McN+

McGRATHNICOL

CORPORATE ADVISORY

2 October 2009

Mr Moston Neck
Australian Energy Regulator
PO Box 10048
Adelaide Street Post Office
Brisbane QLD 4000

Assessment of ETSA Utilities' proposed methodology and calculation of its tax asset base for the 2010-2015 regulatory control period

1. Introduction

I refer to the contract between the Australian Competition and Consumer Commission ("ACCC"), as represented by the Australian Energy Regulator ("AER"), and McGrathNicol Corporate Advisory ("McGrathNicol") for the provision of assistance in assessing the tax asset bases of the South Australian and Queensland electricity Distribution Network Service Providers ("DNSPs").

Specifically, this assessment relates to the methodology used to calculate ETSA Utilities' tax asset base.

2. Scope

McGrathNicol has been engaged to conduct a high level assessment of ETSA Utilities' tax asset base valuation methodology ("Proposed Methodology"), based on information contained in its regulatory proposal for the 2010-2015 regulatory control period.

In assessing ETSA Utilities' Proposed Methodology, we have considered the following:

+ whether ETSA Utilities' Proposed Methodology is consistent with the National Electricity Rules ("NER") and the National Tax Equivalents Regime ("NTER"). Specifically, this involved:
    - identifying an appropriate starting point to establish ETSA Utilities' initial tax asset base as at 1 July 2010;
    - reviewing ETSA Utilities' historic depreciation and tax depreciation assumptions to determine whether these assumptions are appropriate in the context of its Proposed Methodology and Generally Accepted Accounting Principles ("GAAP");
    - examining ETSA Utilities' treatment of past additions and disposals, and determining whether such treatment is appropriate in the context of its proposed methodology and GAAP;
    - reviewing ETSA Utilities' treatment of depreciation on capital contributions to determine if these have been applied correctly;

  - assessing ETSA Utilities' assumptions used to split assets between standard control, alternative control, negotiated and unregulated services to determine whether these assumptions are appropriate in the context of its Proposed Methodology;
  - reviewing ETSA Utilities' treatment of Work-In-Progress ("WIP"); and
  - reviewing ETSA Utilities' treatment of tax losses.
+ whether ETSA Utilities' tax asset base has been calculated in accordance with its Proposed Methodology;
+ the validity of documentation supporting ETSA Utilities' Proposed Methodology; and
+ the ability to audit the documentation supporting the calculation of ETSA Utilities' tax asset base.

As part of the engagement, we have also provided recommendations to address such deficiencies.

3. Background

Revenue earned by DNSPs is regulated by the AER to ensure that they earn an allowable return on capital. Each reset period, DNSPs are required to submit their revenue proposal to the AER.

For this upcoming reset period, in accordance with the NER, DNSPs are required to use a post tax methodology to determine allowable revenue.

DNSPs adopt a "building block" approach to determine allowable revenue. To enable the determination of the tax building block (incorporating depreciation), DNSPs need to determine the tax asset values (as represented by the total future value depreciation allowable for tax purposes) of their regulatory assets as at the commencement of the next regulatory period.

Based on the recommendations from Ernst & Young, the AER should track the effects of tax depreciation provisions and changes on regulated assets from February 1992, as any alterations in depreciation laws mostly affect assets acquired after the relevant change, and will have minimal impact on assets acquired prior to this date.

4. ETSA Utilities' Approach

ETSA Utilities' Proposed Methodology details the approach for calculating its tax asset base as at 1 July 2010 – the commencement of the 2010-2015 regulatory control period.

Broadly, ETSA Utilities' Proposed Methodology is based on the following assumptions:

+ A starting point of 11 October 1999 (being the date of regulation) upon which to calculate its tax asset base at 1 July 2010.
+ Prime cost (straight line) depreciation.
+ Historical acquisitions and disposals (pre 11 October 1999) are based on a combination of balance sheet and cash flow movements.
+ Historic acquisitions and disposals (post 11 October 1999) are based on regulatory accounts.

- The majority of ETSA Utilities' assets acquired in the period prior to 11 October 1999 are attributable to standard control services.[1] The balance is attributable to negotiated services.
- Exclusion of shorter life asset acquisitions and disposals from the calculation of its tax asset base pre 11 October 1999.
- WIP is included in its tax asset base as a one-off transitional item as at 1 July 2010.
- No carried forward tax losses.

5. Sources of information

In assessing ETSA Utilities' Proposed Methodology, we reviewed and considered the following information:

- ETSA Utilities' regulatory proposal for the 2010 to 2015 regulatory period, including all supporting attachments;
- the AER's "Transition from pre-tax to post-tax regulation (21 June 2007)", PowerPoint presentation;
- the AER's "Post-tax revenue model", Final decision – June 2008;
- the AER's "Post-tax revenue model handbook" – June 2008;
- the AER's "Roll forward model", Final decision – June 2008;
- the AER's "Roll forward model handbook" – June 2008;
- the AER's Framework and Approach – Preliminary position paper for South Australia;
- the AER's Framework and approach paper – ETSA Utilities 2010-2015 – November 2008;
- the application of Tax Depreciation Rules to Regulated Energy Entities Phase I Recommendations, prepared by Ernst & Young (30 August 2006);
- the "Independent report for the Application of Tax Deprecation Rules to Regulated Energy Entities for the period 26 February 1992 to 1 November 2006", prepared by Ernst & Young ("EY report"); and
- relevant sections of Australian taxation legislation and the Australian Accounting Standards.

6. Findings

We have set out below our findings from our review of ETSA Utilities' Proposed Methodology and supporting schedules. Our findings are presented in accordance with the four scope elements identified in our Order For Services, which are detailed in the Scope section of this report.

[1] ETSA Utilities appears to have classified 'variable' metering costs for small customers and 'exceptional cases' of legacy Type 1-4 metering of large customer metering installations as standard control services, as opposed to alternative control services. ETSA Utilities states that it has adopted this classification of distribution metering services to better meet the requirements of the NER.

6.1 Whether ETSA Utilities' Proposed Methodology to calculate its tax asset base is consistent with the National Electricity Rules and the National Tax Equivalents Regime

The following table details the findings identified in our assessment of ETSA Utilities' Proposed Methodology. In determining the above, we have:

+ reviewed each individual assessment area (as identified in Section 2 of this report);
+ provided a description of the identified finding;
+ referenced the source of the finding; and
+ provided comments and recommendations, where applicable, for each finding.

Finding	Assessment area	Description of finding	Reference	Comments and recommendation
1.	Identifying an appropriate starting point to establish the initial asset base as at 1 July 2010.	ETSA Utilities' Regulatory Information Notice ("RIN") identifies 11 October 1999 as an appropriate starting point for ascertaining its tax asset values.	15.2 15.4.1	The date of 11 October 1999 represents the date ETSA Utilities became subject to regulation. A start date of 11 October 1999 appears to be appropriate based on the following: + ETSA Utilities became subject to regulation at this time; and + acquisitions and disposals data associated with ETSA Utilities' provision of standard control services at this time (and thereafter) is detailed and robust. Given the inconsistencies in ETSA Utilities' approach to calculating asset acquisitions and disposals (see Findings 9 and 11) in the period prior to 11 October 1999, a start date of 11 October 1999 appears reasonable. In addition, ETSA Utilities confirmed that there had been no change in the valuation methodology of its tax asset base from the date of regulation and the date of privatisation.[2] ETSA Utilities also stated that the adoption of 11 October 1999 is consistent with the assumptions underlying its revenue proposal, which positions ETSA Utilities as though it had been subject to post-tax regulation from the date of regulation.

[2] A sale and purchase agreement for ETSA Utilities was signed on 12 December 1999, which was subsequently completed on 28 January 2000.

Finding	Assessment area	Description of finding	Reference	Comments and recommendation
2.	Identifying an appropriate starting point to establish the initial asset base as at 1 July 2010.	ETSA Utilities states in its Proposed Methodology that the historic point to establish the value of its tax asset base is 1 September 1946.	15.4	1 September 1946 represents the date the first of ETSA Utilities' predecessor entities was first formed and held the relevant network assets. This approach appears reasonable. It is likely that the majority of the assets acquired at this time have since been fully depreciated and will not have any impact on the calculation of ETSA Utilities' tax asset base as at 1 July 2010.
3.	Reviewing historic depreciation and tax depreciation assumptions to determine whether these assumptions are appropriate in the context of each DNSP's Proposed Methodology and GAAP.	ETSA Utilities proposes to value its tax asset base as at 30 June 2010 by applying the prime cost (straight-line) method of depreciation. The rates proposed to be used are based on the Australian Taxation Office's ("ATO") rulings and guidelines in place at the time the relevant assets were first installed and ready for use.	15.7 Attach K.1	This approach appears appropriate and is consistent with: + the AER's preferred method of depreciation for tax purposes(straight-line); + ETSA Utilities' historic approach to calculating depreciation; and + GAAP.
4.	Reviewing historic depreciation and tax depreciation assumptions to determine whether these assumptions are appropriate in the context of each DNSP's proposed methodology and GAAP.	ETSA Utilities' Proposed Methodology states that it has undertaken consideration of appropriate regulatory tax depreciation treatment for all assets, be they acquired before or after 26 February 1992.	15.2	Previously, ETSA Utilities' Proposed Methodology assumed that all assets acquired before 26 February 1992 would be fully depreciated prior to the commencement of the 2010-2015 regulatory control period. However, ETSA Utilities has revised this assumption, such that it no longer applies for assets acquired before 26 February 1992. This approach appears appropriate given that ETSA Utilities may currently hold longer life assets, which were acquired before 26 February 1992, that are yet to be fully depreciated for tax purposes as at 1 July 2010. See Finding 6 for additional information.
5.	Reviewing historic depreciation and tax depreciation assumptions to determine whether these assumptions are appropriate in the context of each DNSP's proposed methodology and GAAP.	The depreciated value of distribution network assets acquired before the date of regulation will form part of the tax asset base as at 1 July 2010.	15.4.1	This approach appears reasonable and ensures that all assets which have not been fully depreciated, irrespective of their date of acquisition, will be included in ETSA Utilities' tax asset base.

Finding	Assessment area	Description of finding	Reference	Comments and recommendation
6.	Reviewing historic depreciation and tax depreciation assumptions to determine whether these assumptions are appropriate in the context of each DNSP's proposed methodology and GAAP.	ETSA Utilities has forecast its depreciation allowance at an asset category level using straight-line depreciation, with all assets within each class assigned standard and weighted average remaining lives.	14	ETSA Utilities' use of standard and weighted average remaining lives for depreciation is consistent with the requirements set out in clauses 6.5.5 and S6.1.3 of the NER. This approach appears reasonable.

Finding	Assessment area	Description of finding	Reference	Comments and recommendation
7.	Examining the treatment of past additions and disposals and determining whether such treatment is appropriate in the context of each DNSP's proposed methodology and GAAP.	ETSA Utilities' Proposed Methodology does not include shorter life asset acquisitions in the calculation of its tax asset base before 1998. Similarly, ETSA Utilities' Proposed Methodology does not include shorter life asset disposals in the calculation of its tax asset base before 1998. ETSA Utilities adopted the same approach for shorter life asset acquisitions and disposals from 1 July 1998 to 10 October 1999[3].	15.4.1	*Additions* For the period pre-regulation, it is not clear what quantum of shorter life assets ETSA Utilities acquired on an annual basis, and whether such acquisitions were material in the context of ETSA Utilities': + total acquisitions for the relevant year; and + rolled forward tax asset base for the relevant year. As a result, ETSA Utilities' tax asset base would have been understated for those years where shorter life asset acquisitions were not included in the calculation of its tax asset base. *Disposals* ETSA Utilities' Proposed Methodology states that there are no known disposals of distribution systems assets acquired before regulation. Accordingly, ETSA Utilities' tax asset base would have been overstated for those years where shorter life asset disposals, if any, were not included in the calculation of its tax asset base. *Net impact* In the absence of financial information, it is not clear what net impact, if any, shorter life asset acquisitions and disposals would have had on ETSA Utilities' tax asset base during the period before regulation. However, we note that ETSA Utilities' Proposed Methodology may be appropriate given that all shorter life asset acquisitions and disposals (that have been excluded to date) are likely to have been fully depreciated by the start of the 2010-2015 regulatory control period (as they would be at least 12 years old). For the 2010-2015 regulatory period, ETSA Utilities should ensure that all asset acquisitions and disposals are accounted for when calculating its tax asset base.

[3] Shorter life assets were originally included in the calculation of ETSA Utilities' tax asset base during this period. However, a later adjustment was made to exclude these values, as they would have been fully depreciated by 1 July 2010.

Finding	Assessment area	Description of finding	Reference	Comments and recommendation
8.	Examining the treatment of past additions and disposals and determining whether such treatment is appropriate in the context of each DNSP's proposed methodology and GAAP.	ETSA Utilities' Proposed Methodology states that the values of regulatory asset acquisitions and disposals reflect the values in the audited regulatory financial statements from 11 October 1999 to 30 June 2009.	15.4.2	This approach appears reasonable. For the purposes of calculating its tax asset base, ETSA Utilities should recognise the value of its assets based on their corresponding tax values.
9.	Examining the treatment of past additions and disposals and determining whether such treatment is appropriate in the context of each DNSP's proposed methodology and GAAP.	ETSA Utilities' Proposed Methodology states that it has relied on historic balance sheet and cash flow movements to determine asset acquisitions and disposals between 1 February 1992 and 28 January 2000.	15.41	Based on the information provided: + The determination of ETSA Utilities' opening tax asset value of new additions based on historic costs movements, as reported in its audited annual reports, appears to be a reasonable approach and adheres to the PABV method advocated under Division 58 of the ITAA 1997. + The determination of ETSA Utilities' opening tax asset values based on cash payments[4] also appears to be an acceptable approach in estimating the tax asset values of new additions acquired each year.
10.	Examining the treatment of past additions and disposals and determining whether such treatment is appropriate in the context of each DNSP's proposed methodology and GAAP.	Asset disposals largely comprise assets, such as vehicles, land and buildings. Asset disposals are recognised in the year of disposal and the written down value is deducted from the tax asset base.	12.3.2	This treatment is deemed appropriate.
11.	Examining the treatment of past additions and disposals and determining whether such treatment is appropriate in the context of each DNSP's proposed methodology and GAAP.	A number of adjustments were made to calculate the ETSA Utilities' asset acquisitions between 1 July 1995 and 11 October 1999.	15.4.1	ETSA Utilities' approach to the valuation of asset acquisitions during this period appears appropriate based on the circumstances and best information available at the time.

[4] Historic balance sheet movements are not available for the years ended 30 June 1996 to 30 June 1999. Accordingly, cash payment values were used.

Finding	Assessment area	Description of finding	Reference	Comments and recommendation
12.	Reviewing the treatment of depreciation on capital contributions to determine if these have been applied correctly.	It is unclear from the information provided, how ETSA Utilities treats capital contributions prior to 1 July 2010 in determining the value of its tax asset base.	15.2	ETSA Utilities subsequently confirmed that capital contributions, where relevant, are included in its tax asset base for the period prior to 1 July 2010. These capital contributions have been / will be included on a net contributions basis, based on discussions with the AER. ETSA Utilities confirmed that capital contributions for the purposes of establishing its tax asset base are allocated to a single asset category. Contributions are subsequently depreciated based on the weighted average life of the assets for which the contributions are received.
13.	Reviewing the treatment of depreciation on capital contributions to determine if these have been applied correctly.	It is unclear from the information provided how ETSA Utilities treats capital contributions post 1 July 2010 in determining the value of its tax asset base.	N/A	ETSA Utilities subsequently confirmed that the assets to which capital contributions relate will be included on a gross contributions basis in determining the tax asset base in accordance with the PTRM.
14.	Assessing the assumptions used to split assets between standard control, alternative control, negotiated and unregulated services to determine whether these assumptions are appropriate in the context of each DNSP's proposed methodology.	ETSA Utilities' Proposed Methodology assumes that all assets acquired before 11 October 1999 are directly attributable to standard control services, with the exception of a component for negotiated services.	15.5.1	Although this appears to be a simplistic assumption, the AER confirmed that it has undertaken a process of classifying the categories of distribution services provided by ETSA Utilities, and that the AER is comfortable with the assumptions ETSA Utilities uses to split the categories and assets of these services.
15.	Assessing the assumptions used to split assets between standard control, alternative control, negotiated and unregulated services to determine whether these assumptions are appropriate in the context of each DNSP's proposed methodology.	Segregation of capital expenditure between: + network and non-network assets; and + the various network services ETSA Utilities provides.	15.5.1 15.5.2	ETSA Utilities has not provided any information as to the assumptions used to classify capital expenditure between: + network and non-network assets; and + the various network services ETSA Utilities provides. However, the AER confirmed that it has undertaken a process of classifying the categories of distribution services provided by ETSA Utilities, and that the AER is comfortable with the assumptions ETSA Utilities uses to split the categories and assets of these services.

Finding	Assessment area	Description of finding	Reference	Comments and recommendation
16.	Assessing the assumptions used to split assets between standard control, alternative control, negotiated and unregulated services to determine whether these assumptions are appropriate in the context of each DNSP's proposed methodology.	Allocation of pre-regulation capital expenditure.	15.5.1	Negotiated services' share of total network capital expenditure for the period prior to 11 October 1999 is based on a fixed percentage share of capital expenditure for the 2001 and 2004 regulatory periods. This is based on the assumption that negotiated control services' capital expenditure for 2001 to 2004 is not materially different from the years prior to 11 October 1999. The AER confirmed that it has undertaken a process of classifying the categories of distribution services provided by ETSA Utilities, and that the AER is comfortable with the assumptions ETSA Utilities uses to split the categories and assets of these services.
17.	Assessing the assumptions used to split assets between standard control, alternative control, negotiated and unregulated services to determine whether these assumptions are appropriate in the context of each DNSP's proposed methodology.	Inconsistency in the dates used to split pre-regulation network and non-network capital expenditure into asset classes.	15.5.1	ETSA Utilities confirmed in a response to the AER that: + pre-regulation non-network capital expenditure is based on the financial years ended 30 June 2001 to 30 June 2004; + pre-regulation negotiated services' capital expenditure is based on the financial years ended 30 June 2001 to 30 June 2004; and + pre-regulation network capital expenditure is based on the financial years ended 30 June 2000 to 30 June 2004, and not 2005, as stated in section 15.5.1 of its regulatory proposal (see above). In order to ensure consistency between the split of non-network and network capital asset classes, ETSA Utilities recalculated its network capital expenditure based on the financial years ended 30 June 2001 to 30 June 2004. By adopting the period ended 30 June 2001 to 30 June 2004, ETSA Utilities' tax asset base would be $110,000 higher than the tax asset base submitted in its regulatory proposal. Based on the information provided, and in order to ensure consistency between the allocation of network and non-network capital expenditure, we recommend that ETSA Utilities splits pre-regulation network capital expenditure into network asset classes based on the periods ended 30 June 2001 to 30 June 2004.

Finding	Assessment area	Description of finding	Reference	Comments and recommendation
18.	Assessing the assumptions used to split assets between standard control, alternative control, negotiated and unregulated services to determine whether these assumptions are appropriate in the context of each DNSP's proposed methodology.	ETSA Utilities' Proposed Methodology states that the likely written down value at 30 June 2010 of any non-network assets acquired prior to 11 October 1999 is limited to a component for furniture, which is immaterial.	15.5.1	This approach appears reasonable based on the information included in ETSA Utilities' Proposed Methodology. All non-network assets prior to 11 October 1999 have useful lives of less than 10 years. Based on a start date for the next regulatory control period of 1 July 2010, it is reasonable to expect that the tax value of all non-network assets acquired before 11 October 1999 will be immaterial or fully depreciated for tax purposes.
19.	Assessing the assumptions used to split assets between standard control, alternative control, negotiated and unregulated services to determine whether these assumptions are appropriate in the context of each DNSP's proposed methodology.	Regulatory accounts commencing with the year ended 30 June 2000 are for ETSA Utilities' stand alone distribution business only, and do not include any non-regulated assets.	15.4.2	This appears appropriate.
20.	Reviewing the treatment of WIP.	ETSA Utilities' Proposed Methodology states that in estimating tax depreciation available for the 2010-2015 regulatory period, WIP will be included in its tax asset base as a one off transitional issue.	15.6	This appears to be in accordance with section 7.5.3 of the AER's Framework and approach paper – ETSA Utilities 2010-2015.

Finding	Assessment area	Description of finding	Reference	Comments and recommendation
21.	Reviewing the treatment of WIP.	ETSA Utilities' WIP as at 1 July 2010 will be calculated based on the work-in-progress balance as at 30 June 2009. The work-in-progress balance will not be depreciated for tax purposes for the period 1 July 2009 to 30 June 2010.	15.6	ETSA Utilities' approach to calculating its WIP as at 1 July 2010 appears appropriate in the absence of any other information that can be used to accurately forecast WIP at this time. However, by not depreciating its WIP for the 12 months ended 30 June 2010, ETSA Utilities may report an overstated tax asset base at this time. This in turn may overstate ETSA Utilities' opening WIP balance as at 1 July 2010 when WIP is included in the opening tax asset base as a one-off transitional arrangement. Conversely, ETSA Utilities' tax asset base may be overstated as at 1 July 2010 in the event that there are additions to ETSA Utilities' WIP balance during the 2009-2010 financial year.
22.	Reviewing the treatment of tax losses going forward.	ETSA Utilities' Proposed Methodology confirms that there are no tax losses attributable to the provision of standard control services to be carried forward at 30 June 2010.	15.8	ETSA Utilities confirmed that there are no available tax losses attributable to the provision of standard control services to be carried forward.
23.	Other issues.	Inconsistencies in the reporting of ETSA Utilities' tax asset base.	Roll Forward Model Tables 15.4 and 15.5	Based on the information provided, there appear to be inconsistencies in ETSA Utilities' opening tax asset based as at 1 July 2010, as reported in its regulatory proposal and its Roll Forward Model: + Table 15.4 of ETSA Utilities' regulatory proposal reports a closing tax asset base of $1,041.1 million as at 30 June 2010; + Table 15.5 of ETSA Utilities' regulatory proposal reports an opening tax asset base of $1,159.5 million as at 1 July 2010 (we would expect this value to be the same as the closing value as at 30 June 2010); and + ETSA Utilities' Roll Forward Model reports an opening tax asset base of $1,059.88 million. ETSA Utilities subsequently confirmed that: + $1,041.1 million represents its tax asset base excluding the increase in WIP from 1 July 2004 to 30 June 2010; + $1,059.88 million represents its tax asset base including the increase in WIP from 1 July 2004 to 30 June 2010; and + $1,159.5 million represents its tax asset base including total forecast WIP as at 30 June 2010. Based on the information provided, it appears that the most appropriate tax asset base as at 30 June 2010 is $1,159.5 million.

6.2 Whether the proposed asset base for tax purposes has been calculated in accordance with ETSA Utilities' Proposed Methodology.

Based on the information provided, there is nothing to indicate that ETSA Utilities' tax asset base has not been calculated in accordance with its Proposed Methodology.

6.3 Assess the validity of the documentation supporting ETSA Utilities' Proposed Methodology.

The validity of documentation supporting ETSA Utilities' Proposed Methodology appears sound.

ETSA Utilities' Proposed Methodology is contained within its regulatory proposal for the 2010-2015 regulatory control period, and is supported by numerous attachments which include:

+ ETSA Utilities' tax depreciation rules;
+ various excel models detailing how ETSA Utilities calculates its tax asset base;
+ a version of ETSA Utilities' Roll Forward Model in the AER's prescribed format; and
+ an agreed upon procedures report substantiating ETSA Utilities' calculation of its tax asset base, as prepared by an independent consultant.

6.4 Assess the ability to audit the documentation supporting the calculation of ETSA Utilities' tax asset base.

Based on the information provided, there is nothing which indicates an inability to audit ETSA Utilities' calculation of its tax asset base for the 2010-2015 regulatory control period.

The above conclusion is supported by the fact that an independent consulting firm had previously conducted an agreed upon procedures exercise of ETSA Utilities' tax asset base calculation.

7. Conclusion

Based on the information provided, ETSA Utilities' Proposed Methodology for the calculation of its tax asset base appears reasonable.

8. Contact

Should you have any questions in respect of the above, please contact Michael Dunnett or Aidan Hardy on (02) 6222 1400.

Yours sincerely,

McGrathNicol Advisory

McGrathNicol Advisory
Contact: Shane O'Keeffe

Disclaimer

We have reviewed ETSA Utilities' methodology in establishing the opening regulated tax written down value as at 1 July 2010. We have relied on the information provided by ETSA and the AER.

We note that we have not undertaken an audit of the tax asset values and the supporting schedules provided, and provide no opinion in respect of their accuracy.

Neither McGrathNicol or any member or employee of the firm undertakes responsibility in any way whatsoever to any person or organisation other than the ACCC and the AER in respect of the information set out in this letter, including an errors, omissions or negligence however caused.