Contribution

When is contribution payable?
1. Where 2 or more insurers under contracts of indemnity insurance are liable in respect of a loss, an insurer who has paid the loss is entitled to contribution from the other liable insurers. It is unclear whether the right of contribution is limited to the loss itself or whether it extends to costs reasonably incurred in investigating and settling the insured's claim.

2. The right of contribution arises out of the indemnity principle. There is, for example, no right of contribution between non-indemnity insurers – such as life insurers.

Rights of contribution when one indemnifier not an insurer
3. An insurer may also have a claim for contribution against others who are liable to indemnify the insured against the loss suffered by the insured. An exception exists where the obligation to provide the indemnity can be described as a "primary" obligation. For example, in Caledonia North Sea Ltd v British Telecommunications Plc [2002] Lloyd's Rep IR 261 insurers paid a series of claims arising out of the destruction of the Piper Alpha Oil Platform in the North Sea. The insurers then brought a subrogated action against various contractors who had provided contractual indemnities to the rig's operator. The contractors argued that they, like the insurers, had given an indemnity. As a result, it was argued that the insurers' claim was a claim for contribution rather than a claim to which they could be subrogated. It was argued that that claim for contribution was out of time. The contractors' argument was accepted at first instance. However, the decision was overturned on appeal. The House of Lords thought that the contractual indemnity was primary whereas the indemnity given by the insurers was secondary. As a result, payment by the insurers did not discharge the primary liability and they were entitled to bring a subrogated action.¹

Requirement that both insurers cover the same loss
4. All that is necessary is that the two insurers be liable in respect of the same loss. It is not necessary that they cover the same types of liability. The fact that both are liable could be purely accidental. Even in that case, contribution will apply. For example, in Albion Insurance Co Ltd v GIO (NSW) (1969) 121 CLR 342 an employee was injured in a motor vehicle accident during the course of his employment which was caused by the negligent driving of a fellow employee. The employer was vicariously liable for the negligent employee's driving. It was covered under compulsory third party motor vehicle insurance and also under a common law extension to its workers compensation policy. The workers compensation insurer paid the claim and then sought contribution from the compulsory third party motor vehicle insurer. The High Court held that its claim was entitled to succeed. As Kitto J said:

"What attracts the right of contribution between insurers then, is not any similarity between the relevant insurance contracts as regard their general nature or purpose

¹ See also Speno Rail Maintenance Australia Pty Ltd v Hammersley Iron Pty Ltd (2000) 23 WAR 291.
or the extent of the rights and obligations they create, but is simply the fact that each contract is a contract of indemnity and covers the identical loss that the identical insured has sustained.” (at 352)

5. The same principle applies even though the person who stands to benefit from one of the contracts of insurance is a third party beneficiary rather than an insured under the contract. For example, in Esanda Finance Corp Ltd v Colonial Mutual General Insurance Co Ltd (unreported, Hayne J, 21 October 1993) Esanda was the insured under a policy issued by GIO but only a person whose interest was noted (as mortgagee) under a policy issued by Colonial. Colonial paid the claim and sought contribution from GIO. GIO argued that the right of contribution only existed where there was double insurance in the sense that the insured was the same under both policies. The Supreme Court of Victoria rejected the argument and held that a claim for contribution was available. It is likely that a similar position applies where an insured has taken out his or her own cover with one insurer and is also entitled to cover as a result of a statutory extension.

6. However, a right of contribution does not apply where the policies insure different interests. For example, there is no right of contribution between a mortgagee's insurer and a mortgagor's insurer if they both only insure their respective insured's interests in the relevant property.

7. The requirement that both policies cover the same loss was recently considered by the NSW Court of Appeal in Mercantile Mutual Insurance (Australia) Ltd v QBE Workers Compensation (NSW) Ltd (2005) 13 ANZ Ins Cas ¶61-636. In that case, a worker suffered injuries arising out of a motor vehicle accident during the course of his employment. The employer had workers compensation insurance which covered it as employer and motor vehicle insurance which covered its liability as owner of the motor vehicle. QBE paid the workers compensation on behalf of the employer and claimed contribution from MMI in respect of its payment of compensation to the worker. It argued that, under s 151B(1)(b) of the Workers Compensation Act (1987) (NSW) its payment operated a discharge of any liability of the employer to pay damages to the worker. Consequently, it claimed that this was a case of double insurance. The Court of Appeal rejected the argument. The payments under the Workers Compensation Act were payments of statutory compensation. They were not payments of damages. MMI's policy specifically excluded liability to pay workers compensation. Consequently, there was no double insurance. The fact that the workers compensation payments were to be deducted from any damages claimed by the worker if the worker had made a claim for damages did not alter the position.

Requirement that both insurers be liable

8. In order for contribution to apply, both insurers must be liable. An insurer who makes an ex gratia payment is not liable under its policy for this purpose and is not entitled to make a claim for contribution from another insurer which is liable in respect of the same loss: Sydney Turf Club v Crowley [1971] 1 NSWLR 274. The insurer who has paid may,
however, have a right to be subrogated to the insured's right of indemnity from the other insurer. Similarly, the insurer from whom contribution is sought must be actually liable for the loss. It is not sufficient that a claim was made which, if upheld, would result in a liability of that other insurer.

9. However, in the case of liability insurance it is not necessary for an insurer seeking contribution after settling a third party claim against the insured to prove that the insured was liable in respect of that third party claim. All that is necessary is for the insurer to prove that the settlement was reasonable: HIH Casualty & General Insurance Ltd v FAI General Insurance Co Ltd (1997) 9 ANZ Ins Cas ¶61-358.

10. The requirement that both insurers be liable for the same loss has caused particular difficulties in the case of workers compensation policies. In some cases, an employer will be liable to compensate an employee for a series of injuries and will have different insurers which are liable to indemnify it against that liability. The question in that case is whether an insurer who indemnifies the employer is entitled to seek contribution from other insurers who provided cover in respect of injuries which have occurred in other years.

11. For example, in Layne & Bowler (Australasia) Pty Ltd v Pearson Machine Tool Co Ltd, (unreported, 25 November 1983, Yeldham J) an employee was held to have suffered from notional total incapacity as a result of a series of injuries. Yeldham J held that the insurer who met the workers compensation liability was entitled to recover contribution from the other insurers who were on risk at the time the other injuries had occurred. Subsequently, however, that approach has been overruled by the Court of Appeal: see Manufacturer's Mutual Insurance Ltd v National Employer's Mutual General Insurance Association Ltd (1990) 6 ANZ Ins Cas ¶61-038. In the Court of Appeal's view, there was no double insurance. The policies were consecutive and each policy covered the employer in respect of the injuries which occurred in each year.

Quantifying the amount of contribution

12. Section 86 of the Marine Insurance Act provides:

“Where the assured is over-insured by double insurance, each insurer is bound, as between himself and the other insurers, to contribute rateably to the loss in proportion to the amount for which he is liable under his contract.”

13. It is generally thought that the same principle applies in the case of non-marine insurance. There is a question, however, about what the Marine Insurance Act means. Consider the following example:

<table>
<thead>
<tr>
<th>Policy A Sum Insured</th>
<th>$20,000,000.00</th>
</tr>
</thead>
<tbody>
<tr>
<td>Policy B Sum Insured</td>
<td>$1,000,000.00</td>
</tr>
<tr>
<td>Amount of Loss</td>
<td>$1,500,000.00</td>
</tr>
</tbody>
</table>
METHOD 1
Policy A pays:

\[
\frac{20,000,000 \times 1,500,000}{21,000,000} = $1,428,571.43
\]

Policy B pays:

\[
\frac{1,000,000 \times 1,500,000}{21,000,000} = $71,428.57
\]

METHOD 2
Policy A pays:

\[
\frac{1,500,000 \times 1,500,000}{2,500,000} = $900,000.00
\]

Policy B pays:

\[
\frac{1,000,000 \times 1,500,000}{2,500,000} = $600,000.00
\]

METHOD 3
Policy A pays $750,000.00
Policy B pays $750,000.00

The first method is sometimes referred to as the maximum potential liability method of apportionment. Liability is apportioned according to the maximum potential liability of each insurer. The second method is known as the independent actual liability method of apportionment. The liability is apportioned by reference to the actual liability each insurer would have if it were the only liable insurer. The third method of apportionment is to apportion the liability equally up to the maximum liability of each insurer.

14. It is now established that the second method is the one which will generally be applied – both in the case of property insurance and liability insurance: see Government Insurance Office (NSW) v Crowley [1975] 2 NSWLR 78; GRE Insurance Ltd v QBE Insurance Ltd [1985] VR 83.
15. The courts have left it open that some other method of apportionment may be more equitable in a particular case. However, even in extreme cases courts have tended to apply the independent actual liability method. For example, in *John v Rawling* (1984) 36 SASR 182 an employee was killed when a hoist on a trailer attached to a utility came into contact with overhead power lines. The trailer and utility were separately insured with the same insurer. The employer also had workers compensation insurance. It was argued that there were, in fact, three insurers and that they should bear the loss rateably according to each insurer's actual liability. Pryor J rejected that argument. Each insurer was liable in respect of the same losses. It did not matter that, in the case of one insurer, that liability arose under two contracts. Consequently, he held that the insurers should share the loss equally.