Double Insurance and the effect of Section 45 of the Insurance Contracts Act

1. Why “Double Insure”? 

Double insurance is a curious phenomenon. It is a significant topic in insurance practice and notwithstanding the provisions of section 45 of the Insurance Contracts Act (which simplifies the legal position as I explain below) it remains a significant topic that occupies the minds of insurance lawyers and judges.

Why does it arise? Insurance doesn't come for free.

Why do insureds ranging from ordinary consumers to large multinationals pay premiums for insurance cover that they are already paying for under another policy or will have the benefit of even if the premium is paid by someone else? My colleagues in the Capital Markets and Finance groups downstairs don’t spend time considering the consequences of companies paying double interest or double finance charges. It just doesn’t happen. Yet insurance is an expense on the balance sheet, just like interest or finance charges. I concede that my tax colleagues spend time considering the consequences of double taxation in cross border transactions but that coincidence of terminology actually makes my point. The tax lawyers are attempting to claw back the tax so it is not paid twice. We in insurance concede that the premium will be paid in respect of both policies but accept that by operation of law the payout will be limited – in the case of indemnity insurance – so that there is only a single recovery by the insured.

It does not seem fair or equitable. The insured pays premium twice, why not get double the cover and double the payout in the event of loss.

- Given the inherent moral risks associated with insurance stemming from the potential for fraud, there would be an even greater incentive on a dishonest insured to destroy property insured if he or she could collect under more than one policy.

- In legal theory, double insurance would offend against the principal of indemnity which governs insurance at its most fundamental. Insurance is intended to compensate the insured and return them to the position – generally speaking – they were in prior to the loss. It is not intended to create a windfall profit. Insurance is not gambling.

The fact that the principal of indemnity underpins the thinking on double insurance has a very significant consequence – the concept is relevant to general insurance only – property and casualty lines where indemnity is granted to the insured under the Policy in the event of loss. In the case of life insurance where the principal of indemnity is not relevant, issues of double insurance do not arise. [To illustrate - it means, I guess, that if one were to plan a fraud on insurers by intentionally burning down the factory owned by one’s spouse, to achieve the maximum result one ought to make sure that one’s spouse is in the factory at the time and that one is the beneficiary on any number of life insurance policies on the spouse’s life. All the life policies will respond to the tragic accident (assuming of course the nefarious conduct remains undetected). But in the
case of the fire policy, one policy of insurance will suffice because the return one
would get will not increase no matter how many times the factory is insured. This
example is of course extreme. The point is that in the case of life policies, no
particular problem is raised by the existence of separate insurances over the same
risk.]

2. So why does double insurance arise?

By way of background and in order to contextualise the remainder of this paper, let us look
at instances where double insurance arises: examples often arise in a construction
context, particularly in relation to major design and construct projects. A number of
eamples follow. To the extent that you believe some of these examples may be contrived,
be warned that I have extracted the core facts either from case law or from actual matters
in which I have had an involvement:

(a) a principal controlled construction all risks policy responds to a claim for
remediation costs following the collapse of the retaining wall in the course of
construction on a no fault basis. It turns out that the negligence of consultants was
the cause of the collapse. The consultants retain their own professional
negligence insurance which responds to the loss;¹

(b) joint venture partners on a major engineering project, each enjoy cover for plant
and equipment under Separate Contractors Floater Master Program Insurance
policies. Each such policy covers JV partners as well as the primary insured. The
joint venture entity also purchases a project specific Industrial Special Risks policy
to cover project specific risks not otherwise insured by the master program cover.
The ISR policy however incudes cover for plant and equipment. Potentially there is
triple insurance;

(c) an insured relies on the provisions of s40(3) of the Insurance Contracts Act² to
notify circumstances that might give rise to a claim under a "claims made" policy in
year X. A claim is made against the insured in the following year. The insured
notifies the claim to its current insurers under a claims made policy. The current
year policy does not exclude the previously notified policy. For example where the
duty of disclosure involved a subjective element – at the time of renewal the
insured having investigated the circumstances notified earlier did not believe a
claim was likely so did not breach its duty of disclosure. See FAI General

¹ Double insurance issues on construction projects are often complicated by the existence of contractual
indemnities. The issue which then arises is whether such losses ultimately lie with one or both of the insurers,
with the party providing the indemnity or are shared between them. These issues are discussed in a paper by
Malcolm Stephens dated 17 May 2004 which is available on our website at:

² S40(3) “Where the insured gave notice in writing to the insurer of facts that might give rise to a claim against the insured
as soon as was reasonably practicable after the insured became aware of those facts but before the insurance
cover provided by the contract expired, the insurer is not relieved of liability under the contract in respect of the
claim, when made, by reason only that it was made after the expiration of the period of the insurance cover
provided by the contract.”
Insurance Co Ltd v Australian Hospital Care (2001) 204 CLR 641. Alternatively the terms of the insured's cover changes from a "claims made and circumstances notified" policy in year X to a "claims made" policy in the following year. The later policy does not exclude claims previously notified.

In these examples, the particular facts mean that double insurance arises but it is equally the case that circumstances could have arisen which would have required a party to rely on its own insurance. In other words it is prudence and good risk management on the part of each insured which often leads to double insurance as an inadvertent result. Indeed neither party would wish to give up its own cover because each would be vulnerable in the event that the "other" insurance did not respond, for example, because the wording did not cover the loss or the insurers are able to reject a claim or avoid the policy as a result of non-disclosure.

The above examples illustrate that it is not necessary that the "other" insurance cover identical risks on precisely the same terms in order to attract the operation of an "other insurance" provision.

3. The Insurer's Perspective

Historically in order to avoid paying or contributing to claims where there was double insurance, most insurance policies contained provisions which limited or excluded cover in instances where "other" policies responded. Often the courts were left to decide which policy would respond and to avoid the insured facing double jeopardy. Two techniques were used by insurers to limit their liability:

- notice provisions; and

- clauses excluding liability where "other insurance" existed.

The immediate aim of notice provisions was to reduce the moral hazard I refer to above (the risk that the insured will destroy the insured property to profit from insurance) by giving an unequivocal warning at the outset. More fundamentally, notice provisions were included in policies as a condition precedent to liability, thereby entitling the insurers to refuse to pay a claim in the event the insured failed to comply with the clause. Notice provisions have survived the legislative changes to the law on double insurance, and I deal with examples currently in use below.

The insured's obligations under notice provisions should not be confused with its disclosure obligations. An insured who applies for insurance need not disclose the mere fact of other insurance. It is only if the other insurance is at an unusually high rate of premium, reflecting special knowledge on the part of the other insurer, that the insured's duty of disclosure may be triggered. However, that is a function of the special knowledge not as a result of the existence of "other insurance".

Exclusion clauses have – with a few exceptions – not survived the enactment of the Insurance Contracts Act but it is important to understand their former role to appreciate the significance of the reforms.
Typically an exclusion clause would exclude cover for:

"… any loss or damage which but for the existence of this policy would be insured by any other policy or policies."

If both policies contained such clauses this could lead to the result that each policy claimed to provide no indemnity if another provided an indemnity elsewhere.

The 1931 English case of *Weddell v Road Transport and General Insurance Co*[^3] was the leading authority in relation to the double jeopardy issue.

The facts of the case were: the plaintiff's motor vehicle policy contained an extension covering friends and relatives of the insured, the extension was conditional on the friend or relative "not being insured under any other policy". A friend of the insured was involved in an accident while driving the insured vehicle. The friend also had motor vehicle insurance with an extension covering him while driving another vehicle "provided that there is no other insurance in respect of such or whereby the insured may be indemnified".

Both insurers denied liability.

In holding each insurer to be 50% liable to contribute to the loss, the judge reasoned as follows:

"In my judgment it is unreasonable to suppose that it was intended that clauses such as these should cancel each other (by neglecting in each case the proviso in the other policy) with the result that, on the ground in each case that the loss is covered elsewhere, it is covered nowhere. On the contrary the reasonable construction is to exclude from the category of co-existing cover any cover which is expressed to be itself cancelled by such co-existence, and to hold in such cases that both companies are liable, subject of course in both cases to any rateable proportion clause which there may be. In other words, it is true to say that the relative or friend is not "entitled to indemnify under any other policy" within the meaning of the Road Transport policy, and not "afforded" indemnity "by any other insurance" within the meaning of the Cornhill policy, when the other policy negatives liability where there are two policies. At that point the process must cease. If one proceeds to apply the same argument to the other policy and lets that re-act upon the policy under construction, one would reach the absurd result that whichever policy one looks at it is always the other one which is effective (at 567–8 )."

The key aspect of the judgment is that the judge refused to allow the process to become circular in holding that the correct construction is to exclude from the category of co-existing cover any cover which is itself expressed to be nullified by such co-existence.

The difficulty for the insureds in this process was that there was some uncertainty as to the application of the clauses and it was left to the insured to pursue both insurers.

4. **Legislative Reform**

[^3]: [1928] 1 KB 359.
The good news so far as double insurance in Australia is concerned is that the Insurance Contracts Act has greatly simplified the complexity of the law in this area. Two sections are relevant:

Section 45:

"(1) Where a provision included in a contract of general insurance has the effect of limiting or excluding the liability of the insurer under the contract by reason that the insured has entered into some other contract of insurance, not being a contract required to be effected by or under a law, including a law of a State or Territory, the provision is void.

(2) Subsection (1) does not apply in relation to a contract that provides insurance cover in respect of some or all of so much of a loss as is not covered by a contract of insurance that is specified in the first-mentioned contract."

Section 45 should be read with section 76(1):

"When 2 or more insurers are liable under separate contracts of general insurance to the same insured in respect of the same loss, the insured is, subject to subsection (2), entitled immediately to recover from any one or more of those insurers such amount as will, or such amounts as will in the aggregate, indemnify the insured fully in respect of the loss."

Section 76(2) deals with contribution to insurers which Michael will address in a few moments.

The combination of these two sections gives an insured an unfettered discretion as to which insurer to target. Considerations are likely to include the terms of the insuring clause, excess provisions, the existence of aggregate retentions, policy conditions – particularly exclusions. Where there is a possibility that an exclusion may apply under one policy but not the other, the insured will target the policy without the exclusion (even perhaps if there is a higher excess) and leave the "other" insurer to struggle with the first insurer over the interpretation of the policy.

As a result of the enactment of section 45 insurers now rely on the clauses requiring notice of other insurance. These clauses generally require compliance to be judged at the time of the loss not at the time the insurance incepts. A typical example would read:

Other Insurance

The Insured shall give notice in writing to the Insurer of any Insurance or Insurances already effected, or which may subsequently be effected, covering any of the property hereby insured, and unless such notice be given and the particulars of such insurance or insurances be stated in or endorsed on this Policy by or on behalf of the Insurer before the occurrence of any loss or damage, all benefit under this policy shall be forfeited.

The purpose of notice provisions under the Insurance Contracts Act has evolved so that, from an insurer's perspective, it is primarily to allow the insurer who is targeted first to seek contribution from other insurers who are potentially on risk for the same loss, or at least assess the prospects of doing so (this is consistent with the view that compliance is judged at the time of loss). Notice provisions remain common in property policies as a warning to the insured in order to reduce the risk that the insured will destroy the insured property to
make a profit from the insurance. In those instances, the clause is more likely to read along the following lines:

**Other Insurance**

As soon as is reasonably practical but in any case within 15 days after entering into any other contract of insurance, You must notify the Insurer of, and give the Insurer full details of, any other insurance which provides indemnity, in full or in part, for any of the liabilities insured under this Policy.

Section 45 was based on recommendations by the Law Reform Commission. From the record of the Commission's deliberations it is clear that the intention was that section 45 would make all "other insurance" provisions in policies of general insurance redundant (save for true excess policies). However, as noted by the authors of *Kelly & Ball*, in two respects section 45 may not achieve that result:

(i) first, it may not apply to notice provisions at all. A notice provision excludes liability because the insured fails to give notice of another contract and not because the other contract is "entered into". The preferred view is that section 45 does apply to notice provisions because that result is clearly more consistent with the purpose of the section. The insurer would still be in a position to enforce specific compliance with the section to obtain the necessary information to support its claim for contribution against the "other" insurer.

(ii) second, section 45 appears to apply only to contracts entered into by the insured, not to contracts under which the insured might benefit which are incepted by a third party – so for example the principal in the CAR example above. If the words "entered into" is given its plain meaning, this would have the uncomfortable result that the insured would be bound by an "other insurance" exclusion under a contract entered into by some other person which also insured his or her interest. That interpretation has – to my surprise - not yet been tested in the courts. It is likely that the section will require legislative amendment.

As is clear from the wording of the section, compulsory insurance including CTP and WorkCover are excluded from the operation of section 45 and it is common to see other insurance clauses referrable to statutory insurance in policies of general insurance:

**Motor vehicles**

This policy does not cover liability in respect of personal injury arising out of the ownership, possession, operation, maintenance or use by the insured of any vehicle in respect of which compulsory liability insurance or statutory indemnity is required by virtue of any legislation (whether or not that insurance is effected).

The exclusion does not apply to personal injury where:

(i) that compulsory liability insurance or statutory indemnity does not provide indemnity; and

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4 See: *Kelly and Ball Principles of Insurance Law*: par 10.0030.5.
(ii) the reasons or reasons why that compulsory liability insurance or statutory indemnity does not provide indemnity do not involve a breach by the insured of legislation relating to vehicles.

Employer’s liability

The Company [the insurer] shall not be liable to indemnify the insured in respect of liability for personal injury to any person arising out of, or sustained in the course of, the employment of such a person in the Insured's service, or through the breach of any duty owed to that person, where the Insured:

(i) is indemnified or entitled to be indemnified (either in whole or in part) in respect of claims for damages under a policy of insurance arranged in accordance with any workers' compensation legislation or accident compensation legislation or would have been indemnified or entitled to be indemnified had the insured arranged a policy of insurance as required by such legislation.

Subsection 45(2) creates a significant exception to subsection 45(1) where "[another] contract that provides insurance cover … is specified in the [primary] contract". The extent to which the other policy must be specified has been considered by the New South Wales Court of Appeal in HIH Casualty and General Insurance Limited and Pluim Constructions.5

Pluim Constructions (Constructions) was doing building work at a club. Related companies Pluim Detail Joinery Pty Ltd (Joinery) and Pluim Commercial Landscapes Pty Ltd (Landscape) were also involved with the job.

Mr Knight, a Landscape employee, was asked to assist Constructions by removing debris from the site using vehicles belonging to Landscapes, and in the course of doing so sustained a knee injury from glass shards.

Constructions had public liability insurance with the appellant (HIH). The club as Principal also had relevant public liability insurance with the Commercial Union Assurance company of Australia Ltd (CU) which responded to the claim.

Although HIH did not deny indemnity, it argued that a condition of the HIH policy (condition 7) allowed it to escape liability. Condition 7 provided that, in the event that the Principal agreed to provide a policy of insurance, then HIH would only indemnify the insured for such liability not covered by the policy of insurance provided by the Principal. The trial judge found condition 7 was rendered void by s45(1) and that the CU Policy was not "specified" in the HIH policy for the purposes of the exception provided in subsection 45(2).

The issue was whether or not the words "the policy of insurance provided by the Principal" in condition 7 of the HIH policy were a sufficient description of the CU policies so as to bring the circumstances within the meaning of s45(2). The court held that the language of the condition was too general and not of sufficient specificity to satisfy s45(2). There was no identification of any particular policy with any particular insurer.

5 (2000) 11 ANZ Ins Case 75 – 476, Supreme Court of NSW.
It followed that Constructions had double insurance. Significantly, the absence of formal claims for contribution between the two insurers did not prevent the court from making appropriate orders to finally dispose of the disputes in order to avoid further litigation.

From an insureds or brokers perspective, the *Pluim Constructions* case demonstrates that section 45(2) can be used as a specific and targeted tool for managing an insureds portfolio of insurance where overlap of policies or classes of insurance is inevitable. A specific description along the lines set out by the Court of Appeal can be inserted into one policy to exclude cover where an overlap is known to exist. That may in turn allow negotiations to reduce the premium payable to the first insurer and addresses to some extent my opening remarks about the unnecessary double payment of premium.