



Australian Government
Clean Energy Regulator

NATIONAL GREENHOUSE AND ENERGY REPORTING

Application for information not to be published

under section 25 of the *National Greenhouse and Energy Reporting Act 2007*

Guidance for applicants

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About the application for information not to be published

This guide has been designed to assist registered corporations or persons who report emissions and energy information to apply under section 25 of the [National Greenhouse and Energy Reporting Act 2007](#)¹ (the NGER Act) for their greenhouse and energy information not to be published.

Section 25 of the NGER Act provides for a registered corporation, or a person required to provide a report under section 22G, 22X or 22XB to apply to the Clean Energy Regulator requesting certain information not be published.

If you require further assistance with the application process, please contact the Clean Energy Regulator on **1300 553 542** or at reporting@cleanenergyregulator.gov.au.

Requests not to publish information

The Clean Energy Regulator is required to publish certain information reported under the NGER Act each year, including greenhouse gas emissions, energy consumption and energy production data of registered corporations. The *National Greenhouse and Energy Reporting (Safeguard Mechanism) Rule 2015* (the Safeguard Rule) contains several provisions under which notification or publication is required when a baseline determination or other declaration is made. Please see Annexure A for a full list of these provisions. More information about what data is published and when can be found on the [Clean Energy Regulator website](#)².

A registered corporation³ or a person required to provide a report³ under the NGER Act under Section 22G (a reporting transfer certificate (RTC) holder), Section 22X (reporting obligations transferred to a member of a corporate group) or Section 22XB (a responsible emitter for a facility not reported under Section 19, 22G or 22X)⁴ may apply under section 25 of the NGER Act for all or part of their information not be published for a reporting year.

Such a request can only be made for information which reveals or could reveal a trade secret, or any other matter having a commercial value that would be, or could reasonably be expected to be, destroyed or diminished if the information were disclosed about a specific facility, technology or corporate initiative relating to the corporation or person.

As part of assessing the application, the Clean Energy Regulator will consider whether the applicant has demonstrated that there are real and substantial grounds that publishing their information may reveal a trade secret or affect the commercial value about a specific facility, technology or corporate initiative. Grounds that are speculative, imaginable or theoretical will not be sufficient. Guidance for providing evidence for a trade secret or other matter is covered in this document.

¹ <http://www.comlaw.gov.au/Series/C2007A00175>

² <http://www.cleanenergyregulator.gov.au/NGER/Published-information>

³ Three types of corporations can be registered corporations:

-Controlling corporations registered under section 17. These are constitutional corporations that do not have a holding company in Australia. It is generally the corporation at the top of its corporate hierarchy in Australia. Foreign corporations may also be controlling corporations;

-Responsible emitters registered under section 18AA. These are persons that have operational control over a large designated facility; and

-A controlling corporation that is registered under Section 14, in relation to a greenhouse gas project.

⁴ A person may also apply under Section 25 of the NGER Act if they are required to report under section 20 (An **approved other person** in a contractual relationship with a registered corporation, or with a member of a registered corporation's group, who the Clean Energy Regulator has, under section 20 of the NGER Act, determined is to provide information). However, to date nobody is required to report under Section 20 of the NGER Act.

This guide covers requests relating to information that would otherwise be published under section 24 of the NGER Act or under the safeguard mechanism.

Who can apply for their information not to be published?

In relation to section 24 of the NGER Act, data will only be published for corporations who meet the publishing thresholds in the NGER Act. For corporate groups, the publishing threshold is met when their combined scope 1 and scope 2 emissions have a carbon dioxide equivalence of 50 kilotonnes or more. For an RTC holder, the publication threshold is 25 kilotonnes or more of carbon dioxide or 100 terajoules of energy production or consumption.

In relation to section 24 of the NGER Act, a registered corporation or a person required to provide information under section 19, 22G or 22X of the NGER Act should only make a section 25 application if they meet the publishing threshold.

Section 25 does not apply to information published in relation to designated generation facilities under section 24 of the NGER Act and therefore their information must be published.

In relation to the Safeguard Rule, applicants must be a registered corporation, an RTC holder, a reporter under section 22X of the NGER Act or a responsible emitter required to report under section 22XB of the NGER Act.

Applying for information not to be published

A request for reported data not to be published must be made on the prescribed application for information not to be published form. The application form is available on the [NGER forms page](#)⁵ on the Clean Energy Regulator website.

Guidance for completing the form begins on page 5 of this guide.

For information published under section 24 of the NGER Act

Applications should be submitted by **30 November** following the reporting year to which the information applies. For example, if the application is in relation to the 2015-16 NGER publication, it should be submitted by 30 November 2016.

For information published under the safeguard mechanism

Some information published under the Safeguard Rule will be aligned to match the NGER publication deadline, so applications regarding total covered emissions from a facility, net emissions numbers and prescribed carbon units surrendered under section 22XN(1), should also be submitted by 30 November following the reporting year to which the information applies.

The deadline for applications under section 25 may differ depending on the information in question:

- The deadline for information published under section 24 of the NGER Act is the 30 November following the reporting year.
- An application for information not to be published in relation to a baseline determination, exemption or multi-year period declaration should be made at the same time the application for the determination or declaration is submitted.

⁵ <http://www.cleanenergyregulator.gov.au/NGER/Forms-and-resources/Forms>

Assessment of the application

Once a completed application form has been received, the Clean Energy Regulator will consider the application, and inform the applicant of whether it has been accepted or refused. As part of the assessment process, the Clean Energy Regulator may seek further information from the applicant to inform the decision.

An applicant has the right to appeal the Clean Energy Regulator's decision to the Administrative Appeals Tribunal. In the event of an appeal, the information that is the subject of the application would be withheld from publication until the appeals process is completed.

Outcome of the application

Publishing example (for information published under section 24 of the NGER Act)

 *The publication requirements are specified in section 24 of the NGER Act.*

Below is an example of how the Clean Energy Regulator will publish greenhouse and energy information reported under the NGER Act (fictional data used). Note that where corporations that have information withheld under section 25 of the NGER Act, or that have made a section 25 application at the time that the greenhouse and energy information is published, that fact will be noted on the publication.

Registered corporations	Total scope 1 greenhouse gas emissions (t CO ₂ -e)	Total scope 2 greenhouse gas emissions (t CO ₂ -e)	Total net energy consumption (GJ)
Company A	80 400	59 500	7 111
Company B	2 134 500	14 290	444
Company C ¹	345 000	-	-
Company D	13 000	135 999	2 756 340
Company E ¹	-	-	-

¹ These corporations have applied to have all or part of their greenhouse and energy data withheld from publication under section 25 of the NGER Act.

The Clean Energy Regulator may also accept an application but publish advice that the greenhouse and energy information in question falls within a specified range of values.

Publication of information under the safeguard mechanism

Under the Safeguard Rule, as soon as practicable after a baseline determination, exemption declaration, or multi-year period declaration has been made, the Clean Energy Regulator is required to publish details of that determination or declaration. Details will include:

- the type of determination or declaration
- the facility to which the determination or declaration relates
- the responsible emitter for the facility
- the start and any end date of the determination or declaration
- whether the new facility, significant expansion, inherent emissions variability or initial calculated baseline criteria were satisfied in relation to the making of the determination

- if the determination specifies a baseline emission number—that number
- if a determination or declaration is being varied—the nature of that variation, and
- where a baseline determination has been made for a facility — an outline of the measures to reduce greenhouse gas emissions intensity undertaken, or to be undertaken, at the facility.

Additionally, for each designated large facility under the safeguard mechanism, the Clean Energy Regulator is required to publish:

- the responsible emitter for the facility
- whether or not the facility is a grid-connected electricity generator
- the current baseline emissions number for the facility
- the baseline emissions number for each financial year that the facility is a designated large facility
- the covered emissions of the facility for each financial year that the facility is a designated large facility
- if the facility is a grid-connected electricity generator—the covered emissions for each financial year after 1 July 2016 calculated on the basis that no financial year is a sectoral-baseline financial year
- the net emissions number for each monitoring period that applies to the facility
- the number of prescribed carbon units surrendered under section 22XN(1) of the NGER Act for each monitoring period that applies to the facility
- if a multi-year period declaration applies to the facility—the start date and end date of the declared multi-year period for the facility, and
- the start date and end date of any monitoring period for which an exemption declaration has been made in relation to the facility.

The Clean Energy Regulator is also required to publish:

- in respect of any excess emissions situations
 - » the responsible emitter for the excess emissions situation
 - » when the excess emissions situation started, and
 - » if the excess emissions situation no longer exists—the date when the excess emissions situation ended
- the covered emissions of each grid-connected electricity generator for each financial year after 1 July 2016 calculated on the basis that no financial year is a sectoral-baseline financial year.

Form guidance

Part A: Applicant details

Part A must be completed for all applications.

Part B: Information to be withheld

Part B must be completed for all applications.

Any documents related to Part B questions that you wish to submit with this form must be listed in the Attachments section at the end of the form.

Part B of the application form allows you to provide details concerning what greenhouse and energy information you want the Clean Energy Regulator to withhold from publication.

When providing these details, please consider the link between the information you wish to have withheld from publication and your organisation's trade secret and/or other matter of commercial value.

A trade secret or a matter of commercial value is something which is not generally known or reasonably ascertainable.

Key points to remember are:

- The trade secret or other matter of value must belong to your organisation.
- If you are seeking to protect a trade secret, you will need to demonstrate that publishing of the information would reveal or be able to reveal the trade secret. Types of evidence include worked examples or mathematical relationships illustrating how the trade secret could be derived from the relevant greenhouse and energy information.
- If you are seeking to protect a matter of commercial value, you must demonstrate with clear evidence how the act of the Clean Energy Regulator publishing the information in question would reveal or be able to reveal the matter. Types of evidence include worked examples or mathematical relationships illustrating how the matter of commercial value could be derived from the relevant greenhouse and energy information.
- Moreover, in regard to a matter of commercial value, you must also demonstrate that making the greenhouse and energy information public could reasonably expect to destroy or diminish the value of the matter. Simply revealing the other matter is not enough.

The trade secret or other matter of commercial value must relate to:

- a specific facility
- a technology, or
- a corporate initiative.

These criteria must also relate to your business or undertaking. The term 'corporate initiative' is quite wide-ranging. For example, it would include actions provided for in a business or corporate plan.

In regard to the greenhouse and energy information itself:

- if you are a registered corporation, the information to be withheld must be part of the information published for your controlling corporation's group

- if you are a person required to provide information, the information to be withheld must be part of the information published for the registered corporation's group that your data is included with, and
- if you are a RTC holder, the information to be withheld must be part of the information that will be published for the facility for which you hold the RTC.

For information published under section 24 of the NGER Act

Under the NGER Act the Clean Energy Regulator is obliged to publish aggregated totals for registered corporations. The totals published for the entire corporate group of each corporation are:

- scope 1 greenhouse gas emissions
- scope 2 greenhouse gas emissions, and
- net energy consumption.

Under the NGER Act, the Clean Energy Regulator has the discretion to also publish the same three aggregated totals for each group member and business unit level in a corporation's corporate group. This information would be in addition to the publishing of the aggregated totals for the corporate group as a whole. To date, the Clean Energy Regulator has not published this information.

If the Clean Energy Regulator decides to publish this discretionary information, you may apply to have one or more totals for one or more group members or business units in your registered corporation's group withheld from publication. For example, you may apply to have the scope 1 emissions for just one of your group members withheld, while agreeing to have the other totals for that group member, and all of the totals for the other group members and business units, published.

You must tell us if you have provided the information that you want to have withheld from publication to outside parties. If the information was provided to outside parties, you will need to indicate how the information was made available.

Part C: Details of the trade secret

Only complete Part C if you are applying in order to protect a trade secret. It is compulsory to complete this Part if you are not completing Part D: Details of the other matter.

The purpose of Part C is to provide you with the opportunity to provide evidence in support of your application. The questions in this part are intended to assist you to show that:

- you are seeking to protect a genuine trade secret, and
- the act of the Clean Energy Regulator publishing the greenhouse and energy information that you want withheld would or could reveal the trade secret.

If the application concerns more than one trade secret, you should complete one Part C for each trade secret. This can be done by copying Part C and including one copy for each additional trade secret with the rest of the application. Do not duplicate the remainder of the application for each additional trade secret, only Part C.

Any documents related to Part C questions that are attached to this form must be listed in the Attachments section at the end of the form.

Key issue

The key issue in making a section 25 application to safeguard a trade secret is to demonstrate to the Clean Energy Regulator that the trade secret would or could be revealed if the Clean Energy Regulator publishes the greenhouse and energy information in question. This will require clear evidence such as worked

examples and mathematical relationships. Applicants will be required to demonstrate that there are real and substantial grounds that publishing their information may reveal a trade secret about a specific facility, technology or corporate initiative. Grounds that are speculative, imaginable or theoretical will not be sufficient.

It is crucial to remember that the greenhouse and energy information you wish to have withheld from publication is unlikely to be the same as the trade secret you wish to safeguard. The key issue is that in publishing the greenhouse and energy information your trade secret will or may be revealed.

In assessing your application to safeguard a trade secret, the Clean Energy Regulator will consider whether the matter the application relates to is, in fact, a trade secret and whether the trade secret will or may be revealed as a result of publication.

What is a trade secret?

A trade secret is any formula, pattern, device or composition of information that is used in a person's business or within an organisation, and which gives that person or organisation an opportunity to derive an advantage over other persons who do not know or use it. A trade secret is something that if it was revealed to a rival, would cause harm to the owner of the trade secret.

A trade secret should have the following characteristics:

- it is used or can be used in a trade or business
- it gives the person or persons who possess it an advantage over their competitors
- the owner of the trade secret has limited its dissemination to those who need to know it for the purposes of conducting their business, or to people who have pledged to observe the confidentiality of the trade secret, and
- the disclosure of the trade secret to a competitor would be liable to cause real (or significant) harm to the person in possession of the trade secret.

A matter that has been subject to public testing, reported in trade journals or revealed at seminars or conferences is unlikely to be a trade secret. Moreover, a matter that was originally secret may lose its secrecy over time. A trade secret does not have to be technical in nature. Many valuable trade secrets could be readily understood by a lay person.

Examples of trade secrets:

- recipes or formulae for the manufacture of products, this will require worked examples or mathematical formulae to demonstrate the connection between the publication and the recipe or formulae, and
- a confidential list of the names of customers or confidential financial data.

In deciding whether a matter that you wish to protect is a trade secret, there are two key considerations.

Who knows the matter?

- Is the matter known outside your business or organisation? In particular, do others engaged in the same industry know it?
- Has your organisation taken steps to guard the secrecy of the matter? This would include such measures as limiting access to the information and/or having staff sign confidentiality agreements obligating them to protect the secrecy of the matter.

How valuable is the matter?

- Is the matter valuable to your organisation? For example, does possessing this matter give your organisation a competitive advantage, or would it benefit your competitors if they gained knowledge of this matter?
- Has your organisation gone to a significant effort and/or spent a large amount of money on developing this matter?
- Would it be easy for others who do not know your matter to acquire or duplicate it?
- Can it be used in an identifiable trade?
- Has your matter lost its secrecy over time?

If the matter that is the subject of your application does not satisfy these considerations then it is probably not a trade secret.

Part D: Details of the other matter

Only complete Part D if you are applying in order to protect a matter of commercial value other than a trade secret. It is compulsory to complete this Part if you are not completing Part C: Details of the trade secret.

Any documents related to Part D questions that are attached to the form must be listed in the Attachments section at the end of the form.

The purpose of Part D is to provide you with the opportunity to provide evidence in support of your application. The questions in this part are intended to assist you to show that:

- you are seeking to protect a genuine matter of commercial value
- the act of the Clean Energy Regulator publishing the greenhouse and energy information that you want withheld would or could reveal the matter, and
- if the data is published then this could reasonably be expected to have the effect of destroying or diminishing the commercial value of the matter.

If your application concerns more than one matter of commercial value other than a trade secret, you should complete one Part D for each of these other matters. This can be done by copying Part D and including one copy for each additional other matter with the rest of the application. Do not duplicate the remainder of the application for each additional other matter, only Part D.

Key issues

In assessing your application to safeguard a matter of commercial value, the Clean Energy Regulator will determine whether you have demonstrated that you have a matter of commercial value that may be affected by the publication of greenhouse and energy information.

The key issues in making a section 25 application to safeguard a matter of commercial value are:

- can you demonstrate to the Clean Energy Regulator that the matter of commercial value could be revealed if the Clean Energy Regulator publishes the greenhouse and energy information in question, and
- if the matter were revealed, would this destroy or diminish the commercial value of the matter?

Applicants will be required to demonstrate that there are real and substantial grounds that publishing their information may affect the commercial value about a specific facility, technology or corporate initiative. Grounds that are speculative, imaginable or theoretical will not be sufficient.

What is a matter of commercial value?

Something has 'commercial value' if it is valuable to you for the purposes of carrying on the commercial activity in which you are engaged.

A matter can have commercial value if it is:

- important for the profitability of the owner
- important for the viability of a continuing business operation
- important for the viability of a particular transaction or project, and
- something that would be of value to a competitor.

The investment of time and money in the matter is not in itself sufficient to give a matter commercial value. Something may be expensive to produce but does not necessarily have commercial value.

A matter may lose its commercial value over time. This is particularly so if it is concerned with a one-off commercial transaction and similar activities are not carried out in the future.

Information may be valuable to your organisation because it is essential to your operations. But if this same information is fairly widely disseminated outside of your organisation then it is unlikely to have commercial value.

Examples of matters that usually do have commercial value include:

- a method or procedure developed and employed in a business that enables it to provide a service more quickly than its competitors, or
- a list of customers with their specific requirements.

Information that is common knowledge in the applicant's industry is an example of a matter that is unlikely to have commercial value.

In asking yourself whether your organisation has a matter of commercial value consider the following questions:


- Is the information of value to your organisation in relation to its commercial operations?
- Is the information restricted to your organisation or to a limited number of other parties?
- Would the information be of value to a competitor?

Destroying or diminishing the commercial value of the matter

Even if a matter has commercial value and the publishing of greenhouse and energy information would reveal the matter, this is not enough for the Clean Energy Regulator to accept an application not to publish the data. The Clean Energy Regulator must be satisfied that publishing the greenhouse and energy information could reasonably be expected to destroy or diminish the commercial value of the matter.

If the greenhouse and energy information or the matter is already public knowledge in some form, the act of the Clean Energy Regulator publishing the greenhouse and energy information is unlikely to destroy or diminish the commercial value of the matter. The same would apply if either the greenhouse and energy information or the matter can be revealed using publicly available information when reasonable effort is applied.

In order to make a case that the commercial value of the matter could reasonably be expected to be destroyed or diminished by publication, you need to explain why there is a reasonable expectation of this



happening. This must be more than merely possible, speculative or a conjectural expectation. Real and substantial grounds must exist to support the expectation of the loss of commercial value.

In asking yourself whether the commercial value of the matter would be destroyed or diminished, consider the following questions:

- If the information was disclosed outside of your organisation would this destroy or diminish its commercial value?
- Is it reasonable to expect that if the greenhouse and energy information is published your other information will either lose its commercial value or have it reduced?
- What substantial grounds do you have for this expectation?

Annexure A: Publishing requirements under the safeguard Rule

The Safeguard Rule contains several provisions by which notification or publication is required when a baseline determination or other declaration is made.

Section	Context and publishing requirement
S16(3)(b)	<p>Process for making a reported- emissions baseline determination</p> <p>As soon as practicable after making a <u>reported-emissions baseline determination</u>, the Regulator must [...]</p> <p>Publish the details (see definition) of the determination on its website.</p>
S19(4)(b)	<p>Variation of reported-emissions baseline determination because of reporting error or changes in activities</p> <p>As soon as practicable after <u>varying a baseline determination</u> because of reporting error or changes in activities, the Regulator must [...] publish the details of the variation of the baseline determination on its website.</p>
S20(5)(b)	<p>Variation of transport reported-emissions baseline determination where calculated-emissions baseline determination or benchmark-emissions baseline determination incorporated</p> <p>As soon as practicable after <u>varying a baseline determination</u> where calculated emissions baseline determination or benchmark-emissions baseline determination incorporated, the Regulator must [...] publish the details of the varied determination on its website.</p>
S30(5)(b)	<p>Making of calculated-emissions baseline determination</p> <p>As soon as practicable after making a <u>calculated-emissions baseline determination</u> the Regulator must [...] Publish on its website:</p> <p>The details of the determination; and</p> <p>The information included in an application in compliance with paragraph 27(1)(b)</p>

S38(5)(b)	<p>Making of benchmark-emissions baseline determinations</p> <p>As soon as practicable after making a <u>benchmark-emissions baseline</u> determination, the Regulator must [...] Publish the details of the determination on its website.</p>
S44(5)(b)	<p>Making of production-adjusted baseline determinations</p> <p>As soon as practicable after making a <u>production-adjusted baseline</u> determination, the Regulator must [...] publish the details of the determination on its website.</p>
S51(5)(b)	<p>Variation of baseline determinations</p> <p>As soon as practicable after <u>varying a baseline determination</u>, the Regulator must [...] publish the details of the variation of the baseline determination on its website.</p>
S54(5)(b)	<p>Making of landfill-benchmark baseline determination</p> <p>As soon as practicable after making a <u>landfill-benchmark baseline determination</u>, the Regulator must [...] publish the details of the determination on its website.</p>
S56(6)(b)	<p>Variation relating to changes in carbon dioxide equivalence</p> <p>As soon as practicable after <u>varying a baseline determination due to changes in carbon dioxide equivalence</u>, the Regulator must [...] publish the details of the determination on its website.</p>
S57(4)(b)	<p>Remaking of baseline determinations because of error</p> <p>As soon as practicable after <u>remaking or refusing to make a baseline determination due to error</u>, the Regulator must [...] publish the details of any remade baseline determination on its website.</p>
S62(4)(b)	<p>Issue of exemption declaration</p> <p>As soon as practicable after <u>making an exemption declaration</u>, the Regulator must [...] publish the details of the declaration on its website.</p>

S63(4)(b)	<p>Revocation of exemption declaration because of false or misleading information</p> <p>As soon as practicable after <u>revoking an exemption declaration because of false or misleading information</u>, the Regulator must [...] publish the details of the revocation of the exemption declaration on its website.</p>
S67(5)(b)	<p>Making of multi-year period declaration</p> <p>As soon as practicable after <u>making a multi-year period declaration</u>, the Regulator must [...] publish the details of the declaration on its website.</p>
S68(4)(b)	<p>Variation or revocation of multi-year period declaration on request</p> <p>As soon as practicable after <u>varying or revoking a multi-year period declaration</u>, the Regulator must [...] publish the details of the variation or revocation of the multi-year period declaration on its website.</p>
S69(4)(b)	<p>Revocation of multi-year period declaration because of false or misleading information</p> <p>As soon as practicable after <u>revoking a multi-year period declaration due to false or misleading information</u>, the Regulator must [...] publish the details of the revocation of the multi-year period declaration on its website.</p>
S72	<p>A list of information relating to be published and kept up-to-date on the Regulator’s website.</p> <p>For full details see Annexure B.</p>

Definitions

“Details” in relation to a determination or declaration under the Safeguard Rule, includes:

- (a) the type of determination or declaration
- (b) the facility to which the determination or declaration relates
- (c) the responsible emitter for the facility to which the determination or declaration relates
- (d) the start and any end date of the determination or declaration
- (e) whether the new facility criteria, significant expansion criteria, inherent emissions variability criteria or initial calculated baseline were satisfied in relation to the making of the determination
- (f) if the determination specifies a baseline emission number—that number, and
- (g) if a determination or declaration is being varied—the nature of that variation.

Annexure B: Information that must be published under section 72 of the Safeguard Rule

1) *Designated large facilities*

- the responsible emitter for the facility
- whether or not the facility is a grid-connected electricity generator
- the current baseline emissions number for the facility
- the baseline emissions number for each financial year that the facility is a designated large facility
- the covered emissions of the facility for each financial year that the facility is a designated large facility
- if the facility is a grid-connected electricity generator—the covered emissions for each financial year after 1 July 2016 calculated on the basis that no financial year is a sectoral-baseline financial year
- the net emissions number for each monitoring period that applies to the facility
- the number of prescribed carbon units surrendered under section 22XN(1) of the Act for each monitoring period that applies to the facility
- if a multi-year period declaration applies to the facility—the start date and end date of the declared multi-year period for the facility, and
- the start date and end date of any monitoring period for which an exemption declaration has been made in relation to the facility.

2) *Excess emissions situations*

- the responsible emitter for the excess emissions situation
- when the excess emissions situation started, and
- if the excess emissions situation no longer exists—the date when the excess emissions situation ended.

3) *Covered emissions*

- The covered emissions of each grid-connected electricity generator for each financial year after 1 July 2016 calculated on the basis that no financial year is a sectoral-baseline financial year.