

## Chapter 32 – Failure to review and secure reapproval of the scheme

### The original DFP approval of the NI RHI scheme

32.1 As outlined in chapter 11 of this Report, the original 2012 DFP<sup>1843</sup> approval of the NI non-domestic RHI scheme was given on the basis that arrangements were put in place for scheduled reviews to allow the progress of the scheme to be monitored and noted, based on what had been outlined in the DETI business case that a first scheme review was scheduled to be carried out by DETI in 2014. The business case had said that any changes or revisions arising from the review would then be implemented by 2015.<sup>1844</sup> The DFP approval also stated that the approval was time limited to 31 March 2015 because, although the scheme was envisaged to be open to new applications to 2020, HMT funding had only been secured up to 31 March 2015. Consequently, any decision to continue the scheme beyond 2015 would require further separate approval.<sup>1845</sup>

### Realisation that reapproval had been missed and the “fig-leaf” review

32.2 As discussed earlier in this Report, the day before the 3 June 2015 RHI-specific meeting of senior officials, which arose out of the sharp exchange of views over RHI at the SMT meeting on 29 May 2015, Mr Cooper looked again at the 2012 DFP RHI approval.<sup>1846</sup> He then realised that the need to seek and obtain reapproval from DFP for the scheme to operate beyond 31 March 2015 had not happened, and therefore there would be irregularity in expenditure from that date until the approval problem was resolved.

### The “fig leaf” review

32.3 Mr Cooper told the Inquiry that shortly after that discovery, during the 3 June meeting of senior DETI officials to discuss RHI, there was also discussion about why the review of the scheme that had been promised would commence in January 2014 had not taken place.<sup>1847</sup>

32.4 Mr Cooper told the Inquiry that he believed that “everyone knew that there hadn’t been a review done”.<sup>1848</sup> He said that, at the 3 June meeting, Mr Wightman agreed they had not done such a review but noted that there had been a consultation in 2013 which could be portrayed as a review.<sup>1849</sup> Mr Cooper accepted in his evidence to the Inquiry that the suggestion that the 2013 Phase 2 public consultation constituted the review of the non-domestic RHI scheme in relation to which assurances had been given in both the casework and business case papers was a “fig leaf”.<sup>1850</sup> He said that no-one spoke up to say that such a misrepresentation was wrong: “There was no agreement to it, but there was no demurring.”<sup>1851</sup> Mr Cooper told the Inquiry that the general tone of the 3 and 17 June meetings was “We’re not in a great place here”... “We need to put our best foot forward...”<sup>1852</sup>

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1843 DFE-171222 to DFE-171223

1844 DFE-82703

1845 DOF-03253 to DOF-03254

1846 DFE-10097; TRA-15769; TRA-15808; DFE-278096

1847 TRA-15827 to TRA-15828; WIT-10588

1848 TRA-15861; TRA-15867

1849 TRA-15865 to TRA-15866

1850 TRA-15864

1851 TRA-15864 to TRA-15865

1852 TRA-15867 to TRA-15868

- 32.5 Dr McCormick said in written evidence to the Inquiry that he has no recollection of this suggestion being raised at the 3 June meeting.<sup>1853</sup>
- 32.6 Mr Wightman had very little recollection of this meeting but accepted in his written evidence to the Inquiry that, without any intention to mislead, he may have highlighted that a Phase 2 review had taken place in 2013.<sup>1854</sup>
- 32.7 In a narrative he prepared to be given to DFP, and which he emailed to Ms Brankin on the following day, 4 June 2015, he referred to the April 2012 DFP approval conditions and said: “In October 2013, DETI commenced a Phase 2 review of the domestic and non-domestic RHI schemes and completed a public consultation in October 2013”. He did go on to say in the same paragraph: “Completion of the Phase 2 review for the non-domestic scheme and the Cost Control Proposals was deferred to 2015 until after the domestic RHI scheme was fully implemented and an effective marketing campaign had been completed.”<sup>1855</sup>
- 32.8 Therefore, the 2013 consultation and ongoing policy development work was being referred to in terms of “review”. Mr Wightman, having had an opportunity to consider the documents, said in his written evidence to the Inquiry:<sup>1856</sup>
- “I acknowledge that through the documentation provided by the Inquiry, it is evident that I was mistakenly suggesting that the Phase 2 Review was the ‘review’ referred to in the DFP approval letter.”
- 32.9 A similar but more detailed briefing paper headed ‘Renewable Heat Incentive – Business Case Addendum’ prepared by Mr Wightman on 11 June 2015 (not to be confused with the later October 2015 Business Case Addendum), for discussion with DFP, in an attempt to secure a further 12-months approval under the heading ‘Review of the RHI (RHI Phase 2)’ contained the statement that:
- “In line with the Business Case approval, officials commenced a Phase 2 review of the domestic and non-domestic RHI schemes in 2013...”<sup>1857</sup>
- In the same document Mr Wightman confirmed that the scheme continued to provide value for money.<sup>1858</sup>
- 32.10 Subsequent to the 3 June stocktake meeting and a meeting with Ms Scott of DFP on 12 June, Mr Cooper sent Ms Scott a memo on 1 July updating her on approvals in relation to the non-domestic RHI scheme which included the sentence: “The Department undertook work on a review of the non-domestic RHI with proposals being subject to public consultation in October 2013.”<sup>1859</sup> The Inquiry notes that, on 30 September, Mr Cooper sent an email to Mr Mills in which he had recorded that finance colleagues and DFP Supply had indicated that they would need information about the review “that was carried out in I believe 2014.”<sup>1860</sup>
- 32.11 Further erroneous references to the ‘review’ continued, including in the October 2015 final version of the actual “Business Case Addendum for the NI Renewable Heat Incentive” submitted

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1853 WIT-26436

1854 WIT-17876

1855 DFE-146513 to DFE-146514

1856 WIT-17876

1857 DFE-146558 to DFE-146564

1858 DFE-146560

1859 WIT-30268 to WIT-30270

1860 DFE-147640

- to DFP.<sup>1861</sup> Paragraph 2.10 stated: “The Department undertook its first review of the RHI in 2013”.
- 32.12 During the Inquiry’s representations process Mr Cooper made a series of representations to the Inquiry in respect of the issue of how the promised review of the NI RHI scheme had been characterised. He emphasised that relevant officials were verbally made aware that the actual review, when properly described, had not taken place. The Inquiry accepts that the original “fig leaf” suggestion had not emanated from Mr Cooper but from Mr Wightman and has given careful consideration to Mr Cooper’s representations.
- 32.13 The Inquiry acknowledges that Angela Miller of DFP provided written evidence to the Inquiry that at the meetings between DETI and DFP of 3 and 12 June, where RHI had been discussed, and which she had attended with her line manager, Michelle Scott, Mr Cooper “advised that a review of the scheme, which was a condition of the DFP approval, had not been carried out.”<sup>1862</sup>
- 32.14 In a reference to a telephone call that she received from Dr Crawford in the summer of 2015, Ms Scott gave written evidence to the Inquiry that: “At that point, I recall the lack of review and resulting lack of assurance on value for money being my greatest concern.”<sup>1863</sup>
- 32.15 However, in such circumstances, the Inquiry finds it very difficult to understand why the representation that the 2013 public consultation had constituted the promised review of the non-domestic RHI scheme continued to feature, without amendment or clarification, in subsequent important documents which constituted the objective record.
- 32.16 These included paragraph 4 of the memo of 1 July 2015 referred to above from Trevor Cooper to Ms Scott concerning approvals, which stated “The Department undertook work on a review of the non-domestic RHI with proposals being subject to public consultation”; the DETI covering letter forwarding the RHI Business Case Addendum to Michelle Scott of 27 October 2015,<sup>1864</sup> which stated at paragraph 9 “A Phase 2 Review of the RHI was completed in 2013”; and the drafts and actual RHI Business Case Addendum itself which contained the assertion that “the Department undertook its first review of the RHI in 2013 to improve scheme performance.”<sup>1865</sup>
- 32.17 When it was put to Mr Cooper that such inaccurate communications seemed to be acceptable his response was “It’s a very difficult one to answer, because there’s actually no defence.”<sup>1866</sup>

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1861 DFE-149798

1862 WIT-41718

1863 WIT-43027

1864 WIT-30801 to WIT-30802

1865 DFE-149798

1866 TRA-15863

## Findings

- 186.** The Inquiry is satisfied that the public consultation in 2013 was not, and could not reasonably have been, considered to be the review referred to in the DFP approval of April 2012.
- 187.** In a number of DETI policy papers relating to the RHI scheme during 2015, the RHI Phase 2 proposals and the linked 2013 consultation were represented as constituting the review of the non-domestic RHI scheme, a review that was a condition for DFP approval of the scheme in 2012. To have employed what Mr Cooper characterised as this “fig leaf”, suggesting there had been compliance with the DFP condition, was incorrect and potentially misleading.
- 188.** During the representations process, carried out in advance of the publication of this Report, witnesses have said to the Inquiry that the evidence the Inquiry received indicated that no one was actually misled by the fact that there was an erroneous characterisation of the 2013 RHI consultation process as an RHI scheme review. Whilst the Inquiry accepts that this may be correct, the Inquiry considers there to be an important obligation on civil servants to ensure that the contents of documents they author are entirely accurate and adhere to standards of candour which are appropriate to the circumstances.

## Making the Minister aware that the “ball had been dropped”

- 32.18 As mentioned earlier in this Report, on 8 June 2015 an Issues Meeting took place at which Minister Bell was briefed by Dr McCormick and others about, amongst a number of issues, the NI RHI scheme. Mr Cairns, Minister Bell’s SpAd, was present and told the Inquiry that it was at this meeting that Dr McCormick admitted that “We’ve dropped the ball” by failing to obtain DFP reapproval for the scheme in March 2015.<sup>1867</sup>
- 32.19 Unfortunately, no detailed minute, note or record of this meeting seems to have been made. As a result, it remains unclear as to whether the Minister was fully briefed about the decision to discard the cost control which had been the subject of public consultation in 2013 and to “park” 16 of the 18 topics originally dealt with in the draft consultation response, although the contemporaneous evidence would suggest that this level of detail was not addressed in the briefing at the meeting. In the course of giving oral evidence to the Inquiry, Mr Wightman accepted that the issue of the missed reapproval could have been the subject of an earlier written submission, although he pointed out that it was contained in the ministerial submission of 8 July.<sup>1868</sup>
- 32.20 According to Dr McCormick’s written evidence, and as outlined elsewhere in the Report, the Minister was told at the 8 June Issues Meeting that the projected spend for 2015-16 had risen to £23 million, that the planned review of tariff had not taken place and that urgent action was now needed. The manner in which the absence of a tiered tariff encouraged excessive heat production and resulting payments was still not clearly understood and, accordingly, was not discussed.<sup>1869</sup> It appears that, at this stage, despite the efforts of Janette O’Hagan, the ‘perverse incentive’ was still not clearly understood either.
- 32.21 Mr Bell does not accept that he was made aware of such information, although he did accept that he had been informed that RHI spend was already projected at £22 million in his first-day brief as a Minister in May 2015.<sup>1870</sup> The Inquiry has also considered the email from Mr Stewart to Mr Mills on 8 June, which included the following passage:
- “On Renewable Heat, the Minister noted the position and asked to be kept informed on the progress on the three strands of remedial action; i.e. securing budget cover (or addressing the consequences of not securing it); seeking approval from DFP; and legislation to pursue tariff changes/controls.”<sup>1871</sup>
- 32.22 It can be seen, therefore, that one of the necessary workstreams which was identified for action from early June involved seeking approval from DFP for the scheme. An email from Ms Thompson, dated 11 June 2015, to Mr Wightman and Mr Hughes reminded them of the need to secure renewed DFP approval for the non-domestic scheme before 31 March 2015.<sup>1872</sup>
- 32.23 On the same day, in preparation for a meeting with DFP officials on 12 June, Mr Wightman forwarded a paper that he had prepared on the RHI scheme to Mr Cooper and Mr McFarlane at DETI’s Finance Division, copying in Mr Mills, Mr Stewart and Mr Hughes.<sup>1873</sup> That paper also

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1867 TRA-12649 to TRA-12650

1868 TRA-10645 to TRA-10651

1869 WIT-10515

1870 TRA-12265 to TRA-12267; DFE-386035

1871 WIT-27553

1872 DFE-349875

1873 DFE-146558 to DFE-146564

highlighted the need to secure DFP approval to extend the scheme to the year 2015-16, but said the handover material had not referred to the need for such approval.<sup>1874</sup> It is not without significance that the briefing note still maintained that the scheme continued to provide value for money in terms of Government funding.<sup>1875</sup> As noted further below, it seems that this was a contention which had to be advanced by DETI in order to seek to secure the further DFP approval which was required to regularise spending on the scheme. The note also stated that “a review of the existing Non-Domestic tariff is ongoing” and recorded the intention to introduce a tiered tariff in October 2015. Reference was made to the need to obtain DFP approval for an increased AME profile, given forecast expenditure in 2015-16 was now twice that set out in the last forecast of November 2014. It also pointed out that “Both RHI schemes are demand led.”<sup>1876</sup> There was no suggestion of a potential impact on the DEL budget in the note.

32.24 As also noted previously in this Report, in an email the following day, 12 June 2015, to Mr Murphy (DETI’s senior principal economist and head of ASU) Mr Cooper commented that the paper drafted by Mr Wightman showed “a fair bit of naivety around the issues.” Referring to Energy Efficiency Branch, he went on to say:

“There is no self-awareness that the reason they may be delivering greater renewables than GB counterparts is the simple fact that they may be overcompensating so it’s not actually over performing indeed potentially quite the contrary.”<sup>1877</sup>

32.25 An issue considered by the Inquiry and addressed further below is whether the concerns or doubts expressed in this email were subsequently conveyed to DFP, adequately or at all, in the Business Case Addendum which was submitted in October 2015 in an attempt to secure reapproval for the NI RHI scheme.

32.26 At a further meeting of senior officials in DETI in respect of RHI, held on 17 June 2015 and attended by Dr McCormick, Mr Stewart, Mr Cooper, Mr Murphy, Mr Rooney, Mr Mills and Mr Wightman it was agreed that action was needed to achieve both prospective and retrospective DFP approval, to clarify the budget provision with DECC and DFP and to produce a revised business case urgently to support legislative changes to improve value for money.<sup>1878</sup> The Inquiry has been told by a number of witnesses that these actions were linked, especially because DFP was unlikely to grant a further approval unless the legislative changes required to improve value for money were in prospect. A conundrum then faced by DETI, however, was how to present the NI RHI scheme (for the purposes of securing retrospective approval) as having provided value for money previously, at the same time as bringing forward proposals to improve the value for money the scheme was going to provide from then on.

32.27 Although it had already been discussed with DFP informally, on 1 July Mr Cooper officially notified Ms Scott at DFP of the failure to obtain DFP approval to continue the NI RHI scheme beyond 31 March 2015 in accordance with the original April 2012 DFP approval.<sup>1879</sup> He explained that the non-domestic RHI scheme uptake had taken off and that forecast expenditure for both schemes (at that point) had reached £23 million for 2015-16 (roughly double the previous forecast made in November 2014). He explained that the further funding was required to

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1874 DFE-146559

1875 DFE-146560

1876 DFE-146561 to DFE-146562

1877 DFE-146565

1878 DFE-146865 to DFE-146866

1879 WIT-30268 to WIT-30270

meet unavoidable commitments and that the rapid increase in required funding was due to the Northern Ireland poultry industry adopting biomass heating technology for its chicken houses. He informed her that the Department was writing to DECC to get clarity on funding and that they were considering the introduction of cost control measures.<sup>1880</sup> As previously discussed in this Report, the formal memo did not ask DFP to engage with HMT.

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1880 WIT-30269 to WIT-30270

## Findings

- 189.** The Inquiry finds that Minister Bell was aware from 8 June 2015 that the “ball had been dropped” (Mr Cairns’ description of the message conveyed by Dr McCormick in relation to the RHI scheme at the meeting on that date) in that: approval for the scheme had lapsed; there was a significant overspend of the budget, an overspend that had increased by £1 million in the short time since his first-day briefing; and there was a need for urgent legislative control. Once again, in the absence of any minute or record of the meeting of 8 June, the Inquiry had to resolve an evidential conflict. However, given the content of the first-day brief, the contemporary email from Mr Stewart to Mr Mills of 8 June (which is consistent with Dr McCormick’s evidence), as well as the seriousness of the situation and the presence of both Minister and Permanent Secretary, the Inquiry cannot conceive of any reason for suppression of the facts. In the circumstances, it prefers the evidence of Dr McCormick that the Minister was briefed.
- 190.** Despite his observations to some colleagues that the overspend may have been due to the RHI scheme providing overcompensation, the Inquiry has not found any documentary evidence of Mr Cooper formally escalating that legitimate and ultimately correct concern.