

Senate Standing Committee on Community Affairs

QUESTIONS ON NOTICE

[DOHA-NEHTA] Portfolio

Additional Budget Estimates

February 2013

Subject Outcome: E-Health 10.2

Agency: NEHTA

Issue: Claims of Privilege

Name of Senator: Sue Boyce

QUESTIONS:

In the last session of estimates in October last year we submitted a number of questions related to E-Health and in particular its management by NEHTA.

We had asked a series of questions in regard to the contract entered into with IBM in regard to the completion of the NASH, a contract that was terminated by NEHTA.

NEHTA's response to one key question, Question 6, essentially was to say and I quote; " *The subject matter of the contract termination between IBM, NEHTA is currently under legal process and privilege applies.*"

We asked whether the terminated contract contained penalty clauses for non-delivery. How much had IBM already been paid under the terms of that contract and what percentage of that contract price will be written off or lost as a result of the contract termination.

- 1. Can you tell me what "legal process" between IBM and NEHTA is currently underway in regard to this contract?**

NEHTA and IBM Australia have reached by mutual agreement a conclusion to their discussions regarding the termination of the National Authentication Service for Health (NASH) Design & Build and Operate contracts. The terms of that agreement are confidential.

- 2. In what way are the terms of the question I have just quoted subject to the strict legal definitions of privilege?**

The questions previously asked went to the subject of legal advice which NEHTA received about termination of the contract and the discussions it was having with IBM at the time. In order to protect the privilege in that advice, NEHTA needed to ensure that its actions, including answers to your questions, did not waive that privilege.

The discussions which were occurring between NEHTA and IBM at the time of your questions were also confidential and subject to the privilege in aid of settlement. NEHTA needed, and continues to need, to ensure that it does not breach its confidentiality obligations.

As noted above, the terms of the final agreement with IBM are confidential. As such, the parties are bound, under contract law, to keep the terms confidential.

3. Who provided that advice regarding our questions and the issue of privilege and can we obtain a copy of it?

NEHTA obtained advice from its external lawyers regarding termination of the contract with IBM. That advice is protected by legal professional privilege and NEHTA will not waive its rights to that protection. NEHTA is concerned not to breach any confidentiality obligations it has, which may occur if privilege in the advice were waived.

4. What considerations were made re the balance between your notion of privilege and the public's right to know how you are managing the expenditure of over 1 billion dollars of taxpayers money?

NEHTA takes very seriously its management of the implementation of e-Health in Australia, and the costs involved in that. It acknowledges that the public has an interest in how taxpayer dollars are spent.

Nevertheless, for NEHTA to achieve the best outcomes for taxpayers in relation to legal matters arising in the course of its operations, it needs to be able to access full and frank legal advice. Open disclosure of the advice which NEHTA received about termination of the contract and its discussions with IBM may have jeopardised those discussions and the ultimate agreement with IBM.