How can the audit committee promote compliance?

Chair of Audit Committees
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From 22 February 2018 many private sector and government organisations will have to report “all eligible data breaches” to the Privacy Commissioner and all affected individuals.

Mandatory Data Breach Notification

These provisions increase the onus on directors to ensure their organisation is monitoring the security of the information they hold, but many organisations won’t be ready for their introduction.

An ‘eligible data breach’ occurs if:

(i) there is an unauthorised access to, unauthorised disclosure or loss of personal information held by an affected entity; and

(ii) a reasonable person would believe that such access, disclosure or loss is likely to result in serious harm to any of the individuals to whom the information relates.

An affected entity must determine whether a “reasonable person” would believe that the unauthorised access to or disclosure or loss of the personal information is likely to result in serious harm to any of the relevant individuals, including customers, suppliers and others.
The terms “serious harm” and “harm” are not defined. However, it is hard to envisage a situation where physical, psychological, emotional or any economic/financial harm caused by a data breach would ever not be “serious harm”.

There is an exemption from notification of a potential eligible data breach where “remedial action” has been (or is being) taken prior to any actual harm occurring such that a reasonable person would no longer consider that there is a likelihood of serious harm occurring to any of the relevant individuals.

Tax Corporate Governance

What will the ATO focus on?
The concept of ‘justified trust’ is a tenement in modern-day tax auditing and has been explained by Deputy Commissioner Jeremy Hirschhorn as follows: “If we were to tell a citizen jury what we had done to assure the tax paid by an individual company, would they be satisfied that we had done enough to make sure that the tax they have paid is correct?”¹

There are four pillars to justified trust:
1. Understanding a taxpayer’s tax governance framework.
2. Identifying tax risks flagged to the market.
3. Understanding significant and new transactions.
4. Understanding why the accounting and tax results vary.

In many regards, satisfying the ATO that an organisation has a robust and operationally effective Tax Corporate Governance (TCG) framework will go some way to providing the ATO with assurance as to the remaining three pillars.

Fundamentally:
- Boards are expected to have oversight of TCG and be able to attest to the operational effectiveness of the organisation’s TCG framework.
- TCG frameworks should provide the organisation policies and procedures to identify, escalate and mitigate tax risk.
- TCG frameworks should be documented and underpinned by a control testing framework.

Five questions for management

1. Measures and mechanisms
   What specific measures/mechanisms are in place to detect data breaches across all parts of the business and all forms in which the data is held (e.g. paper and electronic/digital)?

2. Data breach reporting and escalation framework
   What specific data breach reporting and escalation framework is in place and who will assess whether each data breach is an eligible data breach requiring notification?

3. Data breach response plan
   Does the organisation have a data breach response plan and incident response team? When was the last time the plan was practised with the team?

4. Training
   What training on data breaches has been undertaken for which personnel in the organisation?

5. Independent assurance
   If the organisation does have any of the above, what independent assurance has been done of the quality and implementation of such? If no, how does the organisation know what has been implemented and if such is compliant?

¹ Towards justified trust between the ATO and the Infrastructure industry, Jeremy Hirschhorn, 2016 National Infrastructure Conference
Reporting of uncertain tax positions - to the ATO and to the market

Reportable tax positions
For a number of years, the Commissioner has required a relatively small number of taxpayers to lodge a Reportable Tax Position (RTP) Schedule, disclosing the organisations most contestable positions. For income years ending on or after 30 June 2018, the cohort of taxpayers required to lodge an RTP schedule will be expanded to the Top 1000. In addition to the disclosure of contestable positions and positions in respect of which there is a significant mismatch between the tax disclosures in the financial statements and the ITR, taxpayers are required to disclose whether they have taken a position or entered into an arrangement that is subject of specified ATO publications (e.g. Tax Alerts and Practical Compliance Guides). Accordingly, the RTP Schedule is a tool that will likely be used by the Commissioner to identify whether taxpayers have taken risks flagged to the market (i.e. the second pillar of justified trust).

IFRIC 23 - Uncertainty over Income Tax Treatments
The release of IFRIC 23 by the International Financial Reporting Interpretations Committee (June 2017) has clarified how to apply the recognition and measurement requirements of the tax accounting standard (IAS 12 Income Taxes) to positions where there is uncertainty over income tax treatments. The Interpretation provides guidance on a number of key matters including:

1. How an entity should consider assessing uncertain tax treatments separately or collectively
2. How and when an entity should measure uncertain tax amounts where it is not probable that a taxation authority will accept an uncertain tax treatment
3. How an entity should consider changes in facts and circumstances in respect of uncertain tax treatments

Entities will need to apply significant judgement firstly in identifying the unit of account for each tax uncertainty and assessing the probability of these being accepted by the tax authorities. Thereafter, judgement is also needed to determine the method appropriate for measuring and recognising each uncertainty. The probability threshold for uncertain positions under the new guidance is now likely to be applied earlier by entities than current practice and could therefore result in more tax liabilities being recognised sooner.

IFRIC 23 requires these determinations to be made based on expectations of how the tax authority will resolve the uncertainties. It also requires an entity to assume that a taxation authority will examine all amounts it has the right to examine and has full knowledge of related information. Applying the interpretation could be challenging for entities, particularly those that operate in complex multinational tax environments. Entities will need to evaluate whether they have established appropriate processes and procedures to obtain information, on a timely basis, that are necessary to apply the requirements of the interpretation and make the required disclosures.

Five questions for management

1. Assessment
   Has management done an assessment of all existing uncertain positions, including those currently recognised and not recognised, to understand the potential sensitivity and magnitude of the new guidance?

2. Tax uncertainty
   Does management expect a change in the unit of account being applied to current uncertain tax positions with the tax authorities that may fundamentally change the level at which uncertainties are being considered and assessed?

3. View of tax uncertainty
   Does management have a view on those uncertain positions that are likely to be recognised earlier under the new guidance based on the assessment of probability of being accepted by the tax authorities and have they considered which measurement method would be most appropriate for these?

4. Implementing a process for tax uncertainty
   How do management intend to implement a process for identifying and assessing uncertain tax positions that is consistent across the group?

5. Managements’ view of any expected changes
   What is managements’ view of expected changes to financial statement disclosures of uncertain tax positions in line with other tax transparency initiatives being undertaken by the entity?

The Interpretation is effective for annual reporting periods beginning on or after 1 January 2019, but early adoption is permitted which may be viewed as being in-line with the spirit of tax transparency.

The Voluntary Tax Transparency Code
More public scrutiny
Historically, taxpayers were able to keep their tax affairs private. Indeed, the tax legislation includes ‘secrecy’ provisions preventing the Commissioner and his officers disclosing details of specific taxpayers. While the secrecy provisions remain, in 2015 legislation was introduced requiring that the Commissioner disclose specific information relation to the total income, taxable income and tax payable of large corporate tax entities.

Subsequently, the Voluntary Tax Transparency Code was introduced by the Board of Taxation in 2016, although its take-up thus far has not been extensive, with few multinationals participating. The introduction of the code came after community demands for increased transparency over the tax affairs of corporates. It is part of a broader trend whereby ‘cracks’ have started to appear in the privacy of corporate taxpayers. Under the voluntary tax transparency code corporate taxpayers may disclose both quantitative and qualitative details of their tax affairs.

Historically, taxpayers were able to keep their tax affairs private. More public scrutiny

• For corporates with Australian turnover in excess of $100 million, details include reconciliation of accounting profit to tax expense, reconciliation of tax expense to tax payable, identification of material temporary and non-temporary differences, and effective tax rate.

• For corporates with Australian turnover in excess of $500 million, details include overview of business operations, details of dealings with international related parties, details of activities in low tax jurisdictions, tax corporate governance.

The interpretation is effective for annual reporting periods beginning on or after 1 January 2019, but early adoption is permitted which may be viewed as being in-line with the spirit of tax transparency.
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