Renewable Heat Incentive Inquiry

Closing Submissions on behalf of Team 2

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A. Executive Summary

1. The non-domestic renewable heat incentive scheme has been a catastrophe. This Inquiry's relentless forensic examination over almost 2 years, including 111 days of detailed oral hearings, has laid bare very many individual and institutional failings. Hardly anybody emerges with credit. Members of Team 2 made a number of mistakes. As did members of Team 1. So did almost all officials who had any involvement with the scheme. The Inquiry has rightly shone a light on and exposed those mistakes in the full glare of publicity. It will catalogue them in its report. That is one part of its important task. But it is far from its complete task. The Inquiry's overall obligation is to seek to restore public confidence. That cannot be done simply by identifying the errors that were made. It is necessary to identify how it came about that they were made. Were they due to corruption? Or dishonesty? Or laziness? Or incompetence? Or were they due to institutional failings, including resourcing? Or were they attributable to a combination of factors? Only by addressing the underlying causes of the clear and acknowledged failings can the Inquiry discharge its obligation under its terms of reference "to restore public confidence in the workings of Government." Public confidence can only be restored by explaining how those errors came to be made and what should be done to ensure that nothing like this can happen again.

2. The purpose of these submissions is not to argue that members of Team 2 did not make any individual errors. Nor is it to argue that any such errors were inconsequential. The purpose of these submissions is to put such errors in context and to demonstrate that, on the evidence, there is absolutely no basis for any finding that any member of Team 2 acted in a corrupt or dishonest manner. They were all hard working, highly motivated, and highly dedicated civil servants who were doing their honest best on the public's behalf and in the public interest. They had no motive to misrun the scheme. They were not running renewable heat boilers, and nor were their friends or family. They had no political motivations. Their only interest was to discharge their public duties to

the very best of their abilities. But properly running the non-domestic RHI scheme, with the resources that had been allocated, was simply impossible. The operational management of the scheme (including the introduction of the domestic scheme) had been allocated to 1½ full time officials. Mr Wightman, though full-time, spent 50% of his time dealing with EnergyWise. By contrast the GB scheme had 77 officials. And the Northern Ireland RHI task force now has 48 officials. Team 2 have been taken to task in the full glare of publicity over many days of evidential hearings. They have been held to account for their decisions. They have sought to assist the inquiry to the very best of their ability, providing detailed and very full written and oral evidence. Mr Wightman and Mr Hughes have had to endure significant and adverse media attention over a sustained period of time, during which they have continued to perform their roles as civil servants.

3. It is submitted that the Inquiry should conclude, on the evidence, and as appropriate to each individual member of Team 2 (bearing in mind their different roles and responsibilities) that:

(1) Team 2 were hardworking public officials who had led successful careers in the civil service and who were sufficiently well regarded to be recruited into a difficult and challenging policy area.

(2) This scheme was fundamentally flawed from the outset and well before Team 2 were appointed.

(3) They did not seek to, and did not, enrich either themselves or any member of their friends or families from the design or management of the scheme. They are not corrupt or dishonest.

(4) They worked extremely hard over many months in providing loyal public service.

(5) They were not provided with the training or resources or direction that they could reasonably have expected.

(6) Any errors were in large measure due to that lack of training, resource and direction.

(7) They were not alone in making mistakes. Almost every official involved in the scheme did so. The very fact that so many different officials made so many mistakes strongly suggests that institutional failings were in play.

B. Introduction

4. These closing submissions are provided on behalf of Team 2[1], a group of four civil servants at various grades, namely Ms Davina McCay, Mr Seamus Hughes, Mr Stuart Wightman and Mr Chris Stewart. At the outset of the Inquiry this group were instructed by the Department for the Economy ("the Department", formerly the Department of Enterprise, Trade and Investment) that the Department would not represent them and that they would require separate legal representation. As such Team 2 have been represented independently of the Department for the purposes of the Inquiry. For its part the Department has put in its own evidence, including a gratuitous *"witness statement"* explaining the respects in which it disagrees with the evidence of Team 2.

5. All members of Team 2 have fully and timeously complied with the many requests of them to produce documents, statements and assistance with the Inquiry's evidence gathering. They have all provided written and oral evidence

[1] For ease of reference these witnesses will be referenced, collectively, as "Team 2". This appears to be a term formulated originally by the Department in recognition that there was a complete change in the responsible personnel in 2014. Team 1 comprises those who introduced the scheme and ran it until early-mid 2014. Team 2 are those who filled the posts left by Team 1, excluding Mr Mills who was appointed in January 2014 and who has had separate individual legal representation for the Inquiry. Although convenient shorthand, it is important that these witnesses are considered as individual civil servants within the wider context of DETI/DfE and not as some autonomous "team" operating within DETI/DfE. By the same token, and with the same caveat, this submission will make reference to "Team 1" to refer collectively to those other civil servants.

(in Mr Wightman's case oral evidence over 7 days) to the Inquiry. These closing written submissions could not, nor are they meant to, do justice to the entirety of the written and oral evidence given by the officials that make up Team 2. These submissions should be read in conjunction and subject to that written and oral evidence.

6. There is some focus on Mr Wightman and Mr Hughes in these submissions. This reflects the focus of the Inquiry, so far as Team 2 is concerned, and the more limited role played by, in particular, Ms McCay. Ms McCay was only in post for a very short period of time (35 days). There is no basis upon which Ms McCay should be subject to any criticism or adverse comment by the Inquiry. Indeed, it is of note that Mr McCormick (TRA-12036) did read Ms McCay's witness statement with *"sympathy"* noting the *"sheer undue weight"* that he considered had rested upon her, also acknowledging that Ms McCay *"did her very best"*. Mr Stewart, for his part, did not have practical day to day management responsibility for running the scheme. He gave important evidence about the response to the emerging crisis and the delays in introducing cost controls. It is respectfully submitted that Mr Stewart gave impressive and compelling oral evidence which was likely of some considerable assistance to the Inquiry and which should be fully accepted. It is not, however, suggested that Mr Stewart is beyond reproach – he acknowledges that there are certain things he could and should have done differently.

7. So far as Mr Wightman and Mr Hughes are concerned they have each candidly accepted that there are a number of criticisms that can be made of their conduct of the scheme. The most significant potential criticisms are addressed below. They both accept that the Inquiry can rightly and fairly be critical of them in respect of those matters. It is, however, critical for the Inquiry to grapple with the context and causes of those failings.

8. So far as the context is concerned, it is necessary to identify what had happened before their appointment, the extent to which the scheme was fit for purpose when they were appointed, the extent to which the failure of the scheme was attributable to inherent flaws that had been designed into the scheme before their appointment, rather than being due to changes that they introduced into the scheme, the training they had been given, the resources at their disposal, and the instruction that they had been given as to where their focus should lie. It is respectfully submitted that there were significant and fundamental flaws from the outset. If basic steps had been taken from the outset, and from well before their appointment, the consequences would have been very different.

9. So far as the causes are concerned there are a number of logical possibilities. It is respectfully submitted that on the evidence the Inquiry can safely rule out any suggestion of corruption or bad-faith or dishonesty or idleness or incompetence. The truth is that it was simply impossible to run the scheme in a way that achieved value for money and minimised risk with the lack of training, inadequate direction and woefully inadequate resource that had been provided. Given this, it is hardly surprising that they, and many others, made significant mistakes.

10. Thus, before addressing specific issues of concern as to Team 2, we wish to make general submissions as to context and cause that cut across a large number of the specific issues of interest to the Inquiry.

C. Context

11. Team 2 stress that they do not wish unfairly to criticise any members of Team 1. The submissions that are here made as to the context in which Team 2 took up their appointments are therefore not made with the intention of casting blame on Mr Hutchinson, Ms McCutcheon, Ms Hepper, Mr Thompson and Ms Clydesdale. But these matters do provide the basic and important context in which Team 2 came into post. A very short summary of a few of the key features

(which does not begin to do justice to the Inquiry's detailed work – many more have been identified) are as follows.

Expert external input and due diligence

12. On the face of it (i.e., as it appeared at the time) there had been a high degree of external expert input, due diligence and Ministerial decision making before the implementation of the non-domestic RHI scheme. That included preliminary work from Aecom Ltd and Pöyry Energy Consulting, resulting in a detailed report. It included a highly technical and lengthy, and it might be said expensive, economic analysis from Cambridge Economic Policy Associates ("CEPA"), with AEA Technology Limited, leading to several lengthy reports. It included an *apparently* rigorous business case prepared by DETI and then presented by DETI to DFP. It included DFP approval for expenditure on the scheme. It also included the fact that the scheme was intended to mirror an equivalent scheme that was operating in Great Britain and which had been through its own due diligence process. It involved the European Union granting state aid approval (which itself indicated external satisfaction that there were appropriate controls in place). It involved an external and specialist public body, OFGEM, to administer the scheme. An apparently clear Ministerial decision, based on official advice which was informed by an independent expert economic appraisal, had been made to adopt the scheme. And a detailed legislative framework had been put in place.

13. Of course, it is now known that every stage of this elaborate and apparently robust due-diligence process was riddled with error. But that was not known at the time. Nor could it have been known at the time without a painstaking review of the documentation. Such a review is something which could not reasonably have been expected of a new incoming team with no energy experience, unless explicitly directed to do so and given the necessary resources.

14. The overview of RHI that was set out in the handover note[2] said that the tariffs had "been designed specifically for the local heat market" and that "the NI tariffs tend to be lower than GB tariffs". It said that the scheme had been designed following public consultation, that there had been an independent economic analysis by "CEPA" and that the scheme had been approved by a DETI Casework Committee, DFP, the DETI Minister and the EU. It was said that the scheme was administered on a day to day basis by Ofgem. There was no mention of the lack of cost controls or of a need to oversee the work done by Ofgem. There was no mention of a need to secure re-approval by March 2015. There was no mention of the need to undertake a review of the full scheme. There was no complete and accurate explanation of the funding arrangements. There was no reference to the need for State Aid approval for the Domestic Scheme. There was no mention of the mandatory duty to publish information on the Scheme, nor of the fact that Janette O'Hagan's last email had gone unanswered. There was no mention of the significant staff resources (of 77 people) that DECC had in place for renewable heat.

15. The civil servants who were appointed in 2014 could be forgiven for believing that the scheme had been rigorously planned and implemented and that it was basically sound and robust.

Choice of incentive scheme flawed

16. But it was not. The Inquiry has amply demonstrated, in the course of the hearings, that a detailed and fair reading of the materials reveals that an incentive scheme of this type would never have delivered the policy objective. As highlighted in section 3 of the 2012 Casework Committee Minutes[3], "*A challenge fund could have produced the most renewable heat at the lowest cost*". Moreover capital grant schemes (such as the challenge fund) are not 'novel' but tried and tested; (their risks and methods of mitigating and managing them) are well understood;

[2] WIT-13046.
[3] WIT-17250 to 17262

and they do not require the underlying policy assumption to hold good for 20 years. The decision to adopt an incentive scheme rather than a challenge fund was straightforwardly irrational. Team 2 do not advance submissions as to how this came about. That is a matter for the Inquiry's detailed consideration and assessment of the evidence. The important contextual point, however, is that Northern Ireland should never have adopted an incentive scheme of this type. If it had adopted a challenge fund then it is likely that many of the problems that have arisen would have been avoided.

17. However, as stated above, Team 2 could be forgiven for considering that the incentive scheme was a basically sound policy initiative which had also been considered by Economists in DETI and DFP. Of course, if they had the time and space to consider the detail of the materials, and if they had possessed the incisive technical expertise of the Inquiry's assessor, they might themselves have spotted the point. It is not, however, realistic to have expected them to do so. Having not done so they proceeded on a wholly misconceived basis from the outset. Albeit it was not deliberate, the net effect is that they were set up to fail. It is acknowledged that both Internal Audit Service and the Northern Ireland Audit Office identified a number of problems with the running of the Scheme. There are many more which the Inquiry will expose. However, these problems have been identified with the benefit of a heavily resourced and detailed forensic analysis of the scheme (and with the benefit of looking back on events after the key problems had become apparent). They were clearly not apparent to the small team of officials who were appointed in 2014.

Inherent flaws in design of scheme

18. As explained above, the basic decision to implement an incentive scheme was fundamentally flawed. But matters did not stop there. Fundamental flaws were also hard wired into the detail of the scheme from the outset. It was demand led. It had an extremely long tail (20 years). The Department was unable, directly, to control demand. It was therefore essential to ensure that there were rigorous

costs controls. It was also necessary to ensure that there were powers to suspend or halt the scheme. None of this was done. Counsel to the Inquiry's various alarming metaphors (ticking time bomb/runaway train) are entirely apt.

Perverse incentive

19. So the choice of scheme was wrong. And the basic design of the scheme was wrong. But it is worse even than that. The tariff was set at a level higher than the fuel cost for a certain size of boiler. That created the perverse incentive. Hence the aphorisms *"burn to earn" / "cash for ash"* that are now, understandably, an indelible part of the lexicon of any media reporting of the scheme. The original CEPA (CEPA 1) report clearly acknowledges the need for tiering if the tariff is higher than the fuel cost (IND-63535 at §6.7.1) Seemingly, CEPA and everybody else missed (or failed to appreciate the significance of) the fact that the revisions to the tariff levels in their 2012 Addendum Report (CEPA 2) had increased the 20-99KW biomass tariff above the biomass fuel cost, thus creating a requirement for tiering. It will be for the Inquiry to establish why that was so, and Team 2 do not make any submissions in that respect. It is, however, a further part of the context.

Failure to follow GB scheme

20. There was a clear policy intent to follow the GB scheme. Had that been faithfully implemented it would have brought into play all of the safeguards and due diligence undertaken in respect of the GB scheme, whilst acknowledging that the GB scheme has, itself, come in for significant criticisms, albeit of a different (lower) order of magnitude in comparison with the NI Scheme. However, it did not replicate the GB scheme. Tiering, which was present in the GB scheme, was not introduced. Again, it is for the Inquiry to establish why this was so. Again, it is a further part of the context.

Project management and risk register

21. There was no proper project management and no adequate *"live"* risk register. The Department now recognises that these were key failings.

Review of scheme scheduled for 2015

22. There was clear recognition that it was necessary to undertake a fundamental scheme review in 2014. By the time of the appointment of Team 2 that had seemingly been pushed back until 2015, as evidenced by the draft Business Case prepared by Peter Hutchinson notwithstanding this was a condition of approval for DFP[4].

Summary of contextual points

23. The scheme, as it was at the start of 2014, was fundamentally flawed from design to implementation. These flaws were entrenched by the point in time when Team 2 came to manage the scheme. It should never have been implemented in this way. The scheme should have been subject to proper project management with a live risk register and effective resources from the very beginning, with rigorous cost controls and a timely comprehensive review. If that had been done the catastrophe would not have occurred. That is the context in which Team 2 were appointed to their posts. They were put in the position of being responsible for a novel and complex demand-led scheme with no training or expertise, no cost controls, no suspension powers, no formal project management, inadequate resources, no scheduled review until 2015, no notification of need to secure re-approval, and with other tasks for their primary focus, such as the domestic scheme and, for Mr Wightman, EnergyWise.

[4] WIT-30264 and DFE-10095/96

D. Institutional and systemic causes of failure

Instruction and direction

24. It is easy to assert that an error is only apparent with the benefit of hindsight. When witnesses have used the qualification "in hindsight", Counsel to the Inquiry have, in many cases, demonstrated that an appropriate degree of foresight should have been applied. Equally, however, it is all too easy to fall into the trap of judging matters with reference to hindsight and without sufficient regard to the contemporary context. As Megarry J warned in his celebrated dictum in Duchess of Argyll v Beuselinck [1972] 2 Lloyd's Rep 172 at 185:

> "In this world there are few things that could not have been better done if done with hindsight. The advantages of hindsight include the benefit of having a sufficient indication of which of the many factors present are important and which are unimportant. But hindsight is no touchstone of negligence. The standard of care to be expected of a professional man must be based on events as they occur, in prospect and not in retrospect … On any footing, the duty of care is not a warranty of perfection."

25. Similarly, in Ahanohu v SE London & Kent Bus Company [2008] EWCA Civ 274 Laws LJ observed at [23]:

> "There is sometimes a danger… that the court may evaluate the standard of care owed… by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care."

26. It is easy to say that hindsight should be disregarded, but very difficult to do so in practice. We all know now what was wrong with the Scheme. It all seems obvious. The tariff discrepancy jumps from the page. It obviously was not *obvious* at the time. The focus in this Inquiry in a period of nearly 2 years and 111 days

of hearings has been on this particular scheme. It could have been very different. There could have been a disaster with the domestic scheme. It is respectfully submitted that to ensure that as much as possible is done to leave hindsight out of account there should be an intensive focus on what officials understood and were instructed at the relevant time. There is ample evidence about that.

27. So far as Team 2 (particularly Mr Wightman and Mr Hughes) are concerned the key points are that:

(1) They were instructed to focus on the introduction of the domestic scheme, itself a huge task that was woefully under-resourced.

(2) Ofgem would administer the scheme and it would effectively "run itself". Thus, Davina McCay was told "RHI would look after itself"[5].

(3) They were expected to engage with industry in a transparent manner.

28. The Energy Division Composite Divisional Plan for 2014-2015[6] was formulated just before Mr Wightman took up his post. It was that Divisional Plan, rather than the informal handover note, that *authoritatively* prescribed the duties for individual Grade 7 officials within Energy Division. Those duties were onerous and extensive. They included, for example, the introduction of the domestic scheme[7]. The Divisional Plan did not include any requirement to review the non-domestic scheme, or to review the tariffs, or the need for tiering, or the need for cost or budget controls. Mr Wightman's explicit "PPA/PDP"[8] were set by his line manager on 29th July 2014[9]. They were reviewed at his appraisal review. It was rightly observed in his performance review that he had "made an excellent start" and that "the priority has been domestic RHI". There was no suggestion

[5] WIT-13021.
[6] WIT-17099.
[7] WIT-17118.
[8] Personal Performance Agreement/Personal Development Plan.
[9] WIT-17148.

that he ought to have been devoting more time or attention to the non-domestic RHI which, it was said, "had to take second place to progressing the domestic regs". The objectives in Mr Hughes' "PPA/PDP" which were set by Mr Wightman also flowed from the Divisional Plan.

29. These are the authoritative contemporaneous records of the tasks that Mr Wightman and Mr Hughes were required to undertake. It is fair to assess their conduct by reference to these records. In order to guard against hindsight it is important to have firmly in mind what they were instructed to do at the time rather than what it is now clear, with hindsight, they should have been instructed to do. It was those instructions that, rightly, formed the basis for their annual appraisals[10]. There was no suggestion, at their appraisals, that they should have been undertaking duties that were not specified in their Divisional Plan.

30. It is now clear that each of those instructions were flawed. There should never have been a plan to introduce the domestic scheme before the non-domestic scheme had been sorted out so that it did not present a clear and present danger to the Northern Ireland DEL budget. It should never simply have been left to Ofgem to administer. There ought to have been proper project management and risk control. However, there is no doubt about what the instructions given to officials actually were, and there is no doubt that (wrongly) the focus of those instructions was the introduction of the domestic scheme.

Lack of adequate resource

31. It is important to consider the actions of officials in the context of the chronic lack of resources within DETI at all material times. Mr Wightman makes this case in detail in his written evidence[11]. Importantly, this is not a case that is being made after the event. In his two Annual Reports, at the relevant time, both Mr Wightman's line manager (Mr Mills) and the Countersigning Officer (Mr

[10] WIT-17148.
[11] Witness statement dated 20 June 2017, WIT-17001, at §§31-40, WIT-17028-17030.

Stewart) acknowledged the pressure that he was under and that his post was overloaded. As Mr Stewart noted in Mr Wightman's Annual Report on 2nd April 2016[12], Mr Wightman was *"doing two jobs"*. Mr Mills noted that the demands on Mr Wightman's time were "not sustainable in the long run." Mr Hughes also makes essentially the same point in his written evidence[13]. Ms McCay also considered that her position had not been adequately resourced.[14]

32. Mr Stewart's oral evidence to the Inquiry acknowledged that resources for Energy Division had been *"inadequate"*[15]. Nobody has credibly suggested that there was an adequate level of resourcing. It would be quite impossible to do so.

33. Mr Wightman and Mr Hughes were responsible for: managing the existing RHPP scheme; managing the Non Domestic RHI scheme; dealing with the Carbon Trust loan issues; agreeing a data sharing protocol and change control with Ofgem and progressing development of the Domestic Scheme. Mr Wightman also had to deal with other policy responsibilities in respect of energy efficiency including progressing from inception, proposals for a new Government energy efficiency scheme (EnergyWise) to meet requirements under the EU Energy Efficiency Directive.

34. The size of the equivalent division in DECC (77 staff in renewable heat), and the size of the DfE RHI task force (48 staff, including a dedicated grade 3 post, a grade 5 post and two grade 6 posts), make the point. The fact is that when DETI was committed to the non-domestic RHI scheme there was a failure to properly consider whether there was adequate resource to deliver it safely. Had this been done it should have been appreciated that DETI should never have pursued the scheme, at least not without ensuring a massively greater level of resource than that which Mr Wightman and Mr Hughes had been left to cope

[12] WIT-17158
[13] Witness statement dated 2 June 2017, WIT-14019 at §7.
[14] WIT-13021 at §16, WIT-13035 at §80.
[15] TRA-11523 p. 26: 17-24

with, on top of their other responsibilities. The public has been left to pay the price. So too have the individual civil servants who were left to do their best with inadequate resource and have now been exposed to sustained public castigation, fuelled by the deplorable anonymous leaking of emails to the media and their own Department seeking gratuitously to undermine their evidence. This leaking of emails placed both officials in an extremely difficult position, *effectively* forcing them to seek transfers away from Energy Division in February 2017.

35. The Business Case (September 2014) for the new Domestic Scheme identified the need for three additional staff to administer the scheme in-house. Despite these additional posts being approved by the DETI Resourcing Group, it took until February 2015 before Mr Wightman was temporarily allocated a Staff Officer for 3 months to help with the Domestic Scheme. Notwithstanding these pressures the team was able to launch this Scheme in December 2014. It was not until the autumn of 2015 that Mr Wightman was allocated another SO and secured an AO in December 2015. This was in the context of the loss of a part time DP from the domestic RHI scheme and a part time EO2 from the energy efficiency team through the NICS Voluntary Exit Scheme just months earlier. These pressures were referenced in Mr Wightman's submission of 8 July 2015. These resource pressures were also apparent on the energy efficiency side and on the development of the EnergyWise proposals. This was recognised in an independent Gateway 1 Review of the EnergyWise Project which gave an amber/red rating. One of the critical recommendations was for Mr Wightman (as Project Manager) to be freed up to work on the project on a full-time basis.

36. The resource issue has been acknowledged by numerous witnesses, including Mr David Thomson, who agreed that at the time of the introduction of the RHI Scheme the Department was "*badly under-resourced*"[16].

[16] TRA-05642 p. 22: 4-5

37. The very fact that so many errors were made by so many different people who were apparently honest, competent, capable and dedicated public servants is itself strong evidence of under-resourcing. That is the overwhelming inference to be drawn from the surrounding circumstances. As Mr Stewart convincingly explains[17]:

> "having looked at the outcome of RHI, the panel's heard a great deal of evidence of mistakes being made by small teams working under pressure. And I think the logical conclusion for that is that, had there been greater resource, less pressure on teams, then, quite probably, there would've been fewer errors and we might at least have had a better chance of not being where we are today.
>
> I can't point to any empirical right answer as to what the correct level of resource would've been. The panel's heard I think a number of times the comparison with the team of 77 in DECC, but even that team produced a scheme that's been heavily criticised by the Westminster PAC. But I think, all of that notwithstanding, I think the only conclusion that I could draw now is that resources were inadequate."

38. Public confidence cannot be restored unless important lessons are learned about the need to ensure appropriate resourcing for new policy initiatives. Put bluntly, if an initiative like RHI were implemented today, with the same lack of resourcing, then the same types of consequence might well follow. Without the Department and the wider NICS showing that they have learned the need to ensure proper resourcing there can be no confidence that, next time, proper resourcing will be put in place.

39. To their credit Team 2 worked all hours to make up for the lack of numbers. The timings on the email correspondence, and the sheer volume of paperwork that was produced, is testament to that. However, the under-resourcing was such

[17] TRA-11523 - TRA11524

that it was inevitable that significant errors would be made. This factor cuts across many of the issues dealt with in the remainder of these written submissions.

40. Mr Stewart, for his part, had inherited the problem. Perspicaciously, he correctly recognised and diagnosed a symptom of under-resourcing, namely John Mills' wish to move on. He correctly recognised that if a man of John Mills' calibre was struggling with the work load, then the work load was too much. That was certainly true at John Mills' level. It was exponentially more so at the operational level. Mr Stewart sought to do what he could to ameliorate the situation as he understood it at the time, but this took time to implement. Moreover, even Mr Stewart did not fully appreciate the true extent of the problem until it was revealed in the course of the Inquiry's hearings[18]. Subsequently, the Department has recognised the inadequacy of resources within Energy Division and has now established 3 discrete energy divisions along with the RHI Taskforce all overseen by a dedicated 'energy' Grade 3.

41. Mr Stewart did not take the decision to implement the scheme. He did not design the scheme. He did not determine the appropriate level of resource. Given that those responsible for implementing and designing the scheme had not grappled with the resource problem, it is not realistic to have expected Mr Stewart immediately and proactively to have identified the problem that *they* created. When the problems did become apparent he took all the steps that he could reasonably have been expected to take, given the resource constraints and prevailing knowledge at that time. In 2014/15, the risks associated with the scheme were not apparent to Team 2. Additional resource was virtually non-existent, and diverting resource from elsewhere would have been at the expense of the safe and effective delivery of other policies. Moreover, at that stage the

[18] Transcript 27 June 2018 (Day 80) at pages 26-27.

risks on which Mr Stewart might have based an argument for the provision of greater resource had not been identified.

42. It is respectfully submitted that it is simply not realistic to expect a newly arrived official (even one as senior and experienced as Mr Stewart) to challenge the policy agenda set by an experienced and long-established Minister and senior officials.

43. Moreover, Mr Stewart's post was, itself, heavily loaded. It is worth observing that the Department has now[19] split the post he occupied, with energy becoming the sole responsibility of a Grade 3 post. Mr Stewart, with all his other commitments, simply did not have the luxury of time and space to undertake a root and branch review of the resources that had previously been allocated to different policy areas. Nor was there any obvious reason for him to do so.

44. It is appreciated that the Department was able to apply considerable resource (a team of 30-40) in 2016. However, that was to deal with the inescapable aftermath of the RHI. It was achieved in a very different resource climate to that which prevailed in 2014/15. It amply demonstrates just how under-resourced DETI was in 2014-15. However, it is not an indicator of the level of resource that Mr Stewart could credibly or realistically have sought to implement.

Lack of staff continuity

45. There was, in 2013-14, an unprecedented turnover of staff in respect of those responsible for the Non-Domestic RHI Scheme. Effectively the entire chain of command left their posts within a short period of time and without any strategic succession planning. Nobody has clearly explained why this was allowed to happen without appropriate mitigating steps, and why no co-ordinated strategy was implemented to manage the change. These will be matters for the Inquiry to assess. The practical impact for Team 2 was that there was a total loss of

[19] With effect from 12th November 2018.

experienced staff, and a significant loss of corporate knowledge within Energy Division at a critical time in the life of the Scheme. Fiona Hepper left in November 2013 followed by Joanne McCutcheon in April 2014 and then Peter Hutchinson on 16 May 2014.

46. Mr Mills described this situation as having left a *"significant knowledge gap"* agreeing that this, in hindsight, should not have been allowed to happen[20]. Mr Stewart (with perhaps a little understatement) considered that this situation was *"clearly suboptimal"*[21]. Mr Wightman, Mr Hughes and Ms McCay believe that this should never have been allowed to happen, even without the benefit of hindsight. For example, Mr Hughes, in over thirty years of service had never before experienced such an unprecedented turnover of staff within the Civil Service. This issue cuts across various other issues including the overarching and related issue of resources and the specific issues of lack of expertise (and lack of related training), overloading of posts, inadequate communication within DETI and between NI Departments (and also with GB Departments) and inappropriate work priorities all in the context of a scheme that was inherently and fatally flawed from the very outset.

Ineffective Communication/Cooperation

47. The Inquiry has identified many weaknesses in respect of communications within DETI (including between DETI and Invest NI), within DFP and between both Departments and DARD. Examples include:

(1) The 2 month delay in Finance Division responding on the status of funding (March 2015), despite the same finance officials having been directly involved in the 2011 email exchanges[22].

[20] TRA-09531 p. 47: 21-23
[21] TRA-11520 p. 23: 8, albeit Mr Stewart was reluctant to criticise colleagues when he was unaware of the thought process (if any) that had been applied.
[22] Paragraph 85 WIT – 17042/3

(2) Finance Division referring officials to DECC, despite their own knowledge of the issue[23], therefore wasting time in the summer 2015.

(3) Trevor Cooper's email to Shane Murphy (DFE-146565) regarding alleged naivety. This concern was not communicated to Mr Wightman. Had either of these two officials shared their concerns with Team 2 or other senior officials, these concerns could have been addressed.

(4) Invest NI and awareness of gaming risk. Invest NI officials were aware of loopholes in the scheme from 2014 referring to it as a "*cash cow*" but not sharing their knowledge with either Ofgem or DETI[24].

(5) CAFRE not alerting DETI officials to the direct involvement of a Moy Park official and UFU poultry farmer in their July 2015 CAFRE report and then telling those contributors not to disclose their involvement to DETI. See Cathal Ellis' oral evidence at TRA-07403.

48. There is no real doubt that ineffective communications and relationships impacted on the ability of Team 2 to operate effectively.

Dysfunctional relationship with Ofgem

49. DETI appointed Ofgem in 2012 because of its experience with the GB Scheme. It appears that there was a completely different understanding between DETI and Ofgem as to the nature of the relationship and the work that was to be undertaken by Ofgem. It will be for the Inquiry to assess the evidence as to Ofgem's operation of the scheme including the evidence as to inappropriate application / interpretation of the Regulations, failure to pass on information on opportunities for scheme gaming, and failure to share information on actual scheme abuse. In paragraph 19.18 of its 2nd Witness Statement of 1 June 2018[25],

[23] Paragraph 87-89 WIT – 17043
[24] TRA – 13418 to 13428
[25] WIT-95269 to 95272

Ofgem highlights a number of examples where their sharing of information could have been much better[26].

50. Whatever the rights and wrongs of the matter, Mr Wightman and Mr Hughes inherited the dysfunctional relationship that existed between DETI and Ofgem whilst being instructed that Ofgem effectively looked after the scheme and they should focus on introducing the domestic scheme. This meant that they were not instructed to monitor Ofgem's performance and were instead justifiably relying on Ofgem to operate and administer the scheme on a day to day basis in the public interest. They were entitled to rely on Ofgem, as a responsible public body, to act competently, efficiently and economically, and to draw any concerns to their attention. Instead, they became immersed in matters such as data sharing (dis)agreements and carbon trust loans, which meant that they had even less opportunity for their day to day tasks.

Lack of clarity as to funding arrangements and bureaucratic relationship with HMT

51. The non-domestic scheme was set in motion without any proper understanding of the basic funding arrangements. When Team 2 came into post they were not provided with any clear account of the funding arrangements[27]. They were not instructed that the funding described as AME should be "treated like DEL" or that there was any potential budget risk. There was no clear institutional understanding of the position, just some email correspondence saved within TRIM, the many potential interpretations of which have engaged Inquiry Counsel with a considerable number of witnesses. There was no easy way to clarify the basic funding arrangements. Officials could not simply pick up the telephone to the Treasury. Instead they were compelled to go through a tortuous bureaucratic process reminiscent of Minister Hacker's Department of Administrative Affairs.

[26] See Dermot Nolan's oral evidence on day 109 at TRA-16463
[27] WIT-17031 at §44.

52. This had demonstrable consequences. In trying to secure clarity and advice from Finance Division in March 2015, it took almost two months to receive a response. Then, despite the Finance Division officials being aware of the non-standard nature of the AME funding (having been involved in the 2011 email exchanges) they asked Energy officials to liaise with DECC which wasted precious time during the summer of 2015.

53. Then there was tension in the relationship between the two heads of Divisions (John Mills and Trevor Cooper) in May 2015. Poor communication led to a failure to engage on and agree the wording of key documents, such as the Memo to DFP in late June 2015.

54. The Inquiry has also been provided with a copy of an email between Trevor Cooper and Shane Murphy on 12 June 2015[28] about a summary paper Mr Wightman had prepared on which Trevor states that '*there is a fair bit of naivety around the issues.'* Neither Mr Cooper nor Mr Murphy raised these concerns with Mr Wightman. This highlights the lack of communication within DETI. Given the seriousness of the issues involved, it is respectfully submitted they should have been working collectively *with* Energy Division to address the issue. Instead, there was a culture of not sharing information.

Political gamesmanship and breakdown of trust and confidence

55. The Inquiry has heard evidence as to the way in which politicians and SpAds operated. It will be for the Inquiry to assess that evidence and reach conclusions as to how that impacted on RHI. It does not, in general terms, directly affect Team 2 and no general submissions are made.

56. There are, however, a number of respects in which this did directly impact on Team 2.

[28] DFE-146565.

57. First, it is now clear that Minister Hamilton conspired with John Robinson to send, anonymously, documentation to Dr McCormick and to the media which sought to cast blame for the spike on Mr Wightman and Mr Hughes. Mr Hamilton did not make any mention of this in either of his two statements[29], instead saying that he had "no further information to offer"[30]. Nor did John Robinson make any mention of it in his initial witness statement, despite declaring that he had "endeavoured to supply all information under my control to the Inquiry." Nor did he make any mention of it in his oral evidence. But when Mr Hamilton was confronted with the direct question in oral evidence he provided a tongue-tied admission[31] that he had conspired with John Robinson improperly to leak documentation so as in order to achieve a political advantage and deliberately to avoid dealing with it "properly" and according to a "[proper] process".

58. Mr Hamilton knew that Stuart Wightman was working under the management and supervision of Chris Stewart (who was by then his direct line manager). Both, in turn, reported to a steering group chaired by Dr McCormick. Dr McCormick and Mr Stewart were involved in the preparation of the advice that attracted Mr Hamilton's apparent opprobrium. Therefore, it was wholly unfair for Mr Hamilton to single out Mr Wightman for criticism, both at the time and in his subsequent evidence to the Inquiry. If Minister Hamilton had genuine concerns about the conduct of Mr Wightman or Mr Hughes he had every opportunity to raise this in an open, fair and transparent manner. Instead, he resorted to subterfuge. As Dame Una rightly implied[32], this is wholly inconsistent with the Ministerial Code. It is also completely contrary to the Nolan principle of openness. It is difficult to think of something that could be more calculated to fracture any relationship of trust and confidence. Mr

[29] Despite having been asked specifically to provide details of any relevant interactions with Civil Servants (WIT-21017) and of any breach of the Nolan principles (WIT-21021).
[30] WIT-21048.
[31] TRA-16217 at line 16.
[32] TRA-16221 at line 6.

Hamilton has offered no apology to Mr Wightman or Mr Hughes for his conduct. The consequence of this conduct was that Mr Wightman and Mr Hughes were named at an early stage in the media, and a narrative was generated that they bore responsibility for improper leaks of information and thus sole culpability for the entire spike in demand. It also meant that Dr McCormick may have formed an early adverse view of Mr Wightman and Mr Hughes,[33] which we submit may have contaminated Dr McCormick's assessment of the evidence since then and throughout the course of the Inquiry proceedings. The matter was portrayed as criminal wrongdoing, with terms such as "insider trading" and "fraud" being used[34]. The reputations of Mr Wightman and Mr Hughes were publicly traduced without them having any opportunity to respond. That is the complete antithesis of a fair process.

59. Second, Minister Hamilton now claims that he had lost confidence in Mr Wightman. If that was the case it was open to him to raise that with senior officials and to seek a change in personnel either before or immediately after receipt of the submission in October. Instead, he kept Mr Wightman in post but denigrated his work not because of any experience he had had with Mr Wightman, nor because of the quality of his work, but simply because he had been in the Department when RHI scheme had gone "off the rails"[35]. It was only in and around 16 December that Minister Hamilton requested the departure of Mr Wightman, Mr Hughes and Mr Stewart.

60. Third, Minister Ó Muilleor referred to the 'buy out' proposal in disparaging terms, claiming that it had been 'blown out of the water' by his officials. This contrasts with the evidence of David Sterling, who indicated that the decision to adopt the alternative option (now known to be inferior) was taken 'on balance'. Minister Hamilton and Minister Ó Muilleor were fighting a party political battle

[33] WIT-11565 at §142.
[34] WIT-11566 at §144.
[35] TRA-16165. Much later, in December 2016, he asked that Mr Stewart, Mr Wightman and Mr Hughes cease involvement with RHI matters.

through the proxy of unfair criticism of a valid piece of work undertaken in good faith.

61. Fourth, in January 2016 the Minister approved a submission recommending the suspension of the RHI scheme, but that approval was then immediately rescinded at the intervention of SpAds[36]. The impression was then created (albeit not necessarily by SpAds) that in fact the delay had been caused by DETI and it was DETI that had been stalling the necessary action. So officials were pressing for appropriate steps to be taken, this was being resisted by SpAds, and officials were then portrayed as being the cause of delay[37].

62. Fifth, SpAds sought to mould the way in which submissions were presented in a way that, it is submitted, was inappropriate. Thus, Mr Cairns asked for the removal from a submission of reference to the Minister having had discussions with OFMDFM and DFP[38]. That, in itself, was a "somewhat odd, but of little material significance"[39]. However, it transpired that the Minister was not aware of the proposed change giving rise to a difficult and embarrassing encounter as between Minister Bell and Mr Stewart.

63. It is entirely appreciated that the relationship between Ministers, SpAds and officials can be difficult and that, on occasion, through nobody's fault, such relationships might break down. It is all too easy for one person to ascribe improper motivations to others when in fact relationships can break down without anybody behaving improperly. Here, however, it is respectfully submitted that there are a number of things that were done which were quite wrong and which was bound to undermine trust and confidence, thereby fundamentally prejudicing a constructive working relationship. This was the environment in which politically impartial public servants were expected to

[36] WIT-11544.
[37] WIT-11544, WIT-11551 at §101.
[38] WIT-11547.
[39] WIT-11548 at §90.

deliver very challenging policy objectives. It was hardly conducive to a constructive and healthy working relationship between officials, SpAds and politicians.

Summary of institutional and systemic causes of failure

64. Team 2 inherited a scheme with fundamental flaws. They were told to focus on another demanding initiative and that the scheme would run itself. There was woefully inadequate resource to operate the scheme, no staff with experience of running the scheme, and thus no corporate experience, no appropriate project or risk management, the communication systems were dysfunctional, ineffective and bureaucratic, and in some respects others acted in a way that undermined any relationship of trust and confidence. All of that, but particularly the resourcing, meant that significant mistakes were all but inevitable. The sheer number of mistakes by so many different officials at all levels is symptomatic and demonstrative of underlying *systemic* and *institutional* failings.

E. Phase 1

65. This phase of the Inquiry dealt with the period from the inception of the scheme up to and including 1 November 2012. It is submitted that it was within this phase that the critical failings occurred in respect of the genesis, design, construction and initial implementation of the Non-Domestic RHI Scheme. As noted above the Scheme had serious and substantial inherent flaws from its very inception. Team 2 were not in post during phase 1. They did not have the knowledge and experience that might have come with having established the scheme. They unknowingly inherited a flawed scheme in 2014 which they never had the opportunity to examine in detail given the direction they were given to focus on introducing the domestic scheme and the lack of adequate resources.

F. Phase 2

66. This phase of the inquiry dealt with the period from **c. November 2012 to c. July 2015** and covered a number of issues of direct relevance to the Team 2

witnesses, particularly Mr Hughes and Mr Wightman, including in particular the following matters which are addressed in turn:

(1) The Handover Note;

(2) Inappropriate Work Priorities;

(3) Risk Management and Monitoring;

(4) Lack of Scheme Review;

(5) The O'Hagan Emails of March 2015;

(6) The status of the funding for the scheme;

(7) Inadequate Oversight of OFGEM.

(1) The Handover Note

67. The wholesale turnover of staff required careful management by senior officials to minimise the loss of corporate knowledge. This simply did not happen.

68. Although it was no substitute for that, Mr Hutchinson did, at Mr Mills' request, prepare a handover note[40] (albeit, incongruously, he did not apparently draw Mr Mills' attention to those matters that he considered to be urgent). Ms McCutcheon had also had some degree of input into the handover note prepared by Mr Hutchinson. This handover note was passed to Ms McCay, who naturally understood that the actions on the note were listed in order of priority[41]. Ms McCay provided the complete (14 page) document to Mr Hughes and Mr

[40] WIT-26091.
[41] WIT-13029.

Wightman[42]. Both Mr Hughes and Mr Wightman had access to the complete version of this document.

69. Mr Hutchinson, Ms McCay, Mr Hughes and Mr Wightman were clearly all aware of the handover note at the relevant time. Mr Hutchinson wrote it, the others had been provided with a copy of it, and Mr Hughes and Ms McCay had annotated it. It was clearly a useful document at the time, and it has re-emerged as a significant document in the course of the investigations into what went wrong. However, after the immediate aftermath of the handover it appears to have been put to one side. It was not a day to day reference tool (and that was not its intention). It is tolerably clear that it was simply forgotten.

70. The fact that it was not produced earlier has caused considerable consternation. Dr McCormick was clearly extremely concerned, irritated and distressed that it was only produced shortly before his appearance before the Public Accounts Committee. Michael Woods has suggested that there was a lack of transparency, and that he was obstructed, because he was not provided with it.

71. However, it is respectfully submitted that the more prosaic and likely explanation is that nobody had recalled the note. It was not at the forefront of anybody's mind. It is striking that all officials, who had no conceivable motive for concealing the existence of the note, had not drawn its existence to the attention of Mr Woods or Mr McCormick. Again, the obvious and credible explanation is that it had simply been forgotten. For his part Mr Wightman disclosed that he had a copy of the note in response to the Inquiry's disclosure request. When he found an electronic copy of the note that he had emailed to himself he immediately volunteered that fact to the Inquiry (and the Inquiry could not, and would not, otherwise have known about that). Both Mr Wightman and Mr

[42] Ms McCay does not now recall providing it to Mr Wightman (WIT-13025) and Mr Wightman does not now recall receiving the entire handover note (WIT-17031). However, Mr Wightman has established that he did receive the entire note (because he has located an email to himself) and that must have been provided by Ms McCay.

Hughes have readily volunteered other material that is adverse to their interests. They have both gone out of their way to co-operate with the Inquiry. They have been ready to accept responsibility for their mistakes. All of that is completely inconsistent with any intention to suppress material evidence.

72. Dr McCormick and Mr Woods have jumped to conclusions about this. However, on a fair assessment of the evidence any imputation that the handover note was concealed is unfair and unjustified.

73. Mr Wightman has explained that his initial account[43] of receipt of the handover note was incorrect, though this statement did reflect his genuine (but mistaken) belief at that time (20 June 2017). Mr Wightman believed that he had only been provided with the first three pages of what was, in fact, a fourteen-page document. Mr Wightman clarified his evidence on this issue in his further witness statements[44] and in his oral evidence, particularly on day 64 (15 May 2018). Notwithstanding this clarification/correction Mr Wightman has remained consistent in his evidence that he does not recall reading through the complete handover note beyond the first three pages of that document.

74. Nowhere in the handover note is there any clear acknowledgement of the fundamental faults in the non-domestic RHI scheme. There is no indication that there were no budget controls or cost controls. Officials were not put on fair notice of the inherent risks.

75. The handover note did, however, identify, amongst a number of "immediate" actions, an "urgent" need to review tariffs in order to avoid over-generous payment. Mr Wightman actioned this requirement to the extent of incorporating it within the Branch plan. It was not, however progressed during 2014/15 due to resource pressures and other work priorities and was not included in the

[43] WIT-17031 at §45
[44] WIT-17676 and WIT-17706

2015/16 Branch Plan. That was a significant failing. It is, however, fair to point out that:

(i) This was just one of a large number of actions that were said to require immediate attention (and which had not been dealt with by the outgoing staff).

(ii) On any view it was utterly unrealistic to expect Mr Wightman and Mr Hughes to be able to deal with these matters within the indicated timescales.

(iii) The suggestion of a risk of over-generous payments does not begin to convey the nature and scale of the risk that was inherent in the scheme. It does not indicate that there is a fundamental flaw in the scheme leading to a perverse incentive and an inability to control cost. Nor does it really convey the degree or nature of risk that was present. Moreover, the assumptions on which the tariffs were based were not explained in the handover note.

76. Furthermore, it might fairly be observed that the handover note does not deal with a number of critical issues including the fact and status of the risk register, the fact that RHI recipients were being over-incentivised significantly above CEPA assumptions, the need for re-approval in March 2015 for the non-domestic scheme, the need for a full review of the Scheme, that State Aid approval was required for the domestic scheme, the need for ongoing monitoring of the Non-Domestic Scheme and its underlying assumptions, that officials had met with Janette O'Hagan in October 2013 and that Janette O'Hagan's email had not been answered, the statutory duty to publish data on the Scheme and the non-compliance with that duty.

77. The failure to address certain issues from the handover note must also be placed in the context of the status of this ephemeral document – a *relatively* informal,

relatively "low-level" document prepared (and effectively exchanged[45]) at DP level. This single document should not be elevated, with the benefit of hindsight, to have a status and significance that it simply did not have as of May/June 2014. Mr Wightman has given written evidence to the Inquiry which makes the point that a handover note – of the kind prepared by Peter Hutchinson – is temporary in nature and is not, in general terms, the appropriate means of capturing and communicating critical information[46] a point which only serves to highlight the lack of adequate project management structures for the Scheme from its inception. Mr Wightman made efforts to address this flaw by using the bulleted list of *"immediate actions"* in the handover note to populate the Energy Efficiency Branch Plan that he developed in July 2014. At that point the Branch Plan became the "live" document for Mr Wightman's future reference. While acknowledging that Mr Wightman ought to have carefully considered the entire handover note, this factor (the creation of the Branch Plan) does go some way to explaining why Mr Wightman would not have felt it necessary to constantly refer back to what was, in his view, only ever meant to be a temporary document. Mr Hughes' evidence on the handover note corroborates the position that this document was considered only as an initial and temporary guide.

78. It is also fair to compare the detail of the handover note with what was in fact known within DETI at the point of handover. From June 2013, Sandra Thompson's evidence to the Inquiry demonstrates that Team 1 were using load factors as high as 35% for forecasting purposes – see witness statement of Sandra Thompson dated 5 June 2018[47]. Ms Thompson's evidence (at §1) confirms that:

[45] Mr Wightman was given an additional copy, as is now clear. But it was prepared at DP level and was provided to the new DP, Mr Hughes.
[46] WIT-17709 at §14
[47] WIT-27006

> "...following receipt of details of the first payments issued, Revision 13 of the spreadsheet dated 28 June 2013 shows that the load factors have been revised upwards to around 35%."

79. As such DETI was aware (from as early as June 2013) that the scheme was operating with a "real world" load factor that was very significantly beyond the CEPA assumption of 17%. It was in this context and with this knowledge that DETI officials met with Ms O'Hagan on 8 October 2013[48]. During this meeting Ms O'Hagan specifically queried if the NI RHI payments would align with the rest of the UK (offering a tiered approach to funding) in order to encourage greater efficiency. Ms O'Hagan's note[49] of the meeting states:

> "I'd advised that what we were seeing on the ground in Northern Ireland is that buildings are using more energy than before because it pays them to do so. The flat rate means that there was no incentive at all to be efficient and it was more likely that the heating would be kept on in buildings in all year round, with the windows open everywhere. Fiona, Joanne and Peter told me that they did not believe that this was the case as they did not think that "people would not do this" ... I added that it is now in business' interests to be wasteful with what's strictly not a renewable energy source."

80. Despite DETI's knowledge (from June 2013) of the significantly increased load factor (double the assumption) and having heard Ms O'Hagan's specific concerns at a meeting in October 2013, no action was taken at that time to deal with these concerns. It is respectfully submitted that it is unfair to attribute primary responsibility for these matters to Team 2, who came into post the following year. They should have been addressed and resolved well before then.

[48] WIT-264817 at §3b
[49] WIT-264856

81. It was not sufficient to raise these matters in the handover note (following a further email from Ms O'Hagan on 12 May 2014[50]) and not to record them in a more formal manner. The Inquiry has discovered, for example, that the risk register, once created, had never been updated since 2012. In his evidence to the Inquiry, Mr David Sterling (Permanent Secretary in DETI until 30 June 2014) advised that:

> "And, during that period where there was a significant change in staff – and I know you want to come on to this – but the handover arrangements should have such that there was a very clear understanding by all involved that introduction of cost controls was significant and important. **And, indeed, I think, to ensure that, if you like, there should have been escalation to, certainly David Thomson and probably my level."**[51]

82. It is also fair to note that the handover note[52] records that (with emphasis added), *"...It is* ***becoming apparent*** *that the payments made to installations are higher than would have been expected under the CEPA modelling."* However, it had already become apparent in and around June 2013 that load factors were significantly higher than the CEPA assumption, "becoming apparent" is a bit of a stretch in that context.

83. It is respectfully submitted that the Inquiry ought to reject the proposition put forward by Dr McCormick to the effect that the handover note (and reference to Janette O'Hagan) represented the *"biggest single discontinuity"*[53]. This is a gross oversimplification of the many and complex reasons for the failure of the RHI Scheme and resultant crisis. It is untenable to isolate this single issue in the way proposed by Dr McCormick. Team 2 accept, with the benefit of hindsight, that the handover note was a significant document, but it cannot be taken out of the wider context of, *inter alia*, the chronic lack of resources, overloading of posts,

[50] WIT-264862
[51] TRA-06817 p. 125: 17-25 and TRA-06818 p. 126: 1-2
[52] WIT-13047
[53] TRA-12036: 16

staff changes/loss of corporate knowledge, lack of adequate project management, a culture of poor communication and the flaws already inherent in the scheme.

(2) Inappropriate Work Priorities

84. The Inquiry has examined the issue of prioritisation of work on the Domestic scheme over phase 2 of the Non-Domestic proposals and the cost control proposals. The decision to prioritise the Domestic scheme was taken *before* any member of Team 2 took up their post within DETI. Mr Mills acknowledges this fact in his oral evidence.[54]

(3) Risk Management and Monitoring

85. The Inquiry has established that there was no proper project management and the scheme risk register saved in TRIM had never been updated. The Department recognises that these were key failings. Mr Wightman and Mr Hughes both acknowledge the scheme monitoring carried out was unsatisfactory. However, this can be attributed to the limited resources they had available, the direction they received to prioritise the domestic scheme and the reassurances they received that Ofgem would administer the scheme and it would effectively "run itself".

86. If an effective risk register had been maintained from the outset, it would have identified the need closely to monitor fuel costs, installation costs, boiler size and the level of usage against the CEPA assumptions. Such a risk register would have flagged up the need for Team 1 to take corrective action when the levels were forecast at 35% in June 2013 (almost twice that assumed by CEPA).

[54] TRA-07090 p. 102: 11-12

(4) Lack of scheme review

87. It is submitted that *primary* responsibility for the failure to complete a full scheme review in 2014 and to secure scheme re-approval prior to 31 March 2015 pre-dates Team 2. There was no mention of these requirements in the handover note. It is submitted that these requirements ought to have been captured in the Divisional or Corporate Plans/Risk Registers given the novelty of the Scheme and the significant levels of funding involved. Furthermore, it should also be acknowledged that by the time Team 2 were all in post, there had been no preparatory work carried out in respect of either the scheme review or the need for re-approval.

88. The Business Case on the non-domestic scheme confirmed that the review of the scheme was to commence in January 2014 with any changes or revisions to be implemented by 2015[55]. This need for a review in 2014 was acknowledged by Fiona Hepper in her written evidence[56] and oral evidence[57]. Despite this, the draft Business Case (on the Domestic Scheme) sent to John Mills by email on 13 March 2014 stated (at §10.10) that the first formal review of the *"commercial RHI"* would begin in *"early 2015 with necessary changes implemented in 2016"*. During his oral evidence on 21 February 2018[58], Mr Hutchinson concedes that this decision must have been taken *"Unilaterally, yes. It would've been done after some discussion.*"

89. Notwithstanding the apparent deferral of the review of the non-domestic scheme to 2015, there was nothing in the handover note to suggest a full scheme review was required (whether in 2015 or 2014). The only mention of a review related to the need to review the tariff.

[55] WIT-17629 at §10.4.
[56] WIT-16657 at §103
[57] TRA-01792 p. 29: 13 and pp. 29/30: 24-4 and TRA-02293 p. 71: 16-17
[58] TRA – 05149

90. In any event it was completely unrealistic to expect that Team 2 should undertake a full scheme review in time to secure DFP approval in March 2015. At a conservative estimate it would take at least 6 to 9 months to complete a review of a tariff (and between 16 months and 24 months from inception of review to amend legislation[59]). It can take between 6 to 12 months simply to complete the state aid notification approval. As such in order for officials to be able to secure further DFP approval in advance of March 2015, the review process would have to have commenced (not accounting for preparatory work) by, at the latest, January 2014.

(5) The Janette O'Hagan Emails of March 2015

91. Ms O'Hagan had raised her concerns well before Team 2 were in post. They had not been addressed. In effect, they had been ignored.

92. Ms McCay had read the handover note and familiarised herself with its content. She then met with Mr Hutchinson on 15 or 16 May 2014[60]. She took reasonably detailed notes. Ms O'Hagan's name is not recorded, strongly suggesting that Mr Hutchinson had not raised the issue with Ms McCay when they had met[61]. Ms McCay does not believe Mr Hutchinson raised the May 2014 O'Hagan email contact (or the October 2013 meeting) with her during that meeting.

93. On 11 March 2015 Davina McCay received an email from Janette O'Hagan which she then sent to Seamus Hughes on the same date[62]. Mr Hughes' evidence was that he discussed that email with Mr Wightman[63] and then issued a response (copied to Mr Wightman) on 12 March 2015. This elicited a further response from Ms O'Hagan to Mr Hughes later on 12 March 2015 (copied to Mr Wightman)[64]. In his oral evidence Mr Hughes made the point that this was, to

[59]TRA-05506 to 05508
[60] WIT-13024.
[61] TRA-05510-05511.
[62] DFE-106890
[63] WIT-14029 at §20
[64] DFE-106889

his recollection, the first time that anybody had raised this issue with him, whilst acknowledging the reference in the handover note[65]. Mr Hughes accepted in his oral evidence that he did not respond to Ms O'Hagan's email on 12 March but said that he would have spoken to Mr Wightman about this. Mr Hughes accepted that the failure to respond represented a "missed opportunity".[66] Mr Wightman, in his oral evidence, indicated that he regretted that he didn't "pick up on" this email exchange[67]. Mr Wightman's written statement of 20 June 2017 confirmed that he had no recollection of this contact in March 2015 despite being copied into the email exchanges, citing the significant workload and sheer number of emails he was receiving at that time (up to 100 emails per day)[68].

94. Accordingly, from this evidence it can be seen that both Mr Wightman and Mr Hughes regret their failure to act on the information provided by Ms O'Hagan in March 2015. Mr Wightman cannot recall reading the March 2015 emails or any discussion with Mr Hughes about same. Therefore, if there was any discussion of the emails between Mr Wightman and Mr Hughes it is clear that neither of them appreciated, adequately, the significance of this information at that time. It may well be that Mr Wightman did not actually read the emails in March 2015 and this may have limited the efficacy of any brief discussion of them with Mr Hughes. Neither Mr Wightman nor Mr Hughes made the connection between this email contact and the earlier reference to Ms O'Hagan in the handover note. Furthermore, both Mr Hughes and Mr Wightman were working under significant pressure at that time and without adequate resources. In those circumstances it is probable that the failure to respond was down to simple human error aggravated by the working conditions. Indeed, it is difficult to conceive of a credible alternative explanation. It can also be noted that on 11 June 2014 Ms McCay did issue a response to Ms O'Hagan's *earlier* email of 12

[65] TRA-05909 p. 122:16-18
[66] TRA-05913 pp.126 -127
[67] TRA-09240 p. 94:22-23
[68] WIT-17085 at §203

May 2014 (to which Mr Hutchinson had not responded). The content of that response was entirely appropriate at the time given Ms McCay's state of knowledge (WIT-13032 at §65).

95. In relation to Mr Wightman and Mr Hughes, the context is very important. It is one thing for a properly resourced team with sufficient time and support and training to make an error of this type. It is quite another for two officials who were doing the work of a much larger team without any adequate support or resourcing or training or appropriate direction. It was almost inevitable that errors like this would be made. It is respectfully submitted that the real culpability lies not with Mr Wightman or Mr Hughes, but with the appallingly deficient system that was in place.

(6) Status of Funding

96. On one view – knowing what is now known - it might be said that the status of the funding should have been capable of reasonably clear comprehension at the time. In particular, it might be said that it ought to have been appreciated that, whatever the precise nature of the funding, it should have been treated in the same way as DEL.

97. It is, however, tolerably clear that confusion reigned at almost every level. Although Team 2 could no doubt have done more, they were far from alone in not fully understanding the nature of the funding. There is clear evidence that even Bernie Brankin and Trevor Cooper did not fully understand the nature of the funding in 2015.

98. It is certainly the case that DETI (including Team 2) had failed to grasp the risk to the DEL budget posed by the RHI scheme. However, that failure should not have impacted on the design of the scheme. There is no evidence that Team 2 took a more relaxed approach to the scheme because of a failure to fully understand the nature of the funding. If others did so then that was wrong and

reflects a lamentable approach to public funds. Stuart Wightman was urging the introduction of spending controls (tiering) and budgetary controls (degression) irrespective of the nature of the funding and without himself fully understanding what the position was. Those were the right policy responses even though the funding risks were different from that which Mr Wightman appreciated at the time. They would have been the right approaches if the funding had been entirely DEL from the start (and, indeed, these were steps that obviously should have been taken at the outset).

99. That was a reasonable, rational and proportionate approach to take, given the level of available resource and the state of knowledge at that time.

(7) Inadequate oversight of Ofgem

100. Team 2 accept that they did not sufficiently oversee the work undertaken by Ofgem. However, in assessing the extent to which it is appropriate to criticise them for that, the Inquiry is invited to consider three factors in addition to the general contextual points set out above.

101. First, the oversight arrangements pre-dated Team 2's appointments. They were inherited. They were not designed or implemented by Team 2. Of course, they could have been challenged by Team 2 but it is respectfully submitted that the failure to do so is, in all the circumstances, understandable.

102. Second, Mr Wightman was explicitly reassured during his induction with Mr Mills that because the Non-Domestic RHI scheme was already established and administered by Ofgem on their behalf, it would take up very little of his time[69]. There was no instruction to monitor or oversee Ofgem's work. This was an institutional failing for which the Department appears to accept responsibility.

[69] WIT-17034

103. Third, Ofgem is a large, well-resourced and experienced public body with experience of running a RHI scheme on a much larger scale. Team 2 were (quite apart from the instruction that had been given) entitled to place some degree of reliance on the diligence and competence of a national public authority such as Ofgem.

104. It is acknowledged that there is evidence of very considerable failings within Ofgem, in relation to leadership, systems, and the actions of individuals. It is further acknowledged that that does not detract from the responsibility of the Department to have effective oversight arrangements in place. However, it is not at all clear that any degree of oversight would have been sufficient to remedy all of the deficiencies within Ofgem that have been exposed by the Inquiry.

G. Phase 3 & Phase 4

105. These phases have been considered together (adopting the same approach as the Inquiry). Combined they cover the period from **July 2015 to November 2015** and then from **December 2015 to February 2016**, respectively. These submissions address the following issues within these phases:

(1) The submission of 8th July 2015;

(2) Delay in implementing scheme changes in summer 2015;

(3) Stuart Wightman's email of 13th November 2015;

(4) Failure to expedite scheme closure in January/February 2016;

(5) Engagement with Industry;

(6) The Business Case Addendum;

(7) "Cleansing the record";

(8) Criticisms by Michael Woods;

(9) Criticisms by the Department.

(1) Submission of 8th July 2015

106. On 8th July 2015 Mr Wightman sent an urgent submission to Timothy Cairns and Jonathan Bell MLA recommending that legislation be introduced to make changes to the non-domestic biomass RHI tariff from 1st October 2015, and that officials develop proposals for future tariff degression/reduction. The need for the introduction of cost control measures was made explicitly clear: "we need to urgently implement cost control measures to manage future RHI expenditure."

107. As Counsel to the Inquiry indicated in opening[70] a key focus of the Inquiry's work is establishing the reasons why these proposals were delayed. However, the important point so far as Mr Wightman is concerned is that he had made the need for cost controls clear in this submission. The delay in introducing changes that he had described as urgent in July 2015 is not primarily his responsibility.

108. That said, it is acknowledged that criticism can be made about some of the detail in the submission, primarily that it does not fully and accurately describe the funding arrangements that were in place. In a draft of the submission it was said that "the funding shortfall may have to be met by DETI and taken from other investment programmes."[71] This was deleted from the final version, which stated:

> "RHI funding is provided from the Treasury via Annual Managed Expenditure (AME) so does not impact directly on NI Departmental budgets."

[70] TRA-00280: 16
[71] TRA-10775.

109. It was correct that the funding came via AME. It would also strictly have been correct to say that the funding did not come directly from DEL. However, the funding arrangements did, in the event of overspend, impact on NI Departmental budgets. To that extent it was wrong to assert that it did not impact directly on NI Departmental budgets.

110. Mr Wightman candidly accepted this:

> I accept that… I've made these changes probably on instruction from somebody else. So I look now and say I agree with what Mr Aiken suggested: there would've been a more accurate form of words, and you could argue that it is misleading and it looks like normal AME.

111. The following short points are offered in mitigation:

(1) Mr Wightman had, in an earlier draft, made it clear that the funding shortfall might have to be met by DETI. As Mr Wightman put it, his "initial drafts were certainly a bit more stark and a bit more upfront"[72].

(2) The changes that were made to the submission were tracked and saved. It is for that reason that the Inquiry is able to establish the evolution of the document with some certainty. There was nothing surreptitious or underhand about the changes.

(3) The changes were made by Mr Wightman at the instruction of his line manager, Mr Mills (as Mr Mills candidly accepts[73]).

[72] TRA-10776.
[73] TRA-11069. Mr Mills explains the circumstances in which he directed the changes (working off a Blackberry whilst travelling).

(4) Although the change was misleading, it was (admittedly at the risk of making a somewhat semantic point) arguably not entirely incorrect. Moreover, the true picture was confused, confusing, and far from fully understood.

(5) The draft submission was widely circulated before its submission. Nobody raised a concern about the changes that had been made.

112. Mr Stewart accepts that he received copies of the draft submission, that the changes were tracked and that he, like everyone else, did not intervene to raise a concern about the drafting. He has expressed his regret for that omission. However, he had seen and commented on an earlier version of the submission which did not include this piece of drafting. Although the further draft was circulated to Mr Stewart, and although this drafting was tracked and was therefore there to be seen, it would perhaps have been understandable if Mr Stewart's focus had been on those changes that he had directed. It would be natural if his primary focus had been on ensuring that the changes he had suggested had been faithfully implemented. Of course, in an ideal world, he would diligently have checked the accuracy of each and every other change to the document. He regrets that was not done.

113. The panel will form its own view as to the material effect of the misleading content of the 8th July 2015 submission. It is, however, respectfully repeated that the submission was at least clear on the fundamental point that cost controls were urgently required. Moreover, although there was not sufficient clarity about the impact on DEL, it was absolutely clear that this was public money. Officials and ministers were, it is respectfully submitted, obliged to ensure value for money in respect of the use of public funds, irrespective of the precise source of those funds. Ultimately, they all come from the public taxpayer. There is therefore no justification in treating AME any differently from DEL so far as value for money is concerned. It follows that any mistaken belief that

expenditure would be funded from AME provides no justification whatsoever for any resistance to the introduction of controls. As Mr Stewart put it[74]:

> I had, personally, taken the view, throughout all dealings on the RHI, that whilst the difference between AME and DEL is very significant, underpinning both of those is the fact that it's taxpayers' money. There's a requirement to spend it efficiently and effectively to achieve value for money and in line with the wishes of Parliament and the Assembly. So I wouldn't have drawn the same distinction in that. Or, to put it pithily, would never have taken the view that it doesn't matter because it's AME.

114. That should not be a controversial approach. If and to the extent that some did take a more relaxed view to the need to ensure value for money in respect of AME funds it is respectfully submitted that is to be deprecated.

(2) Delay in implementing scheme changes in summer 2015

115. The Inquiry will wish to examine closely the reasons for the delay in implementing scheme changes. The fact is that Mr Wightman had lodged his submission on 8th July, that submission set out a clear and urgent timetable, and that timetable was not met. It is respectfully submitted that it is clear that the primary responsibility for the delay lies elsewhere than within Team 2.

116. That said, Mr Stewart accepts that he could have sought to intervene, as indeed he did with NIRO. The fact is, however, at that time and looking at matters objectively, there was no particular reason for him to do so. It appeared that the appropriate steps were being taken on foot of clear instructions from the Permanent Secretary. Absent hindsight, it is difficult to see what Mr Stewart should have done by way of intervention, other than asking Energy Division to

[74] TRA-11659.

focus on the introduction of cost controls and leaving other "phase 2" matters for another day.

117. In contrast, as matters stood at the time, the case for intervening in NIRO was compelling. At one point there appeared to be a risk to some £900 million of future investment, and an existential threat to an energy-from-waste plant that was considered essential to the financial security of Bombardier. There was no agreed way forward, with policy options being the subject of sharp dispute with the Assembly's Economy Committee and DECC. Therefore, in determining priorities at that time it appeared that NIRO represented by far the greater and more urgent risk. That was an understandable assessment on the evidence available to Mr Stewart at the time. Indeed, without the benefit of hindsight, it is difficult to argue that, objectively, on the basis of what was known to Mr Stewart, RHI carried the greater risk. Of course, it is now known that RHI carried a far greater risk – and a risk that materialised – than NIRO. See further statement of Chris Stewart dated 4 December 2018.

118. It is also the case that there was close alignment between the Permanent Secretary, Mr Stewart, and Energy Division on the way forward in relation to RHI. There was a unified and agreed sense of direction. The obstacles to progress came from outside Energy Division. By contrast, Energy Division disagreed with Mr Stewart's view on what was required in respect of NIRO, and he had to intervene to direct that a particular approach be taken in relation to legislation.

119. Timothy Cairns, in his oral evidence, expressed the view that he was unaware of the degree of concern and frustration felt by Mr Stewart and other officials during 2015, and only learned of it through evidence to the Inquiry.[75] It is respectfully submitted that, on the evidence, Mr Cairns must, at the time, have

[75] TRA12839: 1-3 and TRA-12858: 4

been very well aware of the degree of concern and frustration. Mr Stewart raised the prospect of a formal Ministerial Direction. The significance and seriousness of this is and was well understood. It is one of only two occasions in his entire career that Mr Stewart has taken such a step. After the email exchanges and discussions of August 2015, which included the weight of confirmatory advice from DFP, Mr Cairns could not have been left in any doubt as to the degree of concern and frustration, whatever position he now adopts as to his recollection of his understanding at the time. He could not have viewed the matter as anything other than a response to perceived 'opposition', stemming from frustration.

(3) Stuart Wightman's email of 13th November 2015

120. Mr Wightman had put in a submission on 8th July 2015 stressing the urgent need to implement cost controls. These had not been implemented by the timescale suggested in that submission. On 13th November 2015 Mr Wightman sent an email to Mr Stewart, copied to Dr McCormick and Mr Mills (and others) in which he said[76]:

> The surge of applications over the last 6 weeks... is unprecedented… This could see RHI expenditure increase to over £30m in 2015/16 and to over £40m from 2016/17, even with both schemes closed from April 2016. We are currently running at over 10% of the GB application numbers against the expected 3%.
>
> **I feel that in light of this situation regardless of what impact the amendment regulations might bring there is no choice now but to move to close both RHI schemes from 31 March 2016.**

[76] WIT-11736.

> I am presenting this for your urgent consideration. It will be important for the Minister to be aware that further 'unpopular' legislative changes are needed early in the New Year.

121. It is to Mr Wightman's credit that he sounded the alarm in these terms to the "entire senior management team very quickly" including Andrew McCormick. Mr Stewart correctly described this email as "prescient"[77] and "a brave and significant step" and "very diligent"[78]. It is submitted that he was right to "commend [Mr Wightman] for doing so." It is regrettable that neither Dr McCormick nor Mr Stewart nor Mr Mills responded to this email or directly and immediately took up Mr Wightman's concerns. Mr Stewart, for his part, has expressed regret for that omission[79]. So far as Mr Stewart is concerned, however, he was not far behind Mr Wightman – by 8th December 2015 he had come to the same view as Mr Wightman that closure or suspension was required. On that day he asked (in a widely copied email, including to Dr McCormick) for information as to the timeline and critical steps for closure[80].

(4) Failure to expedite scheme closure in January/February 2016.

122. It is respectfully submitted that it is, again, unfair to cast responsibility for delays during this period on Team 2. Clear advice had been provided as to the risks and the legal advice. However, it appears that decision-making became less and less influenced by the actions or advice of officials as time passed. The advice on the approach to closure was reasonable and rational, reflecting the balance of risk and the clear legal advice from DSO. It would have needed only a single disgruntled stakeholder to lodge a challenge in order for the risk of delay to have crystallised. Ultimately, however, the determining factor in the approach to

[77] WIT-27540 at §64
[78] TRA-11728. It is understandable that in a public inquiry such as the present that the focus is very much on what officials did wrong. There is an embarrassment of riches in that regard (albeit it is submitted that there are reasons for that, as set out in these submissions). It is not, however, all one way. It is fair also to point to what was done right, and this is an example of that.
[79] TRA-11728.
[80] WIT-11737, WIT-11541, TRA-11730.

decision-making was the political response to stakeholder pressure rather than the impartial advice proffered by officials.

(5) Engagement with Industry

123. This issue is matter of particular concern to Mr Wightman and Mr Hughes. They have been horrified to discover how they were manipulated by the industry. They accept that there was a significant element of naivety in their engagement with industry.

124. However, as Senior Counsel to the Inquiry very fairly noted in his opening (for phases 3 & 4) on 5 June 2108 (Day 71) there appeared to be have been *"little or no attempt [on the part of Messrs Wightman and Hughes] to conceal or disguise what was going on."*[81] Indeed, there was no attempt, at all, to conceal or disguise their contacts with industry. On the contrary, their line manager, Mr Mills, was aware that they were engaging with industry and did not seek to limit or curtail that contact or give advice as to what was/was not appropriate to disclose. That simple but important point can is borne out by reference to the fact that these contacts were not concealed but were openly recorded in TRIM and further by reference to the evidence from Mr Mills wherein he noted in an email to Dr McCormick and Chris Stewart of 20 August 2015[82] that, *"Stuart has been speaking informally to Moy Park who are supportive of our proposals for a tariff tier and a cap."* This demonstrates that there was no attempt to conceal the contact from senior officials, and no apprehension that too much information was being provided to industry. Indeed, Mr Mills effectively endorsed[83] and encouraged industry engagement (generally) and accepted this in his oral evidence[84] to the Inquiry:

> "But in a general sense, of course, I would've been, um, I would've been, um, saying, "Let's make sure we're interacting with

[81] TRA- 10254: 15
[82] DFE-10133
[83] DFE-386537
[84] TRA-11119: 18-22

> stakeholders out there", trying to get information, um, and that would —. I think that's fair to say that would've been encouraged at a departmental level. It was a Department, a Department that was focused on interaction with the business sector."

125. It can also be acknowledged that Dr McCormick approved the submission to Minister Hamilton, prepared by Mr Wightman in October 2016, wherein express engagement by officials with the Ulster Farmers' Union and Moy Park is noted at §§15-17.[85]

126. The DETI Operating Plan (2014/2015) which was published in April 2014 had indicated that the Phase 2 proposals were to be implemented by December 2014. Therefore, from late 2014/early 2015, Energy Division were receiving enquiries from the industry about when those proposals would be implemented. In response, Mr Wightman and Mr Hughes were open and transparent about the Departmental aim to progress the proposed changes in October 2015. It is submitted that this was a reasonable approach to adopt given that the published document had included a commitment for the Phase 2 extension to be in place by December 2014.

127. As the branch progressed policy development of the Phase 2 proposals during the first half of 2015, they continued to respond to queries from the industry about the Phase 2 proposals. It is accepted, however, that it was a mistake on the part of officials to have considered the issue of tiering (from May 2015 onwards) as part and parcel of the 2013 phase consultation. From late June/early July 2015 officials were open about the tiering proposals albeit with the caveat that this would require Ministerial approval. Officials were, in effect, trying to "sell" the concept of tiering to the industry as a natural outworking of the 2013 consultation. Mr Wightman and Mr Hughes accept that this level of engagement/disclosure was ill-judged and reflects a commercial naivety on their

[85] DFE-137681-137685

part. It was an error of judgment on the part of officials. It was, however, borne out of the best of intentions – to be open and transparent with industry and to minimise the risk of legal challenge. Moreover, it must also be borne in mind that – at that time – Mr Wightman and Mr Hughes did not know about *actual* gaming/abuse of the scheme, the tariff flaw, the nature of the budget, the state of readiness of industry and the period of delay that would accrue to get approval of the submission.

128. As noted above, industry engagement had been generally encouraged by Mr Mills. Despite this encouragement, the Department did not provide any bespoke commercial awareness training or guidance for officials, charged with actually carrying out such engagement on the ground[86]. Dr McCormick, who was aware of industry engagement, conceded in his oral evidence[87] on 10 October 2018 that there had been an omission at corporate level as to guidance in this area, *"We should have had something in place, a set of principles as to how you deal with areas which are market-sensitive. That's a valid point."* When pressed by Dame Una O'Brien Dr McCormick also accepted that it was *"stretching it quite a bit"* to suggest that Mr Wightman and Mr Hughes should have been proactive and sought guidance from senior officials[88]. Dame Una also very fairly noted that both Mr Wightman and Mr Hughes were new to the Department and that government departments don't rely on junior officials to request the guidance they need. Again, Dr McCormick conceded that this training/guidance was not provided, indeed he could not (on 10 October 2018) confirm whether or not this corporate failing had subsequently been rectified[89]. Despite the fact that Dr McCormick maintained his basic criticism of officials for this engagement he did state:

[86] By contrast, Ms Hepper gave evidence that when information was sensitive she held a meeting and gave clear guidance to staff that the info was to be kept tight [TRA02284].
[87] TRA-15210 at page 64:18-25 and TRA-15211 at page 65:1
[88] TRA-15211 at page 65:2-5
[89] TRA-15211 at page 65:6-23

> "I think we have to accept that there was a corporate responsibility to have provided a better framework and environment in which officials taking on this kind of role could work in a way that was secure and well governed. The fact of the matter is that wasn't the case."[90]

129. This lack of any guidance or training on commercial awareness was *particularly* unfortunate in the circumstances given that there was policy development guidance that positively encouraged active industry/stakeholder engagement on the part of officials – *"A practical guide to Policy Making in Northern Ireland"* (a publication from the NI Executive). This guidance confirms that all policies should be evidence based (using the best available evidence from a wide range of sources with all key stakeholders involved at an early stage and through the policy's development) and inclusive (taking account of the impact on and/or meets the needs of all people directly or indirectly affected by the policy). Mr Wightman refers to this guidance in his first witness statement[91]. Engagement with industry was undertaken in good faith and for legitimate reasons. While the extent of disclosure of information can be questioned with the benefit of hindsight, it should be acknowledged that this was a question of judgment on the part of officials, a judgment that had to be made in the real world environment and without the benefit of any relevant experience, training or guidance.

130. Team 2 was composed of *generalist* civil servants who lacked expertise in energy and renewable heat issues, compounding the lack of training.

131. It is accepted on behalf of Mr Wightman and Mr Hughes that their engagement with industry (from 30 June 2015 onwards) was *likely* one factor that led to an increased awareness of the proposed changes amongst the industry and so may have allowed some installers to prepare in advance of the formal notification in

[90] TRA-15212 at page 66: 5-8
[91] WIT-17001at §67.

September 2015. Mr Wightman and Mr Hughes would, however, stress that their engagement with industry was only one factor amongst many in a complex and dynamic environment. It can be noted, for example, that one of the DUP SpAds, Dr Crawford had shared copies of the submission of 8 July with family members in July 2015 [TRA-09966]. The involvement of CAFRE may also have been a factor. So too may the involvement of Mr Cairns[92]. Mr Cairns does not state explicitly what information he disclosed, but candidly admits that these discussions in July 2015 with MLAs and stakeholders led him to propose delaying the introduction of cost controls.

132. Although the Inquiry has heard submissions/evidence[93] to the effect that the spike in applications received in the autumn of 2015 could be related back to the earlier engagement by officials with industry, rather than the public announcement, the application numbers suggest that a significant proportion of this spike was more likely in response to the public announcement. The fact that boilers were being installed within 2 ½ weeks of being ordered at the height of the spike[94] would suggest that the majority of the 884 applications received in October/November 2015 can be attributed to the announcement on 8 September 2015.

133. A further factor to have regard to in this context is the delay in clearance of the submission to the Minister on the proposed cost control changes. This submission was dated 8 July 2015 but was not cleared until 3 September 2015. Mr Wightman and Mr Hughes were working on the expectation that this submission would be cleared within a week or two and a public announcement would be made on the 1 October implementation date. During his oral evidence on 10 October 2018 Dr McCormick confirms that "*late July looks not unreasonable*[95]" for the clearance of the Submission. Mr Wightman and Mr

[92] WIT-20020-21.
[93] TRA-15368 at page 46:13-25
[94] TRA – 14319 to 14321
[95] TRA – 15204

Hughes also had no reason to anticipate the implementation date being deferred by one month.

134. Mr Stewart accepts that the engagement with industry went too far. If he had known about it at the time he would have put a stop to it. It might fairly be asked whether he should have known about it at the time. All that can be said is that John Mills – the immediate line manager to Mr Wightman and Mr Hughes – did not have any particular difficulty with the engagement at the time albeit that it does not appear he knew the precise detail of it. Mr Stewart was one step further removed and the matter was not raised with him for consideration. Further, without wishing to avoid an appropriate level of responsibility and accountability, it is respectfully submitted that in a heavily loaded and broadly based post such as Mr Stewart's, it would not have been realistic to expect him to have been aware of the detailed daily activities of each of the 100 or so staff in Grade 7 / Deputy Principal posts under his indirect supervision.

135. To do so would have been logistically impossible, counter to the prevailing culture within the NICS, and in tension with his responsibility to exercise strategic leadership rather than day to day supervision of staff at grade 7/DP level.

(6) Business Case Addendum

136. In late 2015 there was an urgent need to secure DFP approval. Mr Wightman was required to draft the Business Case Addendum. He did so under the supervision of senior officials, including Dr McCormick. All were keen to maximise the prospect of securing re-approval. There was insufficient care to ensure that the draft Business Case Addendum provided a fair, balanced and accurate account of the background. It is accepted that the document is flawed in a number of respects, including that it erroneously stated that State Aid approval had been secured for the domestic scheme and that the Phase 2 work in 2013 had amounted to a Scheme Review (in accordance with the conditions

of DFP approval) and it wrongly omitted the caveats accompanying Alan Smith's analysis. These errors should have been identified and corrected before the final draft was submitted to DFP for approval. Mr Wightman accepts his allocation of the responsibility for this failing. But (at least according to Trevor Cooper) other senior management including Dr McCormick were well aware of the accurate position and they too failed to correct the document. They were content for it to be submitted.

137. Although there was very senior oversight and approval of the document, Mr Wightman accepts that he should have appreciated and corrected the errors in the document.

(7) "Cleansing the record"

138. Mr Stewart sent two submissions to the Private Office on successive days, the second in substitution for the first. The resulting narrative has been that this was an attempt to cleanse the record. On careful analysis, however, Mr Stewart's conduct is absolutely beyond any possible reproach.

139. He acted at all times in good faith, and with complete transparency - keeping the Permanent Secretary fully informed. Each submission was signed and dated on the day of issue, and was sent formally to the Private Office for the Minister's attention. Mr Stewart's reasonable expectation was that the Minister would see the submissions. When the second submission was sent this was on the reasonable understanding that the Minister would have seen the first submission, and that the request for the second submission had been made in accordance with the Minister's instructions that had his imprimatur.

140. There was never any possibility of the record being "cleansed" - both submissions were part of the formal auditable Departmental record.

141. Timothy Cairns, whilst not overtly suggesting any impropriety on Mr Stewart's part, sought to give the impression that the difficulty arose because the Minister was not given a "tracked changes" version of the submission. It is respectfully submitted that this entirely misses the point. The request for the second submission purported to be a definitive statement of fact about how the Minister had arrived at a decision - in effect Mr Cairns was telling Mr Stewart the Minister's mind. In that context it was entirely natural for a second, substitute, submission to be prepared in accordance with what appeared to be the Minister's instructions.

142. In fact, as the Chairman succinctly described it, Mr Cairns represented something to Mr Stewart that was false. It was the responsibility of the SpAd to verify that the change was accurate, and had the Minister's imprimatur (without which it would not have been a legitimate request).

143. It might be said that Mr Stewart could have asked for a note from the Private Office, confirming that the Minister had requested or agreed to the change, rather than assuming that he had. Nevertheless, this is, in the scheme of things, a nuanced observation rather than grounds for culpability: Mr Stewart's expectation that the Minister was, at the very least, sighted on the change was entirely reasonable and natural.

(8) Criticisms by Michael Woods

144. Mr Woods is highly critical of what he now says is a lack of cooperation that he received from DETI officials, and the failure to produce the handover note. He goes so far as to attribute this to a lack of candour.

145. On a fair assessment of the evidence, Mr Wightman and Mr Hughes had simply forgotten about the handover note by the time of the internal audit. It is not suggested that Mr Woods asked anybody, in terms, whether there had been a handover note, or that he said anything else that prompted anyone to recollect

it. Significantly, it is not simply that Mr Wightman or Mr Hughes did not produce it. Nobody did. Ms McCutcheon had been well aware of its existence – having some degree of input into its production via Peter Hutchinson. Ms McCutcheon would have had no conceivable motive not to inform Mr Woods of its existence, unless she too had also forgotten about its existence, which is, of course, quite possible. Mr Woods is clearly much vexed about its non-production and has assumed the worst. A fair and independent appraisal of the evidence results in a different conclusion.

146. Mr Woods also suggests that internal audit ought to have been made aware of Mrs O'Hagan's concerns at the time they were expressed. In her most recent statement, Ms Hepper has explained why Team 1(who met Ms O'Hagan) did not refer the matter to internal audit (or take any other steps in response to Ms O'Hagan's concerns). When Davina McCay received the email from Mrs O'Hagan in June 2014 she responded to it and she placed both Mrs O'Hagan's original email and her response in TRIM. Mrs O'Hagan also copied her response to Mr Mills' personal assistant (and it is clear that Mr Mills was himself copied in to Ms O'Hagan's email). It is respectfully submitted that this is all entirely consistent with the Nolan principles of openness and transparency. There is no question of Team 2 having sought to suppress or hide Mrs O'Hagan's email. It is, of course, correct that the matter was not referred to internal audit. As Mr Woods fairly recognised, this is a failing of the system: nobody referred the matter to internal audit and nobody appears to have been aware of any obligation to do so.

147. It is also notable that the evidence that Mr Woods now gives about a lack of cooperation is completely at odds with his contemporaneous assessment – at the

time he acknowledged that he had received full cooperation from all officials. He said, in writing[96]:

> "Internal Audit would like to thank management and staff for their assistance and co-operation throughout this review."

148. Mr Woods did not, at the time, raise any concern about the level of cooperation with Mr Wightman or Mr Hughes or Mr Mills or Mr Stewart or Dr McCormick[97]. If he had thought at the time that he was not receiving appropriate cooperation it is respectfully submitted that he ought to have raised that with the officials concerned, or their line managers. Leaving aside the non-production of the handover note and the Janette O'Hagan emails, he was in a good position, at the time, fairly to assess the level of cooperation he had received. He expressed appreciation for the cooperation he had received.

149. It appears that, in large measure, Mr Woods' concerns have arisen subsequently, perhaps in the light of the evidence given at the Inquiry. In particular, it appears he has reached the view he now expresses in the light of the emergence of the concerns expressed by Ms O'Hagan and the handover note. However, it is not reasonable to conclude that it was deliberately suppressed. The Inquiry is in a much better position to form its own judgment about this matter. It has a wealth of evidence and is in a position to form a holistic assessment of each of the witnesses who have appeared before the Inquiry. It can take a more Olympian view. On a fair assessment of the evidence it should not be concluded that Mr Wightman or Mr Hughes deliberately suppressed any document. That would be utterly contrary to the entire way they have behaved throughout the Inquiry process. That has shown them to be very open to challenge and criticism, and very willing to make concessions against their interests and to produce

[96] WIT-23474.
[97] TRA-16645-46.

documentation and other evidence whether or not it portrays them in a good light.

(9) Criticisms by the Department

150. The Department has lodged a statement from Mr McCann dated 26th October 2018 in which they set out the respects in which the Department disagrees with Team 2's evidence.

151. It is respectfully submitted that this statement does not amount to evidence. Rather, it is in the nature of a commentary or submission. It should not be given any *evidential* weight. For their part, Team 2 have not, as is appropriate, been permitted to file evidence that is in the form of commentary, and have been strictly limited (in length and time) in the submissions that they may make. No complaint at all is made about that – the Inquiry's strictures in this respect are entirely conventional and accord with well-established norms. However, the Inquiry should not allow any impression to be created that the Department has been permitted an unfair advantage as compared to other participants. It is a matter of concern to Team 2 that the Department has chosen gratuitously to intervene in this way and to deploy the considerable resource it now has available to it in order to seek to undermine the evidence that has been given by Team 2. That is particularly so given the wider context set out in detail above which includes, amongst other matters, serious institutional failings which have resulted in Mr Wightman and Mr Hughes being placed in an impossible position, and which includes a Minister and SpAd conspiring to create public scapegoats of Mr Wightman and Mr Hughes.

152. However, given that the Department has taken this step it is fair for Mr Wightman and Mr Hughes to have an opportunity to respond. The Inquiry has explicitly given them that opportunity and they have each filed detailed witness statements.

153. It is also fair to point out the respects in which the Department has *not* taken issue with their evidence, and therefore the respects in which the Department can be taken as agreeing with their evidence. Thus, the Department does not disagree that Mr Wightman and Mr Hughes were not provided with the necessary training, resources, project management tools or requisite information to effectively manage and oversee the RHI scheme[98]. Nor does it disagree that most of Mr Hughes' time was taken up with the domestic scheme[99]. Nor does it disagree what Mr Wightman had been given an unsustainable workload and was doing two jobs (both of them difficult)[100]. Nor does it disagree that the timescale for the actions identified in the handover note was wholly unrealistic[101]. Nor does it disagree that the governance arrangements with Ofgem were unsatisfactory[102]. It explicitly concedes that it did not properly monitor or control the scheme, and that instead it relied overtly on Ofgem[103]. The Department also explicitly recognises that it failed to implement robust project management principles[104]. It also accepts that Mr Wightman's explanation for his engagement with industry is "legitimate"[105]. In short, the Department can be taken to agree that there were serious ingrained structural and institutional failings which lie at the heart of the catastrophic policy failing in respect of RHI. Of course, it will be for the Inquiry to take its own view, rather than simply to adopt the Department's concession. Nevertheless, it is respectfully submitted that the evidence is all one way.

154. The Department says that the decision to defer the phase 2 work was taken without a full consideration of the risks[106]. Team 2 respectfully agrees. However, it is very well established that this decision was taken before Mr Wightman's

[98] WIT-17028 at para 32.
[99] WIT-17028 at para 33.
[100] WIT-17029 at para 39-40.
[101] WIT-17031 at para 46.
[102] WIT-17034 at para 57.
[103] WIT-03561 at para 7.
[104] WIT-03563 at para 12.
[105] WIT-03574 at para 46.
[106] WIT-03562 at para 9.

appointment and this is not a point of disagreement with any evidence given by Team 2.

155. The Department then says that incoming staff should have been fully informed of the working basis for the scheme (including the Department's statutory duties), the policy intent, the nature of approvals and the parameters under which the Schemes were operating[107]. Team 2 respectfully agree. The Department rightly does not suggest that it complied with this obligation to inform Team 2 of these matters. Again, this does not appear to be a point of disagreement. Team 2 are pleased that the Department "has identified this as a point of learning"[108].

156. Mr McCann criticises Mr Wightman and Mr Hughes for not sufficiently reviewing background information and for not being informed enough to recognise that the scheme was not operating as had been intended[109]. It is respectfully submitted that this criticism, from a person who had no contemporary involvement, and who now has the benefit of a team that is some 20 or so times the size of the team in place at the time, is unfair. Mr Wightman and Mr Hughes were not instructed to read the voluminous, detailed and highly technical background information. Nor were they given the time to do so. They were given immediate, important and demanding tasks which meant that they were simply unable to do so. The fact that the scheme was not operating as had been intended should have been far more apparent to those operating the scheme from 2012-2014 than new officials who were appointed in 2014 and had no previous experience.

[107] WIT-03562 at para 10.
[108] WIT-03562 at para 11.
[109] Ms Hepper makes the same point, albeit it is submitted with a degree of myopia given her role in setting up the scheme without sufficient resources and project management.

157. Ms Hepper[110] also criticises Mr Wightman and states that she is 'surprised that an experienced Grade 7 says that he did not read the material in the files relating to a Scheme he was responsible for and had been given 'no direction to do so.' This criticism takes no account of the reality of the situation in which Mr Wightman was placed upon taking up this post. His responsibilities extended well beyond the RHI Scheme. Many of the difficulties that he was faced with were directly related to the way in which, *inter alia*, the inherently flawed Scheme had been established, the complete absence of formal project management and the profound lack of appropriate resources. He therefore simply did not have any reasonable opportunity to carefully read all potentially relevant material.

158. The Department makes reference to the handover note, which is addressed in detail above. It does not, however, explain why the matters raised in the handover note were not addressed earlier or escalated to Mr Mills. Nor does it explain why the fundamental flaws in the scheme were not identified. Nor does it acknowledge that Mr Wightman's and Mr Hughes' duties were set by Mr Mills and by the Divisional Plan, rather than by the informal handover note.

159. On the date of these submissions (4 December 2018, being the extended deadline for filing same) the Inquiry released a further fourteen additional witness statements. Team 2 have not, therefore, had the opportunity to consider this further evidence prior to filing this written submission.

H. Conclusions

160. RHI was a flawed scheme from the outset. It should never have been implemented, and certainly should not have been implemented without proper cost controls. Team 2 bear no responsibility for the decisions that set the flawed policy in train. Team 2 accept full responsibility for any individual errors that can fairly be attributed to them. They have striven to assist the Inquiry to the very

[110] WIT-16769 at para 12.14.

best of their abilities, and have done so in the full and uncomfortable glare of publicity. They have sought to explain, as best they can, their conduct and to account for any errors they have made. They are grateful to Counsel to the Inquiry for the care in which the evidence has been presented, and the consideration that has been given to them as individuals, including an obvious desire to seek to understand their point of view and to give them an opportunity to explain their conduct. They are grateful to the Panel for their patience in listening to an astonishing volume of detailed evidence, the consideration that has been given to their welfare, and their commitment to fairness.

161. All they now ask, is that in assessing their conduct, fair consideration is given to the context and to the institutional and systemic causes of failure. If that is done, then it is submitted that any criticisms of them should be attenuated by a recognition of the truly impossible position into which they were placed. The RHI catastrophe was not caused by a single official or small team of officials. Ultimately, it was caused by a blinkered and misconceived decision to commit to a deeply flawed scheme without appropriate planning and resourcing followed by an almost unbelievable series of compound errors by officials, politicians and SpAds at every conceivable level. That is the simple, prosaic, truth.

162. The scheme was doomed from its flawed inception and by its rushed and misconceived implementation. The fires that burned across Northern Ireland, and which brought about the scheme's ultimate demise, point to one final cause of the RHI fiasco; unchecked, opportunistic and very human greed.