider requesting a review if the AusNCP has failed to treat you with appropriate fairness in the circumstances of the case.

What are the limits of the review?

15. You should be aware that the review can only deal with procedural errors, and will not examine the substance of any AusNCP decision.

What do I need to provide if I request a review?

16. Once you have put in a request for a review you have 10 working days in which to provide full particulars of why you think the AusNCP has deviated from the Published Procedure or why you have not been treated with appropriate fairness. This does not need to be very formal but should provide examples and any other supporting information you think relevant. Everything should be provided in writing, and can be delivered by hard copy or e-mail.

Review Process

17. This section of the notice sets out the procedures we will follow upon receipt of a request for a review. The process is normally a paper based review only.

Review Panel

18. The quorum for a Review Panel is three and will comprise members of the Oversight Committee.

Circulation of information

19. When we receive a review request, we will promptly acknowledge receipt and ask you to provide full particulars, if you have not already done so, within 10 working days.
20. We will promptly circulate a copy of the request to each member of the Oversight Committee, which will act as a review panel, together with a copy of the AusNCP final decision. We will ask Oversight Committee members to declare any interest or involvement they may have which will affect the complaint.
21. We will notify the Oversight Committee of the likely timetable for a review and find out which members are available during that time.
22. We will also send a copy of the request to the AusNCP and to the other party to the complaint.
23. Promptly on receipt of full particulars we will circulate copies to the AusNCP, all Oversight Committee Members and the other party to the complaint.

Ineligible, frivolous or vexatious requests

24. If at any stage we consider that a request is ineligible, frivolous or vexatious we will notify the Oversight Committee of our opinion and recommend that the request be refused.

Comments by the AusNCP and the parties

25. The AusNCP will then have 30 working days to comment in writing on the request and provide any background information it considers will assist the Oversight Committee. AusNCP comments may include recommendations for rectifying errors in procedure identified by the review request.
26. We will circulate the AusNCP comments to both parties to the complaint. Each party will be given 10 working days to comment on any matter relevant to the review.
27. We will circulate AusNCP comments and any additional comments of the parties to all members of the Oversight Committee.

Impartiality of Committee Members

28. Any Oversight Committee member who has been actively involved in the decision-making process for the complaint will not be entitled to participate as a member of the review panel.
29. An Oversight Committee member shall notify the secretariat of an active interest in the complaint. That Oversight Committee member may choose to withdraw from the review process or ask the secretariat to declare that interest and ask the parties to the complaint if they consent to that Oversight Committee member taking part in the review. If any of the parties object, that member will take no part in the review process.

Consideration of the Request

Review Panel

30. The Review Panel will determine its own proceedings and how best to consider the information provided. It will make a recommendation to the Oversight Committee within 15 working days of circulation of the papers.

31. If the Review Panel considers that the recommendation should not be published, or only a summary should be published, it may set out its reasons in an appendix to its recommendation. The Review Panel may also suggest that publication be delayed until a final statement is published.

What is the outcome of a review?

32. If the Oversight Committee considers that there were good grounds for the request the Committee may:
 - 32.1. remit the decision back to the AusNCP with instructions on how to rectify the procedural irregularity;
 - 32.2. acknowledge that there were deficiencies in the AusNCP process in the Specific Instance and make recommendations as to how those errors can be avoided in the future. However, the Committee will not replace the AusNCP decision with its own appraisal.
33. If the decision is sent to the AusNCP for reconsideration the AusNCP will re-open the case in accordance with the instructions of the Committee, correct the deficiencies and, if necessary, reconsider its final statement.
34. No further request for the review of that decision may be made.
35. If the Oversight Committee considers the request for a review is not well founded it will notify the AusNCP and both parties to the complaint. The AusNCP will then post the final statement on the website: www.ausncp.gov.au.

Publication of review findings

36. The final recommendation approved by the Oversight Committee will normally be published promptly on the AusNCP website, unless the Oversight Committee considers there is a good reason to withhold or delay publication or only publish a summary.

Confidentiality

Information which is communicated to the AusNCP by a party to a complaint (including parties to the submission, the enterprise concerned, and other parties with whom the AusNCP consults) will be treated confidentially by the AusNCP. The information provided by each party may be communicated to any other party during the process of an assessment, but only with the prior consent of the party who provided the information. If such information is provided, it will be on the condition that it is kept confidential for the period of the assessment.

Parties should be aware that information and documents provided to the AusNCP will be subject to the operation of the *Freedom of Information Act 1982*, and could be released to an applicant under that Act, unless it was exempt from production. Parties should also be aware that the Commonwealth Parliament can seek the production of information and documents from the AusNCP.

Generally, the AusNCP will not identify the parties to any specific instance complaint until a final statement closing the matter is made. The AusNCP may then consider it appropriate to identify the parties to the complaint.

Superseded

Parallel Proceedings

Purpose

1. The purpose of this paper is to provide guidance to complainants and companies on how the Australian National Contact Point (AusNCP) intends to handle the issue of parallel legal proceedings within the OECD Guidelines complaints process.
2. The AusNCP considers parallel proceedings to be court or similar proceedings in progress at the same time as a Specific Instance, which addresses the same or closely related allegations. Such proceedings can be either criminal or civil in nature and can take place under the jurisdiction of the host country, another country or an international court or tribunal.

AusNCP approach

3. The AusNCP adopts the following principles in respect of the impact of parallel proceedings:
 - 3.1. The fact that parallel proceedings exist will not of itself cause a suspension of its process and/or its determination of any dispute;
 - 3.2. The AusNCP will suspend a complaint only where it is satisfied that it is necessary in order to avoid serious prejudice to a party to parallel proceedings and is appropriate in all the circumstances.
4. Before suspending a complaint, the AusNCP will expect the parties to give serious consideration to the benefits of conciliation/mediation which can lead to a quicker and more cost effective solution to the issues raised.

What this means to the published complaints procedure

5. The AusNCP may accept a complaint under its published procedures, when appropriate, even if it has notice that parallel legal proceedings are underway. The initial assessment will include reference to any parallel proceedings of which the AusNCP is aware.
6. A party to a complaint may request a suspension at any stage of the complaints process on the grounds that continuation of the process may cause serious prejudice to a party to parallel proceedings.
7. Before considering a request the AusNCP will ask the party making the request to provide evidence of the parallel proceedings. This should include court or other documentation wherever possible. The party requesting the suspension will also need to show that continuation of the AusNCP process will seriously prejudice one of the parties to the parallel proceedings. The information provided will be copied to the other party save in exceptional circumstances and upon a request by the applicant that the information should not be shared.
8. On receipt of the information, the AusNCP may form a view on the following:

- 8.1. Would continuation of the complaints process be likely to cause serious prejudice to one of the parties to the parallel proceedings?
- 8.2. If so, it is appropriate in all the circumstances that the process be suspended in part or in its entirety
9. The AusNCP will consider whether there is a likelihood of serious prejudice on a case-by-case basis. The following are examples of situations in which serious prejudice could arise:
- 9.1. A finding by the AusNCP on a specific instance may be accepted by a foreign court as a deciding factor in an important issue before it.
- 9.2. A company director is subject to criminal legal proceedings in a country, the judicial system of which includes a right to silence. The same company is also the subject of a complaint to the AusNCP covering closely related issues. The company is asked by the AusNCP to provide information which is material to the complaint under the Guidelines but which could result in prejudice against the individual in the court case if made public, for example in the Final Statement.
10. If the AusNCP assesses that serious prejudice may occur by continuing with the Specific Instance process it may suspend the AusNCP action and inform the parties of this decision.
11. Once the parallel proceedings have concluded, the AusNCP will decide whether there is any merit in continuing with an examination of the complaint. By way of example, there may be merit in doing so in circumstances where the Guidelines set a higher standard than the laws applied by the court or tribunal.
12. Where a complaint has been suspended, the AusNCP will ask parties to the complaint to provide an update on the status of the parallel proceedings at least every 6 months.
13. The AusNCP will apply this guidance to all current Specific Instances and to all future complaints which it receives.

Clarifications

As the Guidelines are drafted in general terms, so as to apply in all adhering countries with their diversity of legal systems and practices, ‘clarifications’ of the meaning of the Guidelines may be necessary in specific circumstances. The purpose of the clarification is to provide additional information about whether and how the Guidelines apply to a particular situation. Although clarifications may arise in connection with the activities of a specific enterprise, they are not intended to assess the appropriateness of that enterprise’s conduct.

Whenever a National Contact Point gives its opinion as to the relevance of the Guidelines in specific instances, it should keep in mind the international character of the Guidelines and the need to avoid conflicting national interpretations. Where there is any doubt or where there are divergent views, the matter should be brought to the attention of the Investment Committee before the National Contact Point gives a final answer. Final responsibility for clarifications lies with the OECD’s Investment Committee, but it relies on the National Contact Points to assume as much as possible of the task of ensuring that the meaning of the Guidelines is clear in each national context.

The OECD’s Investment Committee is charged by OECD ministers with the overarching responsibility for the promotion of the Guidelines. A request for clarification may be referred to the Investment Committee by government authorities or by the Business and Industry Advisory Committee to the OECD or the Trade Union Advisory Committee to the OECD. The Investment Committee will discuss the matter and consult with BIAC and TUAC. If an enterprise is directly concerned, it may also express its view to the Investment Committee orally or in writing. After these deliberations, the Investment Committee may provide clarification on how the Guidelines apply in a situation like the one in question. The Investment Committee’s examination of the need for, and eventual provision of, a clarification only concerns the application of the Guidelines to the specific issues raised.

Clarifications are not judgments on the behaviour of individual enterprise; hence, clarifications that arise in connection with individual firms do not refer to them by name.