



Australian Government



Consumer
Data Right

Guidance for applicants seeking exemption under section 56GD

February 2021

Table of Contents

| | |
|--------------------------------------------------------------|----|
| 1. Purpose of these guidelines | 2 |
| 2. Exemptions under section 56GD | 3 |
| What does section 56GD of the CCA provide?..... | 3 |
| In what circumstances will the ACCC grant an exemption?..... | 3 |
| What other types of exemptions are available? | 5 |
| 3. Making an exemption application..... | 7 |
| A CDR participant submits an exemption application | 8 |
| The ACCC may request further information..... | 8 |
| The ACCC may consult with relevant stakeholders | 8 |
| Outcome of decision..... | 9 |
| Right to appeal | 9 |
| Timeframe for exemption assessments | 9 |
| 4. How to apply for an exemption | 11 |
| 5. Commonly asked questions | 13 |
| 6. Further information..... | 14 |

1. Purpose of these guidelines

- 1.1. These guidelines reflect the approach the Australian Competition and Consumer Commission (ACCC) will take in relation to applications for exemption under section 56GD of the *Competition and Consumer Act 2010* (Cth) (CCA).
- 1.2. The ACCC is provided with a broad discretionary power under section 56GD to exempt a person from one or more of the provisions of the Consumer Data Right (CDR) regime, which includes the provisions in Part IVD in the CCA, regulations made for the purposes of Part IVD and the consumer data rules.¹
- 1.3. These guidelines set out how the ACCC proposes to interpret section 56GD and describe the general approach the ACCC will take in deciding whether or not to grant an exemption and under what conditions (if any). These guidelines are for the general guidance of CDR participants and their advisors, and should not be used as a substitute for legal advice.

¹ See section 56GD(1) of the CCA.

2. Exemptions under section 56GD

What does section 56GD of the CCA provide?

2.1. Section 56GD provides that:

- (1) The *provisions covered by this section* are:
 - (a) the following provisions:
 - (i) the provisions of this Part;
 - (ii) the provisions of regulations made for the purposes of the provisions of this Part;
 - (iii) the provisions of the consumer data rules; and
 - (b) definitions in this Act, or in the regulations or consumer data rules, as they apply to references in provisions referred to in paragraph (a).
- (2) The Commission may, by written notice given to a person, exempt the person, in relation to particular CDR data or one or more classes of CDR data, from all or specified provisions covered by this section.
- (3) An exemption under subsection (2):
 - (a) may or may not be limited to a specified period; and
 - (b) may apply unconditionally or subject to specified conditions.
- (4) The Commission must publish on its website the details of each exemption under subsection (2).
- (5) Applications may be made to the Administrative Appeals Tribunal for review of a decision of the Commission exempting, or refusing to exempt, a person under subsection (2).

- 2.2. An application for exemption is a formal process. The exemption (if granted) will be made in a written form and details of the exemption will be published on the ACCC's website in a [section 56GD public register](#).
- 2.3. The ACCC may exempt a person in relation to particular CDR data, or one or more classes of CDR data, from all CDR obligations or from certain CDR obligations.
- 2.4. An exemption may or may not be time limited. It may apply unconditionally or be subject to conditions.

In what circumstances will the ACCC grant an exemption?

- 2.5. The ACCC will make a decision on each application for exemption on a case-by-case basis, having regard to the facts and circumstances relevant to the particular entity.
- 2.6. The Explanatory Memorandum to the *Treasury Laws Amendment (Consumer Data Right) Bill 2019* sets out that the power to grant exemptions 'provides the ACCC with the ability to ensure that the CDR system does not operate in unintended or perverse ways in exceptional circumstances' and also provides 'the ACCC with scope to ensure that the CDR system works in the best way possible for consumers and the designated industry.'
- 2.7. The factors that the ACCC may consider in its assessment of section 56GD exemption applications regarding consumer data sharing obligations include the following:

| Factors | Key considerations |
|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| Impact on the CDR objectives - to enable safe, efficient and convenient disclosure of consumer data and efficient and convenient access to product data, so as to create more choice, competition and to promote the public interest | Has the applicant provided a clear justification why the proposed exemption should be granted? |
| The nature and scope of the proposed exemption sought | <p>Is the scope of the proposed exemption (in relation to particular data, classes of data, compliance phases or products) proportionate and reasonable in the circumstances?</p> <p>Is the period of the proposed exemption sought proportionate and reasonable in the circumstances?</p> |
| Potential for any unintended or perverse consequences to arise if the proposed exemption were not granted | <p>What would be the consequences for the applicant, consumers and the CDR ecosystem if the exemption were not granted?</p> <p>If not granted, would this result in inefficient or unreasonable use of resources?</p> <p>Has the applicant explored alternative options to facilitate compliance?</p> |
| Impact of the proposed exemption on the CDR ecosystem | <p>To what extent would consumers be impacted by the proposed exemption?</p> <p>To what extent would other CDR stakeholders be impacted by the proposed exemption?</p> |
| The extent to which the applicant has previously met its CDR obligations and the level of engagement with the ACCC on CDR matters | <p>Has the applicant demonstrated a history of CDR compliance?</p> <p>Has the applicant commenced planning for its CDR compliance at an early stage?</p> <p>Has the applicant proactively engaged with the ACCC?</p> |
| Evidence provided to support exemption | <p>To what extent has there been senior management involvement in preparing the proposed exemption, alternative options to facilitate compliance and proposed resolutions?</p> <p>To what extent has the applicant provided documentation to substantiate issues and proposed resolutions?</p> |

- 2.8. These factors may assist applicants when considering whether to make an exemption application or, if choosing to make an application, what information and documentation to provide to support the application.
- 2.9. Below are examples of scenarios where an application for exemption may be appropriate.

Example - Bank EGAR

Bank EGAR is a non-major ADI that is not required to share CDR consumer data in the early stages of the CDR regime, but is interested in voluntarily participating in the sharing of such data.

Bank EGAR has four brands. It does not have the requisite systems in place to participate in the CDR regime for all of its brands. However, it would like to participate for two of its brands.

Bank EGAR could make an application for exemption under section 56GD in relation to the two of its brands that are not ready to participate in the CDR regime. It could request that the exemption cover CDR data for CDR consumers (extending to all customer data, account data, transaction data and product specific data) held by Bank EGAR for those two brands. It may submit that its early participation in the CDR regime will benefit consumers by allowing them to share their data earlier than would otherwise be the case, and enable Bank EGAR to refine its systems over time so that when it is required to participate in the CDR regime for all brands, it is ready with comprehensive systems in place.

Example - Bond Credit Union / Mikro Credit Union

Bond Credit Union is planning on acquiring Mikro Credit Union. Both entities are due to commence sharing CDR data within six months, and each has bespoke IT systems. While the legal transfer of the business will complete in the next few weeks, a full systems integration will not be finalised for 12 months.

Bond Credit Union could make an application for exemption under section 56GD seeking a delay to the start date of certain obligations under the CDR regime for Mikro Credit Union customers. In its application, Bond Credit Union may submit that while it will be able to share CDR data for its existing customers, it will need additional time to ensure the appropriate systems are in place before it can share data for Mikro Credit Union customers.

- 2.10. The ACCC cannot retrospectively grant exemption for conduct that has occurred. CDR participants are encouraged to contact the ACCC if they have any concerns about ongoing conduct.

What other types of exemptions are available?

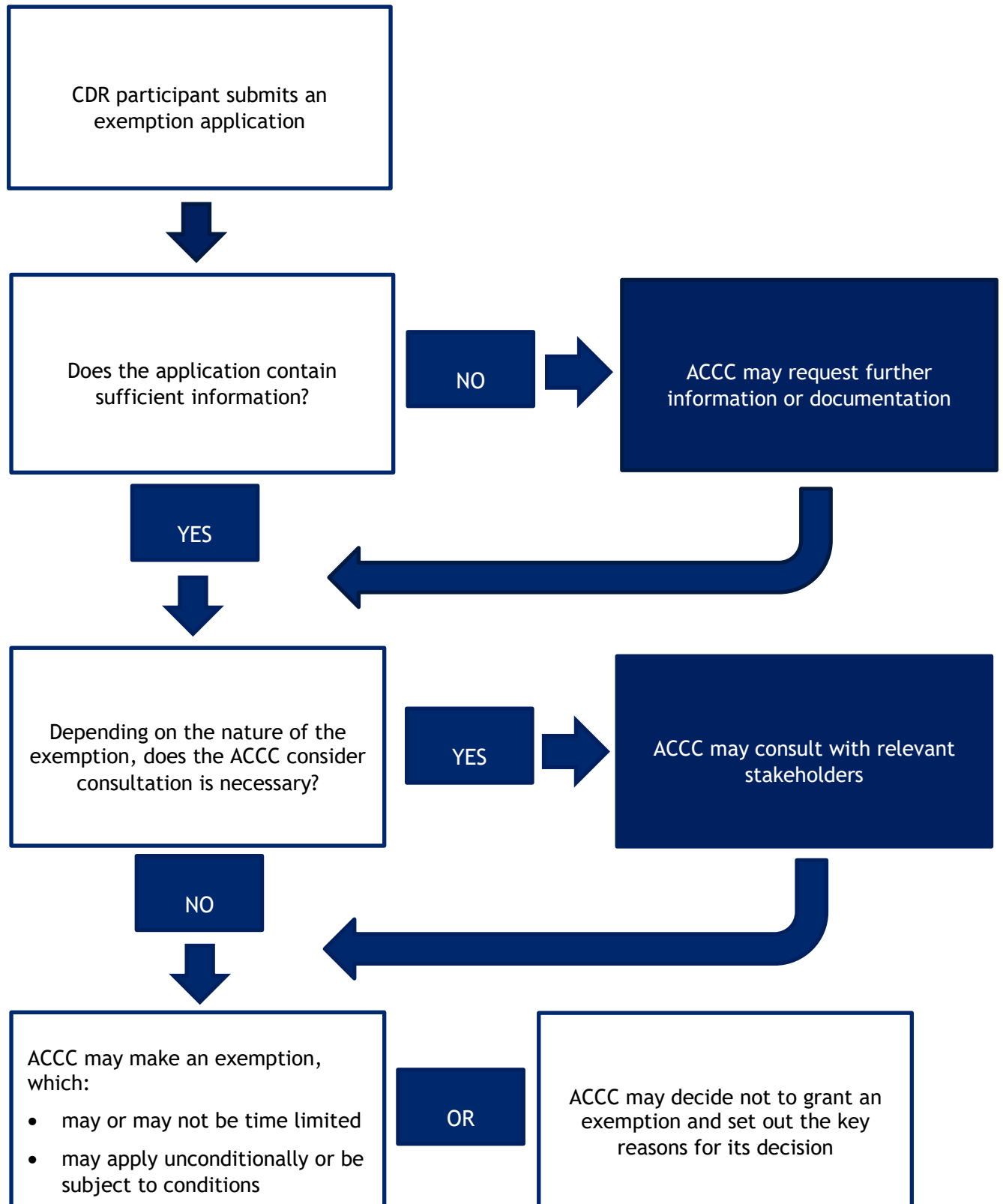
- 2.11. The CCA also allows for exemptions to be made by regulations (see section 56GE). The regulations may exempt a particular person or a class of persons. In contrast, under section 56GD the ACCC does not have the power to grant class-based exemptions (that is, the ACCC cannot exempt a whole class or group of entities).

- 2.12. Regulations under section 56GE can also declare that provisions apply in a modified or varied manner.
- 2.13. Parliament will have oversight over any regulation made as part of the CDR regime. The Explanatory Memorandum notes that ‘regulations will only seek to declare that provisions of the CDR are modified or varied in exceptional circumstances.’

3. Making an exemption application

3.1. The following sections provide further information about the potential stages of the ACCC's exemption assessment process. **Figure 1** shows how each stage may typically interact.

Figure 1 - Stages of an ACCC exemption assessment process



A CDR participant submits an exemption application

- 3.2. To request an exemption under section 56GD, a CDR participant should submit an application to the ACCC (an **exemption application**). The exemption application should be in writing and should include supporting information and documentation relevant to the ACCC's assessment.
- 3.3. Section 56GD is broad in nature and does not provide a specific list of issues the ACCC must consider in making its decision regarding whether or not to grant an exemption. As noted above, the ACCC has developed a list of factors it generally considers in assessing an exemption application. Prospective applicants should use these factors as a guide when determining the type of information and documentation to provide in an exemption application.

Example - Bank EGAR

For example, in the scenario described above, in its exemption application Bank EGAR should provide information that adequately explains why the exemption should cover CDR data held by the two particular brands it has nominated (as distinct from its other two brands).

- 3.4. The information and documentation provided with an application for exemption may include information that is commercially sensitive or confidential in nature. It is important that any confidential information provided to the ACCC is clearly marked. The ACCC will accept confidential information on the following basis:
 - there is no restriction on the internal use, including future use, that the ACCC may make of the confidential information consistent with the ACCC's statutory functions;
 - confidential information may be disclosed to the ACCC's external advisors and consultants on condition that each such advisor or consultant will be informed of the obligation to treat the information as confidential; and
 - the ACCC may disclose the confidential information to third parties (in addition to its external advisors or consultants) if compelled by law or in accordance with section 155AAA of the CCA.
- 3.5. Section 4 below sets out what information, at a minimum, an exemption application should contain.

The ACCC may request further information

- 3.6. The ACCC may need to request further information or documentation from the exemption applicant in order to properly assess whether or not the exemption should be granted and if so under what conditions (if any). In these circumstances the ACCC will issue a written information request to the exemption applicant requesting additional information and/or documentation.
- 3.7. The information request will generally be a voluntary request. However, the ACCC may issue a formal statutory request under section 155 of the CCA if necessary.

The ACCC may consult with relevant stakeholders

- 3.8. The nature and complexity of the exemption sought will influence what consultation (if any) is required. The ACCC may elect to consult with persons it considers reasonable and appropriate for the purposes of assessing the potential effects of the exemption. This may include the Office of the Australian Information Commissioner, the Australian Securities and Investments Commission, Treasury, the approved external dispute resolution body for the relevant sector (e.g. Australian Financial Complaints Authority for banking), government bodies or other affected stakeholders (e.g. consumers).
- 3.9. The length of any consultation process will vary depending on the nature and complexity of the exemption request. Consultation may be in the form of a public consultation notice calling for written submissions, meetings with interested parties and/or targeted correspondence with key stakeholders.

Outcome of decision

- 3.10. If an exemption is granted, the ACCC must provide a written notice to the applicant which will specify the provisions of the CDR regime, regulations made for the purposes of the CDR regime or the provisions of the consumer data rules a CDR participant is exempt from. The written notice to the applicant will specify if the exemption applies unconditionally or if it is subject to conditions. The ACCC has wide discretion in relation to applying conditions to exemptions.
- 3.11. In some circumstances, exemptions may be granted on the condition that applicants notify the ACCC in a timely manner of any material changes that may affect the exemption. An exemption may or may not be time limited. This is subject to the nature and scope of the exemption granted. The ACCC also may revoke or amend an exemption.
- 3.12. General details of the exemption (including the applicant's name and provisions of the CDR regime they are exempt from) will be published on the ACCC's website in a [section 56GD exemptions public register](#).
- 3.13. If an exemption is not granted, the applicant will receive written notification (by email) of the ACCC's decision and the ACCC's key reasons for not granting an exemption.

Right to appeal

- 3.14. Applications may be made to the Administrative Appeals Tribunal (AAT) for review of a decision of the ACCC to exempt, or refuse to exempt, a person from the CDR. Similarly if a person is dissatisfied with any conditions attached to an exemption, they may bring an application to the AAT.
- 3.15. Details on how to apply for a review or contact the AAT are available on the following website: <https://www.aat.gov.au/>

Timeframe for exemption assessments

- 3.16. The time taken to assess an application for exemption will depend on whether the applicant has provided a comprehensive application and responds to information requests from the ACCC in a timely manner. It will also likely depend on the complexity of the exemption sought and other issues relevant to consideration of whether an exemption is necessary and appropriate in the circumstances.

3.17. Applicants are advised to lodge an application for exemption as early as possible to give the ACCC sufficient time to consider it.

4. How to apply for an exemption

- 4.1. In order to ensure a timely assessment of an application for exemption, the ACCC recommends that applicants include the following (as a minimum) in their applications:

Business identifiers

- the name, ABN and description of the entity for which the exemption is sought (e.g. number of customers, types of products/services provided etc.)

Business requirements

- the reasons and justifications for seeking the exemption (i.e. why the applicant cannot comply with the CDR regulatory regime and associated processes/systems)

Scope of exemption

- the provisions of the CDR regime, regulations made for the purposes of the CDR regime or the provisions of the consumer data rules the applicant is seeking exemption for

Term

- the proposed term of the exemption

Potential impact

- details of whether there are any third parties whose interests may be adversely affected if the exemption was granted (e.g. number of consumers)

Benefits

- the benefits to the applicant, CDR consumers and any other key stakeholders if the exemption is granted

Contact details

- the contact details and name/s of the relevant officer/s

Additional information

- any information or supporting documentation the applicant considers relevant to the ACCC's assessment of the exemption application.

- 4.2. An applicant should also have regard to the exemption factors (listed in paragraph 2.7 above) when drafting an exemption application.
- 4.3. An applicant should clearly identify if any of the information or documentation it submits is confidential in nature.
- 4.4. Exemption applications should be submitted in writing to the ACCC. Exemption applications should be sent via email to accc-cdr@accc.gov.au, with the subject line '*Section 56GD exemption application from [name of applicant]*'. The ACCC prefers that exemption applications be sent in Microsoft Word format (although other text readable document formats will be accepted).

- 4.5. Prospective exemption applicants are welcome to contact the ACCC, via the above email address, if they have any queries about the application processes or assessment stages, and are encouraged to submit a draft application.

5. Commonly asked questions

5.1. Below are answers to commonly asked questions about exemptions under section 56GD.

Are there limits on who can apply for exemption?

Any person, including a prospective or current CDR participant is able to apply for an exemption.

Monetary thresholds do not apply.

How long does an exemption last?

The ACCC may grant exemption for any period considered appropriate in the circumstances. The exemption may, or may not, be time limited.

Can the ACCC approval be subject to conditions?

Yes. The exemption can apply unconditionally or be subject to conditions.

What is the lodgement fee?

No fee applies.

Can I dispute the ACCC's decision?

Yes. Applications may be made to the Administrative Appeals Tribunal for a review of a decision of the ACCC to exempt or refuse to exempt a person from provisions of the CDR regime.

6. Further information

- 6.1. The ACCC has published a range of information and guidelines relevant to its role under the CDR. These are available on the [ACCC's website](#).