RHI SUBMISSIONS

SUMMARY

1. There are two main purposes of a public inquiry: (i) ascertaining the facts and (ii) learning the lessons for the future.[i] Clark LJ considered that:

> *"In the vast majority of cases, the second [purpose] is a very important ingredient .....[ii] because it is to be hoped and indeed expected that the detailed examination of the causes of a particular casualty will yield valuable information from which lessons can be learnt.* [Emphasis added]

2. In this case there has been considerable loss to the public purse. The "truth" of what happened must be ascertained. Nevertheless, we submit the secondary focus of this inquiry is just as important: to learn lessons for the future[iii] so as to enable the Inquiry to "*... fram[e] ... recommendations to give effect to those lessons*"[iv] and avoid these mistakes from happening again.

3. We submit many witnesses in this Inquiry, regrettably, have tried to focus on *individuals'* errors rather than on *systemic* failings. It has seemed like a game of "pass the parcel" – blaming those who were left grappling with the problems when they were discovered, rather than considering how the problems were created.

4. Clearly individuals made errors. However, focussing on these draws attention away from *systemic* failures - from which more useful "lessons may be learnt. Secondly, the criticisms have often made with the "benefit of hindsight": the oversights and omissions (which may seen obvious now) did not appear obvious then. If lessons are to be learned, surely we need to understand what prevented those individuals from understanding the RHI issues in time?

5. The primary role of our submissions is to "defend" Mr John Mills ("**JM**") from criticisms made during his time as Head of Energy Division. However, we are mindful of the wider purpose of the Inquiry; therefore, where possible, we have tried to take a constructive approach and suggest where "lessons may be learned" based on his evidence and experience.

6. For ease of reference, we have tried to set our analysis of his position in chronological order and by reference to the major "themes" which emerged during the hearings.

7. One final point concerns the reliability of oral evidence given during the Inquiry. It must have been extremely stressful for all concerned, to have had to explain and justify their actions, in the full glare of television cameras, and with the concern of their careers being tarnished or ruined.

8. Therefore, we would urge the Inquiry to remember the advice given in *Barclays Bank v Christie Owen & Davies (t/a Christie & Co)*[v]:

> *" ... in any case involving such a lapse of time as has occurred in the present case there is a heightened risk that witnesses may be honest but mistaken about what took place, and may give evidence about what they would like to think happened rather than what they can truly recollect. These factors make the appraisal of their evidence more difficult. At the end of the day, the best guide to the truth is often to be found not so much in the demeanour of the witnesses, or even concessions made in cross-examination, but in the contemporary documents and in an objective appraisal of the probabilities overall."*[vi]

9. For these reasons, the Trial Judge endorsed the comments of Leggatt J.[vii] who considered - not only the fallibility of memory - but also the difficulties to which the process of civil litigation gives rise:

> *"In the light of these considerations, the best approach for a judge to adopt in the trial [of a commercial case] is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."*[viii]

FUNDAMENTAL PLAWS IN THE RHI LEGISLATION

10. Our primary submission is that the non-domestic RHI scheme ("**the RHI scheme**") was inherently flawed and could not be "fixed quickly". This was the situation JM inherited in 2014.

11. The equivalent English scheme ("**the GB scheme**") had been drafted using the skills and resources of a much larger civil service staff and relying upon specialist energy, economic and accountancy advice.

12. We accept any devolved administration is entitled to deviate from a GB scheme and to consider whether regional "incentives" were more appropriate.

13. However, if a decision was made to deviate from a "tried and tested" scheme, we submit the relevant Minister, their SPAD, and civil servants should have (i) identified all risks associated with that "deviation" (ii) assessed whether the "benefits" of the deviation were outweighed by the risks (iii) devised a methodology to enable an assessment (over time) as to whether the "deviation" was achieving its aims (iv) set a timetable(s) for such an assessment(s) and, lastly, (v) ensured the availability of funding over the lifetime of the scheme.

14. We consider the relevant personnel in Energy Division (David Sterling, David Thomson, Fiona Hepper, Joanne McCutcheon and Peter Hutchinson) ("**the officials**" or individually "**DS**", "**DT**" "**FH**" "**JMcC**" "**PH**") brought in appropriate "specialist" expertise (CEPA/AEA, Arthur Cox and Ofgem)[ix] to help them consider these issues. CEPA/AEA represented they had an "*….in-depth knowledge of renewable support mechanisms in the United Kingdom and Ireland, combined with our experience of advising DECC and the CCC on the UK RHI ….".* CEPA promised to "*…. deliver this interesting and challenging project to the highest possible standard".*[x]

15. Energy Division also sought guidance from Mr Sam Connolly, DETI's economist. It has been accepted that the Departmental Economist worked closely with Energy Division and CEPA when the legislation was being formulated. [xi]

16. However, neither the Minister or her SPAD, nor any of the officials or specialist advisers identified fundamental flaws in the RHI scheme including:

    (i) CEPA "*missed the point*" that the RHI scheme inadvertently and unintentionally provided an incentive to maximise boiler usage;[xii]

    (ii) The economist's advice wrongly assured the officials that the scheme provided "*value for money*";[xiii]

    (iii) Despite giving this information, we now know that the economists were not engaged in an *evaluation* process.[xiv]

    (iv) Also, despite their specialism they profess not to have had the skills/knowledge to "assess" the information provided by CEPA/AEA;[xv]

    (v) These "admissions" were not made at the relevant time.[xvi] Therefore, the officials' assessment of the scheme's "value for money" was fundamentally flawed;

    (vi) The lack of tiering meant that there were no controls over participants' rates of return; thus there were no "limits" on their entitlement to subsidies;[xvii]

    (vii) The RHI scheme could not be suspended or closed "quickly". The legislation could only be changed by *amendment* of the Regulations. Any amendments required the "affirmative resolution" of the Assembly" (thus causing delay);[xviii]

(viii) Not only did the suspension of the Scheme require amendments to the Regulations, but there were also legal constraints on the power of the Department to make them e.g. the doctrine of "legitimate expectation", the requirement to provide "consultation" etc.;[xix]

(ix) However, the false assumption that the RHI scheme *could* be closed quickly, underpinned the "*basis for assurance at the point of approval in 2012*".[xx]

17. DECC's revisions to the GB scheme made express provision for budgetary control. We submit the officials and specialists should have examined the GB legislation and understood the importance of this revision.[xxi]

18. It should also have been an imperative to include costs controls when the Regulations were being drafted – particularly if there was inadequate clarity about the source of funding (see further below). This was not done. Nor did they include the suspension powers i.e. the "emergency break" which DECC put in place whilst digression was being put in place.

19. Consequently, we agree with Mr McMurray's ("**SMcM**") conclusion that the "…. *[RHI] Scheme was **uncontrollable**….*" [xxii] from its inception, until the tier tariff and cap were introduced on 18th November 2015. Even then, full control awaited powers to close the scheme which were introduced in February 2016.

20. Similarly, SMcM is critical about CEPA and the officials' understanding of possible cost controls, which he claims was evident from discussions in 2013 regarding "trigger points".[xxiii] In his opinion, even if the RHI scheme could have been suspended when 90% of its budget had been committed in any one year,[xxiv] the mechanism discussed would still have required the scheme to have automatically reopened on 1st April in the next financial year. This would have provided insufficient time for officials to carry out a review of the scheme, etc.[xxv] and bring forward remedial action.

21. This is why, he argues, "trigger points" were never used as a mechanism of control in the GB scheme and was quickly replaced by the "*more robust control in the form of digression*".[xxvi]

TIERING

22. We also agree with SMcM's assessment that the absence of tiering in the initial tariff (for small to medium biomass) was another "*fundamental flaw*".[xxvii]

23. It created a "built in" incentive to *maximise* boiler use, which in turn *maximised* payments - and all at a price which rewarded "burning fuel". We submit this fundamental flaw meant that the laudable ambition of providing a "regional incentive" converted it into one which operated "perversely".[xxviii] (This was also compounded by weaknesses in OFGEM's application as to what constituted a "single system").

24. The inclusion of tiering, from the outset, could also have controlled participants' rates of return and thus limited over-compensation.[xxix] Tiering was needed as the "key control" to protect the scheme from "gaming" or abuse.[xxx] Its absence meant there were no safeguards built into the system[xxxi] and no "*upper limit to prevent participants from simply producing heat to generate further subsidy payments*".[xxxii]

25. CEPA did not note that the revised tariff took the reimbursement level above the cost of the fuel, nor was the error picked up in the Department at any time.[xxxiii] There were no "fail-safes" built into the Regulations or the tariff design, therefore changes could only be brought about by "*new actions or interventions by officials.*"[xxxiv]

26. If it was difficult to make accurate assumptions about the use of fuel, boilers sizes etc., we submit nothing should have been left "to chance". Safeguards should have been built into the legislation.

27. Any "assumptions" underpinning the RHI scheme should also have been rigorously examined and/or re-assessed. However (and by way of one example only) SMcM has highlighted how the "*supporting spreadsheet providing the detailed calculations of the medium biomass tariff was not (even) included in the supporting information, although it was provided for other tariffs*".[xxxv]

28. These basic errors were not identified, by the officials in Energy Division or DETI and DFP, when the necessary calculations for the scheme were being considered. A spreadsheet of the type could have made it "*possible to investigate a wider range of scenarios*".[xxxvi]

29. Similarly, even after the RHI scheme was in operation, neither the officials or Ofgem noted the divergence from the assumed load factors/size of boilers which "*would have been apparent from <u>as early as 2013</u>…*"[xxxvii]

30. The significance of this information is that this made the tariff "*more financially rewarding than assumed in the Business Case*".[xxxviii] The same error in monitoring the scheme was made in relation to the "*similar picture in respect of the expected usage of boilers…*".[xxxix]

31. We highlight these matters and believe they are critical because:

    (i) <u>Any</u> scheme (particularly those based on "assumptions" or which is a "*fledging scheme[s]*"[xl]) should be introduced with some means of (a) monitoring it, and (re)assessing the assumptions on which the schemes was based or funded;

    (ii) Any Risk Register should include and identify the nature of those risks;

    (iii) The Risk Register should be duly updated and <u>followed</u>;

    (iv) There should be some guidance and/or objective criteria laid down to enable a critical assessment of the scheme during its operation.

    (v) The means of monitoring these scheme (its risks or assumptions) should have been devised and understood for both staff currently working in any Department (i.e. who were then familiar with the scheme) as well as for <u>new</u> staff (i.e. employees taking over posts who would <u>not</u> be as familiar).

32. This is particularly important we submit, in the Civil Service, where there appear to be <u>regular</u> changes in personnel. New staff have to have some means of understanding what they have to do, why, and in what timescales.

INFORMATION TO INCOMING STAFF

33. We submit a fundamental error within Energy Division was that the "outgoing officials" failed to keep adequate records to provide "incoming staff" with sufficient guidance concerning risks in the RHI scheme.

34. For example, we now know that the RHI "risk register" identified the risk of an incorrectly set tariff,[xli] and that PH and FMcC were to have reviewed this information on a "quarterly basis". The outcome of that review was also to have been *"tabled for review at the next … meeting"*. It appears that the RHI risk register was never updated and there is only one version of the document.[xlii]

35. As PH/JMcC had been involved in the preparation of the Business Case etc., they had intimate knowledge of the assumptions underpinning the legislation – and particularly of the rationale behind and rate of the tariff. We submit they should have been particularly vigilant when monitoring and checking the early data, available to them, and/or to have advised their successors of any (perceived) risks.

36. However, there is **no** note that PH and JMcC ever meet to discuss any new information (either on a quarterly basis or at all) **or** that they analysed it.

37. Secondly, the officials needed to devise appropriate procedures to "test the assumptions" which they had relied on.[xliii] This required forward planning: e.g. when should reviews to be held; what data should be examined; what was the basis of their original measurement(s); how would (anyone) be able determine if the scheme was "delivering" on its targets, etc.

38. We submit outgoing officials failed to hold *or plan for* reviews. Just as importantly) they failed to alert incoming staff to the need for/importance of those reviews and what needed to be reviewed. There were merely some less than clear references to a need for a review and the DFP approval letter - neither of which were specifically brought to JM's attention.

39. When JM joined the Division, the course of prioritising the domestic scheme had already been set; the domestic business case had, consequently, pushed back the need for a non-domestic review to 2015; Divisional documentation such as business plans, risk registers and job plans did not mention heightened risks (e.g. funding) and no specific warnings about (e.g tiering) or the concerns voiced by Ms O'Hagan had been given to JM. The records of JM's Divisional meetings, in 2014, shows that the only RHI issue described as "urgent" was the clearance of the domestic business case.[xliv] In January 2014 in response for a request for urgent issues, JM received a reply that there was "nothing" on the non-domestic RHI side.

40. We submit that, whilst JM was aware, in general terms, of the need to review the non-domestic RHI (or, indeed, any scheme), he was not specifically aware of the need for a specific tariff review of the medium biomass tariff in January 2014. This was a matter requiring detailed planning and guidance and needed to be in place long before January 2014. JM accepts that there were indications of the need for such a review not least, in the records of Divisional Meetings from May/June 2014. However, Energy Division always had a number of ongoing reviews in progress and the questions of RHI reviews was particularly confusing with possible reviews including, a general review, a review of the

biomass tariff, a review of the Phase 2 technologies and any review required for DFP re-approval.

41. JM now accepts that information was available as early as 2013 which might have indicated problems with the RHI scheme. His knowledge arises as a result of the Inquiry. At the time he did not realise there were problems of over-incentivisation, let alone fundamental design flaws, he had no reason to go looking for them as he (wrongly) believed the scheme was underperforming due to the fact that the scheme was underspending against the HMT budget; and he did not know about the information available as there were no relevant evaluation criteria apart from budgetary spend.

42. Similarly, although the Risk Register for the domestic scheme was referred to in PH's handover note no reference was made to the Risk Register for the non-domestic scheme.[xlv]

43. Lastly, the risks assessed did not identify the risks of "fraud" (or "gaming") and/or the how the RHI scheme "diverged significantly" from the GB scheme.[xlvi]

44. Thus, whilst we accept that a review should have been conducted during 2014 to fulfil the terms of the DFP approval letter we submit (i) the importance of the review was not highlighted and (ii) the methodology of the review had not been considered or devised. This was due to poor planning and management within Energy Division before JM took over control.

45. JM's evidence was that many of these errors arose as a result of the non-domestic RHI scheme having been introduced and formulated without the benefit of formal project management.[xlvii] SMcM agreed.[xlviii]

JM's APPOINTMENT TO ENERGY DIVISION

46. We submit many of these "time bombs" were already in place by the time JM was appointed as Head of Energy Division.

47. To add to these difficulties, prior to his move JM had no experience of energy issues or of any of the relevant legislation.[xlix] Despite this, he received no formal training in "renewables" or in any other aspects of the Energy Division job.[l] His learning curve was "on the job",[li] the "*common Civil Service approach."* It will be for the Inquiry to consider whether training should be required in an area of such complexity when (i) there were so few staff and (ii) so many of the senior staff were leaving/ had left their posts.

48. JM explained his personal circumstances to DS[lii] before joining Energy Division. He had been "reassured" by DS that the job could be done in normal hours and "*less hours than Fiona actually did it in*".[liii] JM has not relied upon these "personal circumstances" as an "excuse" for any failings, but explained that he needed a "work/life" balance because of his own personal circumstances. As a matter of fact, we now know that there are 4 persons in post, at the same Grade as JM. Therefore we submit, DS's insouciance about the demands of the post was unwarranted and betrayed a lack of understanding of the issues/ resources in the department and what it was able to do, within those constraints. This was compounded by the number of commitments which had been entered into on

Energy Division's behalf (extension of the gas network, reform of the SEM, a review of electricity tariffs, Electricity Market Reform, introduction of a small scale renewables scheme, an energy Bill, NIRO reviews, smart metering, a mid-term review of the Strategic Energy Framework, implementation of the Energy Efficiency Directive, a major study on the level of renewable electricity, action on security of supply, and others). Even before JM arrived FH (who had adopted a working pattern beyond what could be achieved in any "normal" hours) had had to resile from some of these commitments (energy bill) and some of the commitments are still not fulfilled (review of SEF for example). JM pulled back from some of these commitment (small scale FIT, for example) during his period in charge, possibly saving considerable expense for energy consumers."

49. The reassurance about the demands of the post was also expressly contradicted by the 2014/2015 and 2015/2016 performance appraisals[liv] which described the Head of Energy Division as, potentially, one of the most challenging Grade 5 policy posts. The performance reviews noted that "…. *The intrinsic difficulties of these and other tasks were compounded by a policy and political environment that were always difficult and, at times, openly hostile.*"[lv]

50. DS, FH and JMcC should have discussed the workload within the Division, and of the demands facing the Division *before* JM commenced his employment there. For example, whether there were sufficient resources to introduce the domestic RHI scheme, to implement the "Gas to the West" scheme, to ensure security of energy supply, as well as the multi-dimensional policy challenges including energy market reform, ISEM and "a heavy workload of ministerial enquiries". FH appreciated the demands of the workload;[lvi] arguably, DS did not.

51. RHI (both domestic and non-domestic) was only one area of 13 to 18 "major objectives".[lvii] JM considered NIRO, Gas to the West and the IME3 to be among the most "high-risk" of these.[lviii] In terms of renewable heat, whilst JM then considered that the domestic scheme had been given Ministerial priority (although it has since come to light that this was not the case) the reality is that there were insufficient resources within the Division to bring forward the domestic scheme , phase 2 of the non-domestic scheme and cost controls - all issues about which there were consultations during 2013. [lix]

52. Had these issues/ demands been appreciated, we submit DS/FH/JMcC should have considered, more carefully, what staffing levels were required going forward, contingency arrangements for preserving knowledge and measures for transition due to staffing changes (all things that would have formed part of project management arrangements). JM has been criticised for letting PH leave but DETI should never have let itself get to a position where it was so crucially dependent on one individual. Alternatively, if this was the case, it should have been spelt out that PH could not leave.

53. In this regard, we submit it is important to remember that FH left Energy Division at least a month before JM actually assumed control ("*... [she] moved on before I joined so we did not cross over, in terms of timing*").[lx] JM only had a "*half day briefing session*" with FH, before she left. This session consisted of a discussion about **all** the issues/workload of the Division - but at a time when he was still unfamiliar with these terms/issues.

54. JM recalls no specific issues being highlighted about the non-domestic RHI scheme, and that it was only one of the areas discussed. His recollection was that there was much more emphasis on the domestic RHI scheme and achieving the Executive's Programme for Government target of 4% renewable heat by 2015.

55. He did not consider (then)[lxi] that there had been any specific warning about the need for a review of the RHI scheme, or of concerns about data concerning its uptake, or about the need to ensure new funding was in place after 2015.

56. The induction pack received by JM after that date contained around 80 pages, of which only 4 related to renewable heat, and only 2 to RHI.[lxii]We submit this confirms that the energies and strategy of the Division were not focussed on RHI.

57. We submit, on any *proper* assessment of the issues facing Energy Division, the handover ought to have been (i) more structured (ii) identified real risks and targets and (iii) set achievable objectives. Alternatively, we submit, the officials should have given serious consideration to "dovetail-ing" duties so that, for example, FH could have worked alongside JM for a short period of time whilst he became familiar with the work i.e. detailed and constructive "succession planning".

58. We accept this may not be necessary in all circumstances or in all Departments - but that it was imperative when there was an impending haemorrhage of many of the senior staff in a small Department.

RESOURCES & SYSTEMS

59. The size of Energy Division is another relevant consideration.

    JM inherited a small team of staff, particularly those working exclusively on the RHI scheme (effectively a staff of 2). At the same time over **70** staff were working on the equivalent GB scheme. Even taking regional differences into account, the disparity is striking. JM believes some 30 staff, at least, currently work on RHI though he notes figures of 48 quoted for the RHI task force (**WIT-17812**, for example).

60. Therefore, we submit that, prior to JM's move to Energy Division, staff numbers were demonstrably too small and its experience too limited.[lxiii]

61. We further submit the transfer of so many senior staff from Energy Division in 2013/2014 compounded this problem, leaving it significantly depleted in terms of *expertise*.

62. This was particularly important where (in such a small department) some staff were working on RHI, others on "gas", others on energy supply etc. The senior management officials ought to have ensured that the key personnel in each area were identified and (if they had to move to different departments) ensure how that process was managed.

63. Proper management of this situation should have *prevented* senior/key personnel leaving within a matter of months, denuding Energy Division of their invaluable knowledge and information. At the very least FH or PH should have informed DS or JM of their concerns.[lxiv](JMcC did state that PH's role was "very important" but provided no indication that his move from the Division should be blocked. See further below).

64. It has been submitted that "*the loss of corporate knowledge that occurred during the transition period in 2014… was a contributory factor to some of the issue that subsequently arose*".[lxv]We agree with this assessment.

65. As regards the allocation of resources to (non-domestic) RHI, JM concedes that most of SW's energies and attention, during 2014, were on the domestic scheme. SW also had to work on "Energywise" (a different scheme) working directly to Chris Stewart.[lxvi]

66. We submit that JM's concerns on the nature and volume of the civil servants' workload are valid and should be given consideration by the Inquiry. [lxvii]

67. He also considers that had project management been applied, it may also have assisted with the workload demands and helped to identify problems at a much earlier stage: e.g. that "*RHI was an inchoate process, which still required evaluation – such as putting in place evaluation criteria* The Department had not put any other arrangements in place to manage RHI going forward - beyond leaving it to the handful of staff in Energy Division. For example, there were no structures or checks in place whereby the Department would assess when reviews had been conducted or how the funding of the project was progressing. [lxviii]We submit there are clear lessons to be learned requiring both cooperation and cross-checking" within Departments.

68. As a consequence of all of this, JM wryly concluded that "*It is an incontrovertible fact that DETI was trying to deal with RHI during this period with 70 odd fewer staff than DECC; **now**, there are 30 + staff dealing with RHI and four posts at my grade covering energy. We had the resources of "one and half people". Therefore, stating that "arguably" the Division was under-resourced, seems a comically inadequate description."*

RE-READING THE LEGISLATION

69. We refer to these matters in detail, because it has been suggested that had JM "re-read" the legislation, and all of the supporting policy documentation when he commenced employment in Energy Division[lxix] he should have realised from the outset that the RHI scheme was fundamentally flawed.

70. We reject this criticism and consider it unfounded and unrealistic. JM was entitled to presume that critical issues relating to the RHI scheme had already been properly considered by his predecessors. In his own words "*.... I did not have the time to examine previous documents, which having presumably been subjected to analysis by others before me …. did not present as requiring consideration by me."* [lxx] The non-domestic scheme was in place when JM arrived. It was not an on-going project. JM trusted it had been put in place correctly and did not have any reason to suspect that it had been implemented in a flawed way that would lead to a disastrous outcome.

71. After his appointment, JM immediately had to deal with other energy issues which Energy Division had identified as having a *greater* priority and/or which had *greater* risks.[lxxi] The Department's "Strategic Energy Framework 2010 – 2020"[lxxii] set 43 objectives including the target of "*….10% renewable heat by 2020"*.[lxxiii] The RHI scheme was not an "objective" to be met – but only a *means* by which the 10% target was to be achieved.[lxxiv]

72. Secondly, if the combined resources of CEPA/AEA,DFP/Energy Division officials etc., had not appreciated any of the inherent flaws in the non-domestic RHI scheme, the suggestion that JM could/should have done so "single-handedly" is both unrealistic and unfair.

73. Thirdly, following his handover meeting with FH, JM did not consider the RHI scheme posed any particular risk: "…… *there was no highlighting of the fact that the non-domestic RHI scheme may have been inappropriately implemented or that fundamental issues may have been missed*".[lxxv] On the contrary, the focus was on the domestic scheme, and the importance of "delivering" this to help meet the Executive's Programme for Government target.

CHANGE OF PERSONNEL

74. As outlined above, we submit that in a "fledging project" such as this, senior management/ the outgoing officials ought to have recognised the key demands facing Energy Division, and who were the "key" personnel" involved in those areas. If officials had to leave/be moved on, then appropriate "succession planning" should have been imperative.

75. However, FH had already left Energy Division, by the time JM arrived.[lxxvi] JMcC advised she wished to take a career break in the first month of JM's posting[lxxvii] and, around the same time she advised JM that PH intended to leave, also, for a new post.[lxxviii] JM could not refuse JMcC's request to leave - as it was for personal reasons.

76. Therefore, whilst trying to "get to grips" with the new policy demands of Energy Division, JM also had to run two recruitment processes to obtain staff (at Principal level and Deputy Principal level). "*No replacements were provided by the Department*".[lxxix]

77. This, again, is indicative of a lack of succession planning. There was nothing to have prevented replacements from being identified for known or predictable vacancies before JM took charge.

78. This resulted in a situation where, during the early months of 2014, JM had to spend his limited time conducting interviews etc., all of which were "*time consuming*".[lxxx]

79. There has been criticism of JM for allowing PH to leave his post. However, this again, presupposes that JM understood how important PH was to the Division and why he should not have been allowed to leave his post. As stated above, JMcC had stated that PH fulfilled an important role and that - if he was offered a temporary promotion - that might entice him to stay as he had a 'lot of knowledge' and was 'very capable'.[lxxxi] However, this advice did not suggest PH's knowledge was essential or that his departure from the Division would lead to a critical loss of "knowledge". Rather, PH's departure seemed to just one of many Division-wide resource and personnel issues, and so the risks associated with his departure did not stand out.

80. JM's evidence was that he considered he could not prevent PH from leaving his post. Firstly, he became aware that PH had requested this transfer long ago, and so had already been "held back" for some time. JM thought it would "unfair" to hold him back further and (if he did) that PH may be demotivated and resentful. Secondly, JMcC was PH's line Manager, not JM. In the first instance it was up to JMcC to decide if he should "stay or go". As outlined at (79) above, JMcC did not indicate that PH should be "forced" to stay.

Thirdly, although JM tried to delay PH's departure by a short time, his new department advised they would withdraw their offer should his arrival be postponed any further.[lxxxii] More importantly, we submit again, that JM was then unaware of the importance of PH's role and that so much information was reposed in him.

81. Moreover, despite what JMcC had advised JM, PH did not apply for "temporary promotion" within Energy Division, when that post was ultimately advertised. Davina McCay ("**DMcC**") was ultimately appointed. Indeed, JMcC and PH advised JM that it was "unnecessary" to provide any "temporary" cover for his absence. This suggests that neither JMcM nor PH considered the "loss of corporate knowledge" which is now submitted was "clear and obvious". Similarly, although JM's line managers now seem critical of the decision to let PH leave in May 2014, at the time they were "silent". It seems unlikely that his leaving would have escaped their notice - as so significant a number of people moved at the same time;[lxxxiii] JM mentioned this in DETI management meetings, resulting in a civil service-wide trawl from which 20 people were interviewed.

82. The criticism of JM also ignores the fact that PH never spoke to JM either e.g. informing him that it would be "wise" to let him stay (even for a short period of time) or that it was important to allow him to conduct the "review" (i.e. recognising that DMcC had limited knowledge and was only a "stop-gap" in the post. (We say PH's oversight is all the more glaring when the content of his handover note is considered - see further below).

83. By reason of above, JM considered he was doing "the right thing" by allowing PH to leave; furthermore, by appointing DMcC to be put in PH's place on a "temporary promotion" (i.e. until a permanent appointment could be made) he was, at least, attempting "*…to bridge the gap"*.[lxxxiv]

84. Stuart Whiteman and Seamus Hughes (Head of Branch and Deputy Principal, respectively) ("**SW**" and "**SH**") could only be appointed, during June 2014, after "open competition".

85. The net result of all of these changes, was that:

    (i) From the start of 2014 – June 2014 JM had little or no experience himself and little or no experienced support;

    (ii) Even from June 2014 onwards he was dependent upon staff who, *themselves,* were trying to "get to grips" with their new posts;

    (iii) All of their focus was on the "set" objectives (i.e. the domestic scheme) - in place by the time they started - and not on the RHI scheme.

86. Therefore, whilst we agree with and accept SMcC's conclusion that the "*... loss of corporate knowledge that occurred was a contributory factor to some of the issues which subsequently arose ..."* we consider that it would be unfair to blame JM for this situation. It could and should have been avoided by proper succession planning.

HANDOVER NOTE OF MAY 2014

87. It was and is not routine practice for any departing member of the civil service to prepare a handover note before they leave their post.

88. Given the small resources in the department, and DMcC's "stop gap" appointment, JM considered, however, that it would be helpful if PH prepared a handover note.

89. In the chronology of events, PH had a meeting with Edmund Ward of Ofgem, on 1st May 2014, before the note was prepared. There also appears to have been a conversation between PH and Dr Ward in May 2014 in the last week before PH left,[lxxxv] which may have crystallised the former's thinking about the non-domestic scheme.

90. In relation to Ofgem's evidence, PH was *informed* about rising applications and costs of the RHI scheme.[lxxxvi] We submit, from his detailed knowledge of the scheme, PH *must* have appreciated the imminent problems.

91. Yet, inexplicably, PH's handover note listed **40** "bullet points" for action, with those relating to RHI "buried" at numbers 23 & 24. The "headline" bullet points simply recorded the need for "*consideration of tiered tariffs to prevent excessive payments*" and "*review biomass tariffs under 100Kg*". The urgency of the situation (or risks) were not stressed. Neither was there any mention of the need for further funding/ funding application. It is inexplicable why PH did not speak to JM about these clear concerns. The fact that he did not is evident from the fact that JM did not raise non-domestic RHI concerns when he met with Ofgem and Dr Ward in October (see below) nor did he highlight concerns to the new Permanent and Under Secretaries of the Department arriving in summer 2014. (It is hard to understand what motive JM could have had for not wanting to highlight such problems. He highlighted numerous others).

92. PH also recommended that "the review" was to have been conducted by August 2014. JM has stated that this was unrealistic given the fact that the terms of reference of the review would have to be devised and then conducted. There were also logistical problems (about which PH knew) caused by the "usual" departures of staff over the holiday period.[lxxxvii]PH should have realised this from his own experience in the Division/Civil Service. He also knew DMcC was only in a temporary post and about to be replaced. He has not explained why he did not speak, in person, to JM about the urgency of the situation (if he perceived it to be such).

93. Also, it was only in a further section of the handover note (the 6th page), that PH explained why an urgent review was required, because "*.. it is becoming apparent that the payments made to installers are higher than would have been expected under the CEPA modelling*". Tariffs, the note explained, could "*become over-generous*".[lxxxviii] No indication was given as to what had been "expected" under the CEPA modelling or how this could have drastic funding implications.

94. All the Inquiry's witnesses have submitted that this was a crucial note - which JM ought not to have missed. We say this criticism is entirely misplaced because:

    (i) The handover note was prepared for the attention of PH's successor (it was "…*in the form of a working brief for [PH's] successor*" [lxxxix]) - **not** for JM. It was not intended – nor was it brought – to the attention of JM; [xc]

    (ii) JM has confirmed in his evidence that he was not aware of the contents of the handover note. References to the need for a review were included in the preparatory notes for Divisional Meetings in May/June 2014. He regrets not picking up on this and has explained that the Division always had a number of ongoing reviews so a reference to another review would not have struck him as exceptional or critical in importance unless this was specifically highlighted to him.

    (iii) That none of PH's successors recognised the importance of the "review" illustrates, we submit, the problems caused by poor succession planning;

    (iv) The "urgent" need for the review was "buried" in the handover note, in the middle of other (equally?) "important/urgent actions", need for reviews, etc.. The fact that it should have been the **most** important action, is only clear to everyone **now** (i.e. with the benefit of hindsight) because we now appreciate the risks inherent in the scheme.

95. However, **if these risks were known** to PH before he left his post he ought to have (a) started the review process *during* his last months in post and/or (ii) listed the need for the review as "bullet points 1 – 2" and/or spoken personally to either or JM and/or DMcC about its importance, before he left.

96. We submit there are potential explanations why these steps were not taken but, regrettably, none reflect well on PH. The first possibility is that he was only *beginning* to appreciate the significance of the Ofgem information/link with Mrs O'Hagan's complaints and the need for a review, but had not "joined the dots". Therefore, although he had identified a clear "problem", he failed to highlight it sufficiently for others to find and solve after he had left. Alternatively, he may have feared that (if had he highlighted the problem overtly) he may have been required to stay in his post until a full review was conducted and the problem solved. Therefore, his desire to leave the Division may have been put on hold (again).

97. We regret having to make these personal criticisms. However, if (as PH now contends) he could see the "disaster ahead" we submit, it is incomprehensible why PH did not inform DMcC or JM about the new information and/or how all of this was undermining the "assumptions" made in the original Business Case (which he had helped to prepare). These were matters of the highest importance.

98. We also highlight that - when PH did speak to DMcC - he only highlighted issues relating to the *domestic* scheme, but did not mention issues regarding the non-domestic scheme as crucial or having to be done straight away.[xci] DMcC's evidence about this was unequivocal. Furthermore, when PH met with DS and SH in summer 2014 he did not raise any of these issues with them.[xcii]

99. Secondly, whilst he did mention the need for an RHI review, he did not state that this was urgent; or why it may be urgent; or how it was to be performed, etc. Consequently DMcC (again with such limited experience) was reassured, and did not refer the issues to JM, other than to state there was the need for a review in the Divisional Management meeting notes. The net result was that no action was taken.

100. PH accepted that the "handover note" may not have been the best format to pass on this information. "*…. I think I remember printing off a lot of documents and having two big lever arch files probably with all these kinds of documents …on the proviso that it's all quite complex stuff and in a foreign language*[xciii] *… I think it would be hard for [JM] to have that level of details, I think I [had] probably [the] most level of detail because I worked on it so closely and probably Joanne next …"*[xciv]

101. We submit it is unfair (with the benefit of hindsight or otherwise) to have expected JM to have had notice of the handover note - when it had not specifically been drawn to his attention. He trusted PH to have alerted DMcC to significant issues and/or for PH to have drawn these to his attention. His evidence has been clear "*I knew a handover note had been prepared – as I was the person who had asked for Peter Hutchinson to prepare it – but none of its contents had been drawn to my attention when he left; therefore, I was not really aware of its contents until the PWC interview."* [xcv]

102. Even if the handover note had been brought to his attention, JM doubts he may have appreciated the significance now being attributed to it. JM's evidence was that there were "*…. 12 people at [Peter Hutchinson's level in Energy Division …… assuming they could also describe their activities in this level of detail ….. [there] would have been close to 500 points. .... There were multiple issues to be dealt with – for the most part all of them were described as urgent."*[xcvi] In short, any Head of Division has to rely on his/her staff to identify risks and dangers - and it cannot function otherwise.

103. This is why, we submit real risks (of this nature) should be recorded in business plans or risk registers, to make them plain and obvious. It also requires forward planning e.g. for reviews (especially of fledging schemes) or of funding requirements - in accordance with their importance.[xcvii] Similarly, we submit, handover notes (or their like) have to set proper priorities to enable the "wheat to be separated from the chaff".

104. Thus, JM's difficulties were numerous:

    (i) The understanding of RHI was "*…largely in Peter's head"* and Energy Division had not turned this into formal structures / reporting structures.

(ii) PH's handover note was insufficient and not appreciated;

(iii) When he left, "… *far more knowledge was lost than should have been the case…*"; [xcviii]

(iv) PH's timescale for action(s) was "*not realistic*" and imposed an "*arbitrary deadline*"[xcix] about too many requirement (i.e. 40 "urgent" steps by the end of August 2014);

(v) Resources were too stretched. DMcC was not sufficiently experienced on RHI and did not have the resources at her disposal to manage these deadlines. The very onerous task of dealing with the domestic RHI casework (10 June) left DMcC little time to concentrate on anything else.

(vi) Two of the new staff had not yet been appointed and there were already insufficient personnel within the Division;

(vii) The Division's attention was focussed (as directed) on domestic RHI. Non-domestic RHI was considered as "finished";

(viii) To have taken PH's recommendations forward, within the timescales suggested, PH handover note needed to set clearly priorities or highlight what were urgent from non-urgent matters; [c]

(ix) The review should have been devised and commenced whilst he was "in post";

(x) The resources available to the Division were a matter already known to DS/ FH et al. It has been stated that staffing was increased but so had the commitments entered into on behalf of Energy Division. In fact, resources had not kept pace with promises to do things, particularly on RHI. JM inherited this situation.

OFGEM

105. We submit similar criticisms about "poor reporting" should also be levelled against Ofgem.

106. Energy Division's main administrative responsibility lay in making payments to Ofgem for running the RHI scheme.[ci]

107. JM met with Ofgem twice during 2014. At neither of those meetings were issues of tariff control / over-compensation raised. The first meeting was on 16th April 2014 just before Ofgem "highlighted" tariff and tiering issues with PH.[cii] There is no reason why Ofgem could not have alerted JM to this issue.

108. Ofgem raised its concerns with PH on 1st May 2014. They were aware no response had been made and that PH had left his post and that DMcC/JM/SW etc., were all "new" to

the Division. Yet, none of its representatives "followed up" on the meeting with PH, or requested any formal response from Energy Division. This, as we have said above, was compounded by the fact that PH did not draw JM's attention to any of Ofgem's concerns, either. It is demonstrably clear that JM did not know about the handover note, or he would have raised the issues in it with Ofgem at these meetings. We submit that Ofgem and PH's failures to highlight the issues meant that there were lost opportunities for "dots to be joined".

109. The second meeting between Ofgem and JM took place on 13th October 2014. The briefing note (SW to JM, dated 10 October 2014[ciii]) showed that the main issues discussed were administration costs, carbon trust loans and data sharing. That position is reflected in Ofgem's letter to SW of 9 November 2014.[civ] Again, here is no explanation why Ofgem did not "follow up" on its discussions with PH.

110. Therefore, we submit that Ofgem could have, but did <u>not</u> provide any warnings of (relevant) information to JM or Energy Division. It had direct knowledge of the rising costs and implications.

DEVELOPMENT OF DOMESTIC RHI – DELAY IN 2014

111. Throughout the remainder of 2014, Energy Division's resources were focussed (amongst its many other demands) on the domestic RHI scheme.

112. JM's evidence was the domestic Regulations and implementation of the new domestic scheme commanded his (and his staff's energies) throughout the winter of 2014/15. This "*extra, un-resourced, work ….. effectively reduced resources to [deal] with RHI in totality."*[cv] Again, we say JM "inherited" these resource issues. Although he asked for more resources, the Department refused.

113. SW had now taken over PH/DMcC's role. SW was also "getting to grips" with his new post. The Division was working (almost entirely) on the domestic RHI legislation and issues concerning "carbon trust loans".

114. The work on the domestic RHI scheme gave JM false reassurance, because applications to that scheme were "capped." This "cap" "influenced" JM's view of the non-domestic RHI scheme as "*…. I <u>assumed</u> that there was a similar mechanism in it*".[cvi] Therefore, JM didn't consider there could be a problem with the RHI scheme by "leaving the heating running".[cvii]

115. Neither did JM consider "*over-incentivisation"* as an issue with the RHI scheme – because he was unaware of the issues raised between Ofgem/PH. In fact, as a result of his handover briefing with FH, he believed that <u>lack of uptake</u> was a problem[cviii] and that the Division had to encourage "renewables schemes" to meet the government targets. This explains why an advertising campaign was actually run in the autumn of 2014 – ironically, to encourage uptake.

116. JM was working on a dozen other areas which seemed "high risk" . The apparently slow moving RHI scheme seemed "low risk" within the context of what JM knew at that time.

2015

RENEWAL

117. The reasons for not appreciating that scheme required re-approval were that:

(i) Energy Division kept a spreadsheet of when approvals were needed for various issues but non-domestic RHI had not been put on it because the scheme was, in law, a permanent scheme and so had not been entered (wrongly) on the list of activities requiring time bound approvals.

(i) There was no Department of Finance of Divisional (internal) system to "trigger" a reminder.[cix]

118. Additionally, JM's perceptions were limited by other factors. Domestic scheme funding received (effectively) open-ended approval during 2014 so JM did not expect that the non-domestic scheme would require re-approval at an earlier point. The perception of uptake was also skewed by the budgetary position. The scheme *appeared* to be underperforming because money allocated to Energy Division was being returned "un-used" to Treasury. Problems with the NIRO closure were also demanding more of JM's attention and, for much of the time, seemed the much more significant issue.

119. We submit a register recording these requirements, may not only have assisted JM at this late stage - but may have prevented *all* of these problems arising - because it would have exposed the limitations in the funding from the outset.

120. If the procedures for a re-approval had been in place, approval could have been sought long before 2015.[cx] Once JM knew that he had missed the deadline for re-approval, he began a process of escalating the issue to Departmental level, agreeing a way forward (there was no set procedure for what "re-approval" involved) and seeking (belated) DFP re-approval. This occurred in October 2015 prospectively but not retrospectively. [cxi]

121. There was no note, in any of the risk assessments within Energy Division/ DETI indicating or reminding officials that a re-approval was required.

122. The change of all relevant staff between December 2013 – May 2015 meant that "those with (such) knowledge" had left.[cxii]

123. To his credit, JM honestly acknowledged during his PWC investigation that he recalled that "… *Peter and Joanne had mentioned …. in a previous verbal briefing the need to seek DFP re-approval….".*[cxiii] However, with the other "*hundreds of deadlines"* he had

to recall, that matter had not been to the forefront of his recollection. This was an oversight, but an error that could have been easily avoided, we submit, by the maintenance of project management/forward planning/ risk registers etc., Errors will always be made: the purpose of keeping registers is to avoid having to rely on an individual's memory. It was imperative that there were *systems* in place and were not.

RHI PROBLEMS COME TO LIGHT

124. Following implementation of the domestic RHI scheme, Energy Division began to consider changes to the non-domestic scheme. However, problems emerged as a result of the monitoring of budgeting pressure. These concerns were brought to JM's attention in March 2015. Due to the unusual nature of RHI funding – AME but with annual budgets or budgetary targets – clarity was sought from DETI Finance Division in March 2015.[cxiv]

125. JM rejected claims (particularly through DETI) that the budget "…. *was clear at the outset of the scheme…"*[cxv]. It has been his clear evidence that he and Energy Division staff struggled, from Spring 2015 onwards, to clarify the budget *"without success"*.[cxvi] (See further below).

126. JM has given evidence that the RHI scheme had always been described as "*AME with strings*"[cxvii] - although could not remember when he first heard this expression. No Divisional/DETI records actually confirmed (i) the source of funding and/or (ii) the limitations of funding. While some of the previous officials who established the non-domestic scheme have said they were clear on how the funding worked (but cannot explain how this information was lost) it made no sense to set up an unlimited scheme if funding was limited.

127. However, back in the spring of 2015, the energy budget records only recorded that expenditure on RHI had been paid out of AME, and JM presumed that that relevant instruction must have come from DETI finance.[cxviii] Jeff Partridge from DETI Finance sought clarity and was told by DFP in December 2013 and January 2014 that the RHI budget was done through AME forecasting, lending further credence to the notion that the budget was standard AME expenditure.[cxix] It is difficult to see how JM could understand the actual position regarding the funding when the staff in DETI Finance and DFP were not able to advise him on this. (Even as late as November 2015 official documentation supporting the spending review, and the autumn statement of 25 November 2015 appeared to suggest funding was AME).[cxx]

128. JM was not, initially, surprised. He has given evidence that the fact that the RHI scheme was paid from a "*demand-led AME budget made sense to me. There was no "off switch" in the RHI scheme. If a legitimate application was made, the Department was obliged to pay"*. [cxxi]

129. JM thought the RHI scheme must have been designed in this way, because applicants for the RHI schemes were being invited to "take a risk"; namely, to pay for and install heating installations which would only be repaid over a (long) period of time from the use of the renewables fuels. The incentive was required to encourage the use of renewables fuels - but at a cost.

130. Clarity about funding was not provided until December 2015 when HMT finally confirmed that the spend would result in a "call" upon NI DEL.[cxxii]

131. Energy Division had no accountants and no one in the Division had any budgeting expertise. That expertise lay only within the Department's Finance Division[cxxiii]. JM explained that business units, like Energy Division, are forbidden from communicating directly with DFP and all communication had to be via the Departmental Finance Division.[cxxiv] Energy Division attempted to establish the nature of the funding, without avail, for several weeks.

132. Therefore, JM escalated these "funding" issues in the annual assurance statement and in the senior management meeting during May 2015. [cxxv]

133. We submit DETI/DFP should have been anxious to assist Energy Division and work, quickly and constructively, towards finding answers to these problems. However, it took (effectively) eight months to get an answer to the question which (it is now contended by the Department) was "clear all along".[cxxvi]

134. Regrettably, we submit, the evidence suggests the delay was caused by DETI seeking to attribute blame on Energy Division (or on individuals within it) or to avoid any suggestion that *its* officials were responsible, rather than trying to solve the problem. In effect, stuck in a "blame game" with the driving force being to "avoid responsibility". Alternatively (and contrary to the case it now makes) none of its officials understood how the scheme was funded. (Which was the impression JM had, during his discussions with DETI in 2015, and after clarification had been given by Treasury).[cxxvii]

135. We submit this is the import of JM's evidence who has stated that:

(i) DETI was more concerned on avoiding any overt criticism of its slow response than providing assistance e.g. insisting that JM removed any reference to its inactivity in his departmental note;[cxxviii]

(ii) DETI insisted that Energy Division first see if money could be obtained from Whitehall Department of Energy and Climate Change RHI Budget, rather then seek the answer from DFP and Treasury. JM has described this as a "wild goose chase"[cxxix] which wasted further valuable time;

(iii) There has been no explanation why a letter could not have gone from DETI to DFP to the Treasury during the summer of 2015 asking for clarification regarding the funding.

136. We submit, this "blame game" continues. The Departmental statements contained many "personal" allegations against JM and his (alleged) failings. However, the statements failed to focus on any of their own/ systemic failures or consider how "lessons may be learnt" for the benefit of the Inquiry.

137. In particular if (as it now alleges) the "true" nature of funding of the scheme should have been known "all along" together with the scheme's vulnerability to the risk of overspend[cxxx] then why had DETI Finance not insisted on budgetary controls from the outset. [cxxxi]

138. The "open-ended" nature of the funding had also been approved by DETI Finance, Economists, DFP, the original officials in the Energy Division, the Minister and the Assembly.[cxxxii] None of them had noticed the scheme's inherent vulnerability – yet JM is now criticised for failing to appreciate this error.

CHANGES TO THE LEGISLATION

139. Legal advice provided on 25 June 2015[cxxxiii] confirmed that the Department could **not** suspend the scheme without amending the legislation and that that process required "consultation".[cxxxiv]

140. During discussions within the Department, JM did **not** recall any discussions about the scheme being closed,[cxxxv] nor that suspension should be introduced.[cxxxvi] Tiering appeared to be the best way forward and this was agreed - by everyone concerned.[cxxxvii]

141. This decision was taken in the context of the time and on the information available; then, there was no "spike" in demand; details of the proposed changes had not been leaked; tiering seemed more "politically" acceptable than closure (as the government had already demanded closures in wind energy, etc.,[cxxxviii]) and it required no consultation period.

142. It seemed a "*straightforward legislative change to make and (unlike digression) could be implemented quickly*".[cxxxix] JM hoped the process would last no more than "six weeks" in total.[cxl] By contrast, JM had provided evidence of tariff changes in the NIRO scheme which took over 18 months to implement, due to the requirement for consultation and technical reports. [cxli]

143. There was no criticism from the department about this decision then, nor are any such objections recorded in the contemporaneous notes.[cxlii] We say *these* notes should be regarded as conclusive, rather than the "self-serving" (and undocumented) evidence now put forward on behalf of the department.[cxliii]

144. JM considered then (and now) that the decision to introduce tiering was a "collective" one, based on the available information.[cxliv] JM recognised that a tariff reduction or digression were better *long term solutions* but that they could not be done quickly enough.

145. We submit, therefore, that the Inquiry should reject the criticisms made on behalf of the department, suggesting this route was indecisive, misjudged[cxlv] or wrong. Despite the current protestations that some officials "knew better"[cxlvi] no letters have been produced recording (objection to the introduction of tiering or suggesting a better way forward. JM considered that "*... Suggestions for a review or reassessing state aid (or whatever else), were not actually going to reduce scheme spending. Only legislation, with its attendant Assembly processes, legal drafting and political handling, could do that. At the time I felt that my (largely financial) colleagues didn't appreciate this."*[cxlvii]

DEALINGS WITH SPAD's/ MINISTER

146. JM explained the situation to the Minister's SPAD, Timothy Cairns, expecting a swift and considered response. What he did not expect was further prevarication and delay, but this is what he encountered.

147. Mr Cairns was given an explanation of the difficulties and issues concerning RHI, during early June 2015(in JM's recollection). JM recalls Mr Cairns stating a view about "*not doing everything at once"*.[cxlviii] A submission was prepared by 8 July . Mr Cairns has given evidence that nothing in the 8th July submission was a surprise to him following his meeting with JM which he says was in late June 2015.[cxlix] In evidence Mr Cairns was asked was it a possibility that he or the Minister could have approved the 8th July submission on 9th or 10th July and he claimed that it had to go to Mr Crawford.[cl]

148. However, no action was taken. During July, JM again demanded a response from Mr Cairns and Mr Stewart and JM met with him on the 28th. Mr Cairns asked again *for another* explanatory note.[cli] JM prepared this promptly. Mr Cairns then claimed he had to discuss these issues further at a party and ministerial level (which could and should have been done during June).

149. Mr Cairns was questioned about whether a decision could have been approved on 30th July following his meeting with JM and CS on 28th July, and he responded "absolutely, yes".[clii] He was asked whether - following JM's note to him of 30th July - the submission could have been approved at that stage. He reply was that *"on reflection, that's probably what should have happened*".[cliii] We submit there has been no adequate explanation for the failure to approve the submission from the 8 July onwards from the Minister, SPAD. This caused at least two months' delay.

150. It now appears likely that Mr Cairns and members of the DUP were holding discussions at a "party level". Secondly, that instructions may or may not have been given to delay or prevent closure. Thirdly, that "disclosures" about this process caused further "spikes" in demand. These will be matters for the Inquiry to determine. We submit, on the evidence before it, the Inquiry may be entitled to draw a conclusion that, against Civil Service advice, steps were being taken to block (or at the very least postpone) the process of correcting the failures in the RHI legislation.

151. JM had no "visibility" about these matters nor that details of the closure were being "leaked" - which may have contributed to the scale of the "spike" in demand in autumn 2015 [cliv] It will for the Inquiry to determine who caused these problems. Evidence shows that SPADs including Andrew Crawford and Timothy Cairns were aware at least of the possibility of a very significant spike from at least July 2015.[clv]

152. From mid-summer onwards, JM conceded that it appeared to be "common knowledge" that changes would be made to the legislation.[clvi] He considered it had been leaked from the political level.[clvii]

153. By August, delay had become so significant that JM and CS had no alternative but to make "*numerous threats*"[clviii] that a Ministerial Direction would issue. These warnings were issued on 11th and 20th August[clix].

154. These "threats" brought matters to a head but at the expense of a "request" for a further (short) delay. JM, having waited this long, considered a further month was a "small price to pay" for the benefit of certainty and action. However, we ask the Inquiry to note that - when JM made the changes to the submission reflecting the date change from 1 October to 4 November - he did so in the format of "tracked" changes.[clx]

155. The criticisms levelled against JM are that he should have "forced" the Minister to act: but what more could he have done? A Ministerial Direction has been described as a 'nuclear option'.[clxi] With the "SPAD system" in operation, JM had no alternative but to advise "the advisor" (Mr Cairns) and trust that the views (and anxieties) of the civil servants were going to be properly communicated. Once the issue had been raised with the Minister, the Minister had to decide how and when to act.

DECISION TO INTRODUCE TIERING

156. There has been criticism in recent statements – individual and corporate – of the response to the growing RHI problem over the summer of 2015. In particular there is criticism of "Energy Division's" actions in pursuing tiering and on the business case addendum. Those comments portray RHI as "Energy Division's" problem rather than a corporate problem.

157. With all the information *now* available, it is easy to be critical of many of the assessments made at the time. However, the decision to introduce tiering was taken in conjunction with Andrew McCormick, Chris Stewart, Eugene Rooney, Trevor Cooper, Shane Murphy and SW.[clxii] It was a collective decision and everyone agreed, at that time and within that time frame. Not only did everyone concerned have access to the same information but arguably officials who were involved in the establishment of the scheme could be said to have more knowledge. If they considered tiering was the wrong measure they did not say so at the time. Furthermore, Trevor Cooper expressly recommended tiering as a "*measure to control future expenditure and maximise value for money*" in his submission to DFP in July 2015.[clxiii]

158. With hindsight, a narrative has been imposed on events that result in inevitable disaster. Those involved at the time are criticised for not seeing the "obvious" outcome. Indeed, some who were involved are keen to adopt this narrative by blaming others. But an example of why things were not so crystal clear at the time is the (apparent) provision, by Treasury, during August 2015 of all the AME Funding required by the Department. Despite all the concern over the nature of the funding, in August 2015, "it turned" out that they money was standard AME after all. This did not prove to be the case in the long run, of course. But it does illustrate the issue of hindsight.

159. The Business Case Addendum, which JM concedes, is undermined by subsequent analysis was constructed pre-spike, pre-clarification of budget, pre-awareness of the fundamental design flows of the scheme and pre-discreditation of much of the scheme. However, at the time it appeared to support the rationale for tiering.

160. Energy Division did not realise that, from its outset, the scheme "paid people" to use fuel to gain money. JM considers that he and his colleagues in Energy Division were entitled to rely on the evaluation of his predecessors – agreed and approved at multiple levels – that the scheme was basically sound.

161. In 2015/16 Energy Division's belief was that problems were due to the absence of tiering. The view was that tiering would fix the budget and prevent it from running out of control.[clxiv] The view was that tiering would, in the short term, help bring the budget back under control. Longer term measures could be introduced subsequently. Legal advice was to the effect that suspension could not be done without consultation. Degression was understood to take at least 6 months.[clxv] Therefore, the step which could be taken most expeditiously was tiering.

162. The decisions about RHI and advices to Ministers etc., was all made in the "heat of battle". As JM put it "*... In 2014 the Division was engaged in the domestic scheme and during 2015 we went from one crisis point to the next on the non-domestic scheme. I do not recall ever having the space to think about the scheme...*".[clxvi] There was a lack of resources; of financial expertise and an (over?) reliance on Ofgem.[clxvii]

163. JM considered that the fundamental flow in the design of the scheme – i.e. that the RHI payments were greater than the costs of the fuel and that this resulted in a "burn to earn" incentive was only made clear in the Audit Report of 2016 as he was leaving DETI in early May. [clxviii]

164. Thus, JM considers there is a "*strong element of hindsight at play in accusing me and Energy Division staff of any misconduct in failing to identify the Scheme's flaws before spring 2016.*"[clxix] What seems obvious now, did not seem obvious then in the throes of the difficulties.

165. Indeed, what would have been JM's motivation in failing to identify what was the fundamental error in the scheme? If it was so obvious, why did others not see it? There was not an attempt to conceal evidence of over-compensation. The business case addendum openly conceded at paragraph 4.15 (DFE-284854) that the rate of return of the existing tariff was too high. However, because of the way the scheme was established, Energy Division considered it was were "stuck" with the situation. They considered other possibilities e.g. retrospective action to reduce existing tariffs. Other options were considered "high risk ... from a legal perspective" compared to tiering. [clxx] The business case addendum of October 2015 was circulated and discussed enough times to make it a collective decision. Whatever mistakes or omissions were inputted at that time they reflected the state of knowledge and honestly held beliefs.

166. JM also notes that – even the emerging information – did not prompt Mr Woods to advance the audit of RHI planned for the end of 2015. Therefore "*... in this respect he and his audit colleagues join a long list of people (including myself) who did not foresee the severity of the RHI risk that eventually materialised.*" [clxxi]

167. We consider this is a fair response: there were many failings from many persons.

MRS O'HAGAN

168. It is important to remember that JM was completely **un**aware of Ms O'Hagan's communications until October 2016 when he was interviewed by PWC. Only then, was he provided with the relevant paperwork outlining her complaints. [clxxii]

169. Although passing reference was made to "Mrs O'Hagan" in PH's handover note, he did not clarify the nature of the complaint(s) which Mrs O'Hagan had made; nor of the importance of her complaints; nor that (on the growing evidence) that her warnings were increasingly likely to be accurate.[clxxiii]

170. JM also remained unaware of PH's handover note until the PwC interviews. He had few direct dealings with the stakeholders on RHI and was only aware of one complaint that the scheme generated excessive and unnecessary heating. [clxxiv] JM reported this complaint to Andrew McCormick and SW; SW had put "plans in place" with Ofgem to carry out further monitoring, when the greater problems came to light.[clxxv]

171. The more pertinent criticism, we submit, is why no Divisional record was made of Mrs O'Hagan's complaints and – when it was clear that they were accurate – they were not properly highlighted to the Head of the Division and/or the Minister. This was both an individual and systemic failure.

COOPERATION WITH THE AUDIT

172. Only recently, have criticisms been made suggesting that JM failed to cooperate with the department's audit.

173. These were not made at the time; there are no contemporaneous notes or letters recording any complaint either to JM or his superiors (Chris Stewart or Andrew McCormick).[clxxvi] JM has responded by stating that, if Mr Woods considered his assistance was "lacking" "*I would have expected him to speak to me about that .....* [he] *could have lifted the phone to me and express[ed] those concerns. He never did.*"[clxxvii] JM considers Energy Division (and he) engaged as much as they could regarding what they knew at the time. Any delay in responding to Mr Woods was simply due to work pressures.[clxxviii]

174. Again, we ask the Inquiry to consider the contemporaneous notes of the meeting of the 8th April 2016, which reflect no lack of co-operation and no subsequent follow up from that meeting made any allegation to that effect.[clxxix] Again, we would remind the Inquiry of the advice in *Barclays Bank*: none of the contemporaneous documents suggest any lack of co-operation during the relevant time or record complaints of "non-cooperation".

[i] Clark LJ's report on the Thames Safety Inquiry (The *Marchioness* Disaster) published on 14 February 2000 (Cm 4558).

[ii] The inquiry focused on failures in "transport"

[iii] Clark LJ [*ibid*] at 13.2. See also *R (Persey & Others) –v- Secretary of State for the Environment Food and Rural Affairs* [2003] QB 794 in the Judgment of Simon Brown LJ at [26] – [27].

[iv] Professor Kennedy, Report under the title "Learning from Bristol" quoting from Clark LJ's report. See *R (Persey & Others) –v- Secretary of State for the Environment Food and Rural Affairs* [2003] QB 794 at [28].

[v] [2016] EWHC 2351 (Ch) at [**9**]. The judgment was delivered by Richard Spearman Q.C. (sitting as a Deputy Judge of the Chancery Division) albeit that the comments were made in the context of commercial actions

[vi] Emphasis added

[vii] In *Gestmin SGPS SA v Credit Suisse (UK) Limited, Credit Suisse Securities (Europe) Limited* [2013] EWHC 3560 (Comm) at [**22**]

[viii] Emphasis added

[ix] Statement of Stephen McMurray ("**SMcM**") Department for the Economy

[x] SMcM, para. 54, **WIT-03287**

[xi] SMcM, para 48, **WIT-03286**

[xii] SMcM para. 16, **WIT-03276**

[xiii] See various witness statements including David Tomson, paras 38 – 43 **WIT-13523** to **WIT-13526**; Fiona Hepper, para 31 **WIT-15030**, para 39 **WIT-15035**, para 45 **WIT-15037**; Peter Hutchinson, para 5.31 **WIT-06041**, para 8.67 **WIT-06161**.

[xiv] Sam Connolly – **WIT-10330**

[xv] See para. [**11**] of this Submission

[xvi] Sam Connolly, **WIT-10330** and **WIT-10335** to **WIT-10336**

[xvii] SMcM, para. 16 **WIT-13276**

[xviii] SMcM, para.6 **WIT-03273.** This was confirmed by in advice provided by the Departmental Solicitor's Office (25 June 2015) which stated emphatically *"…. <u>the duty on the Department is clear</u>. It cannot …. suspend the operation of the scheme without amendments to the legislation"*. (Emphasis added) See **DFE-166674** to **DFE-166677**

[xix] SMcM, para. 8 **WIT-03274**

[xx] SMcM, para. 7 **WIT-03274**. **WIT-08683** records an assurance to the Casework Committee meeting on 9 March 2012 that the scheme could be "*closed to applicants mid-year*"

[xxi] SMcM, para. 10-11 **WIT-03275**

[xxii] **WIT-03275**, para 11

[xxiii] **WIT-06086**, **WIT-15043** and **WIT-105020**

[xxiv] SMcM, para. 12-13 **WIT-03275**

[xxv] SMcM, para 13, **WIT-03275**

[xxvi] SMcM, para 14, **WIT-03276**

[xxvii] SMcM, para 15, **WIT-03276**

[xxviii] SMcM, para 17, **WIT-03276** and also at paras 19 – 21, **WIT-03276 – WIT-03277**

[xxix] SMcM, para 16, **WIT-03276**

[xxx] SMcM, para 23, **WIT-03278**

[xxxi] Elsewhere sometimes called "fail-safes" – see **WIT-16678** at para 194 and discussion in SMcM's statement at para 23, **WIT-03277**.

[xxxii] SMcM para. 21 **WIT-03277**

[xxxiii] SMcM, para. 18 **WIT-03276**

[xxxiv] SMcM, para. 23 **WIT-03277**

[xxxv] SMcM, para. 25 **WIT-03278**

[xxxvi] SMcM para.26 **WIT-03278** shown at **WIT-08466**

[xxxvii] SMcM, para. 27 **WIT-03279-03279 (**emphasis added)

[xxxviii] SMcM, para. 27 **WIT-03279**

[xxxix] SMcM para. 28, **WIT-03279**

[xl] SMcM para. 31 **WIT-03281**

[xli] SMcM paras. 29-30 **WIT-03280**

[xlii] **TRA-01514** and **TRA-02364**

[xliii] SMcM para 31-32 **WIT-03281**

[xliv] **DFE-410140**

[xlv] SMcM, para. 30 **WIT-03280**, see also **WIT-16655** and **WIT-15867**

[xlvi] SMcM para. 10, **WIT-03281**

[xlvii] **TRA-09610** Line 12

[xlviii] SMcM paras. 35 – 39 **WIT-03281** - **03283**

[xlix] JM, para. 5 **WIT-14517.** His experience had been as Head of Water Policy Division (from 2008); before that in Water Reform (as Head of the Legislation Branch from 2005) and in a "variety of posts" in the Ministry of Justice

[l] JM, para 11, **WIT-14519**

[li] JM, para 12, **WIT-14519**

[lii] JM evidence **TRA-07073** line 12 and para 15, **WIT-14529**

[liii] JM evidence **TRA-07073** line 14

[liv] JM, para 13, **WIT-14520**

[lv] JM, para 13, **WIT-14520**

[lvi] **TRA-01767** Line 9 and **TRA-02234** Line 10

[lvii] JM, para 16, **WIT-14521** (Emphasis added)

[lviii] JM, paras 22 –38, **WIT-14523 – WIT-14527**

[lix] **DFE-430507**

[lx] JM, para 11, **WIT-14519**

[lxii] **WIT-14700**

[lxiii] SMcM para. 41 - 42 **WIT-03284**

[lxiv] JMcC is claimed to have "urged strongly" that PH should not have been allowed to leave – but she has given no evidence on this point. See further below.

[lxv] SMcM para. 44 **WIT-03285**

[lxvi] In his statement, Mr McCann cited Mr Cooper's (unsubstantiated) assertion that action on RHI was delayed because JM directed Mr Wightman to work on "Energywise". This is just wrong. See also para [**7**] of JM's statement of 16 October 2018.

[lxvii] JM's recent statement of 14 November 2018 at paras. [**38**] – [**39**] **WIT-26095**

[lxviii] JM's recent statement of 14 November 2018 at para. [**53**] and at [**58**] **WIT-26097-8**

[lxix] At **TRA-07131** JM is asked about this by inquiry counsel. FH suggests that she ensured re-approval would be sought and a review conducted by having the approval letter appropriately filed at **TRA-02380-4**.

[lxx] JM, para 32, **WIT-14528**

[lxxi] JM, paras 22 – 29, **WIT-14523 – WIT-14526**

[lxxii] Which had been endorsed by the Executive

[lxxiii] JM, para 12, **WIT-14519**, also at Annex 7

[lxxiv] JM, para 20, **WIT-14522**

[lxxv] JM, para 45, **WIT-14528**

[lxxvi] JM, para 39, **WIT-14527**

[lxxvii] **WIT-26001**

[lxxviii] JM, para 69, **WIT-14535** see handover note of 16th May 2014,

[lxxix] JM, para 39, **WIT-14527**

[lxxx] JM, para 39, **WIT-14527**

[lxxxi] JM, **WIT-26002**

[lxxxii] JM, **WIT-26004**

[lxxxiii] **WIT-14540**

[lxxxiv] JM, para 69, **WIT-14535**

[lxxxv] **TRA-05038**

[lxxxvi] Ofgem, **WIT-95104** para 379

[lxxxvii] JM, **WIT-14537**

[lxxxviii] JM, para 72, **WIT-14535**

[lxxxix] JM, para 78, **WIT-14537**

[xc] JM, para 73, **WIT-14536**

[xci] DMcC **TRA-05484** Line 1

[xcii] PH evidence Day 37 **TRA-05171**

[xciii] **PWC-04755**

[xciv] **PWC-04755**

[xcv] JM, para 24 witness statement of 14 November 2018 **WIT-26091**

[xcvi] JM, para 74, **WIT-14536**

[xcvii] JM, para 78, **WIT-14537**

[xcviii] JM, para 79, **WIT-14537**

[xcix] JM, para 79, **WIT-14537**

[c] JM, para 79(c), **WIT-14537**

[ci] JM, para 83, **WIT-14539**

[cii] JM, para 85, **WIT-14539**

[ciii] JM statement **WIT-14877**

[civ] JM, para 88, **WIT-14539 – 14540** and at **Annex 12**

[cv] JM, para 95, **WIT-14541**

[cvi] JM, para 92, **WIT-14540**

[cvii] JM, para 92, **WIT-14540**

[cviii] JM, para 99, **WIT-14541**

[cix] JM, para 125, **WIT-14548**

[cx] **TRA-07134**

[cxi] JM, para 126 **WIT-14548**

[cxii] JM, para 127 **WIT-14548**

[cxiii] JM, para 128, **WIT-14548**

[cxiv] JM, para 100, **WIT-14542**

[cxv] JM, para 104, **WIT-14542**

[cxvi] JM, para 104, **WIT-14543** and JM, para 113 **WIT-14546**. The definitive answer only came from Treasury in late December 2015

[cxvii] JM, para 111, **WIT-14545**

[cxviii] JM, para 106, **WIT-14543**

[cxix] **WIT-18730**

[cxx] JM, para 107, **WIT-14543**

[cxxi] JM, para 108, **WIT-14544**

[cxxii] DFE, **WIT-00127**, para 340-1

[cxxiii] JM, para 118 **WIT-14546**

[cxxiv] JM, **WIT - 14546**

[cxxv] See 14 November 2018 at [**88**] – [**89**] **WIT-26104**

[cxxvi] JM, para 119 **WIT-14546** and recent statement of 14 November 2018 at [**88**] – [**90**] **WIT-26104**

[cxxvii] See recent statement of 14 November 2018 at [88] – [90]

[cxxviii] JM, para 5, **WIT-26059**, and para 8, **WIT-26060**

[cxxix] JM, para 121 **WIT-14547**

[cxxx] JM, para 114 **WIT-14546**

[cxxxi] JM, para 114 **WIT-14546**

[cxxxii] JM, para 114 **WIT-14546**

[cxxxiii] Para. 35 – **WIT 03572**

[cxxxiv] **DFE 284754** and **284756**

[cxxxv] See JM's recent statement of 14 November 2018 at [**88**] – [**90**] **WIT-26104**

[cxxxvi] JM, para. [**143**] - **WIT- 14553**

[cxxxvii] See JM's recent statement of 14 November 2018 at [**82**] **WIT-26103** and Minute of 17 June 2015 at **WIT-10599**

[cxxxviii] JM, JM, para. [**145**] - **WIT- 14553**

[cxxxix] JM, para. [**143**] - **WIT- 14553**

[cxl] JM, para. [**147**] - **WIT- 14553**

[cxli] JM's recent statement of 14 November 2018 at para 63 **WIT-26099**

[cxlii] E.g. Dr McCormick **WIT – 10599** or **DFE- 146864**

[cxliii] Dr McCormick through Mr McCann

[cxliv] See JM's recent statement of 14 November 2018 at [**81**] and [**84**] **WIT-26103**

[cxlv] The original view, set out in the Departmental Statement – see JM, para. [**148**] **WIT – 14554** c/f the evidence in Mr McCann's statement, to which JM responded on 14 November 2018 at [**80**] – [**87**]

[cxlvi] See JM's recent statement of 14 November 2018 at [**81**] **WIT-26103**

[cxlvii] See JM's recent statement of 14 November 2018 at [**84**] **WIT-26103**

[cxlviii] JM, para [**153**] – **WIT - 14555**

[cxlix] **TRA-12740**

[cl] **TRA-12746**

[cli] **DFE-10042**

[clii] TC Day 88 **TRA-12832-3**

[cliii] TC day 88 **TRA-12839**

[cliv] See recent statement of 14 November 2018 at [**88**] – [**90**] **WIT-26104**

[clv] **IND-27555**

[clvi] JM, para [**156**] – [**158**] - **WIT - 14555**

[clvii] **TRA-11116**

[clviii] JM, para [**153**] – **WIT – 14555** (emphasis added)

[clix] **IND-05719** and **IND-05717**

[clx] **DFE-170770**

[clxi] **TRA-14761**

[clxii] JM, para [**161**] – **WIT - 14557**

[clxiii] **WIT-10646**

[clxiv] See recent statement of 14 November 2018 at [**2**] – [**4**] **WIT-26084-5**

[clxv] **WIT-11715**

[clxvi] See recent statement of JM, 14 November 2018 at [**10**] **WIT-26087**

[clxvii] See recent statement of JM, 14 November 2018 at [**10**] **WIT-26087**

[clxviii] JM's recent witness statement of 14 November 2018 at [**2**] **WIT-26084-5**

[clxix] **WIT-26085**

[clxx] JM's recent witness statement of 14 November 2018 at [**70**] **WIT-26101**

[clxxi] JM's recent witness statement of 14 November 2018 at [**8**] **WIT-26086**

[clxxii] JM's recent witness statement of 14 November 2018 **WIT-26091**

[clxxiii] JM, para [**89]**, **WIT-14538**

[clxxiv] JM, para [**169**] - **WIT - 14559**

[clxxv] JM, para [**169**] - **WIT - 14559**

[clxxvi] See recent statement of JM, 14 November 2018 at [**12**] **WIT-26087**

[clxxvii] See recent statement of JM, 14 November 2018 at [**12**] **WIT-26087**

[clxxviii] **IND-06031**; **WIT-23274** and recent statement of JM, 14 November 2018 at [**12**] **WIT-26087**

[clxxix] At odds with Mr Woods note at **WIT-23043**