

**FROM:** Manager, Worldwide Markets (Compliance)  
**LOCATION:** 86/GY12  
**EXTENSION:** 5131  
**DATE:** 21<sup>st</sup> February 2002  
**REFERENCE:** Y2728  
**SUBJECT:** AUSTRALIA: NEW ALTERNATIVE DISPUTE  
RESOLUTION CLAUSE ("ADR CLAUSE")  
**ATTACHMENTS:**  
LSW1145: Alternative Disputes Resolution Clause  
  
Appendix 1: Guidelines relating to which Australian  
contracts underwriters can/cannot include the ADR  
clause  
  
Appendix 2: Summary  
**ACTION POINTS:** **For information**  
**DEADLINE:** **Not applicable**

### **ADR clause**

To give underwriters a wider range of options when considering provisions for dispute resolution on Australian insurance contracts Lloyd's Worldwide Markets has sponsored the attached "Alternative Disputes Resolution Clause", LSW 1145 ("ADR clause").

### **Purpose of clause**

It is intended as an alternative to the existing service of suit clause. It provides alternative dispute resolution mechanisms for commercial policies which can be implemented at the election of the parties, whilst preserving the right of the parties to have a dispute finally determined by a court if it becomes necessary.

## Reasons for arranging availability of the ADR clause

Recently in Australia – mirroring developments elsewhere – there appears to be a trend in commercial contracts towards means of dispute resolution other than the courts. Alternative methods of dispute resolution such as mediation are considered to be cheaper, more efficient and faster than the traditional reliance on court proceedings to resolve all disputes.

This has led us to reconsider the use of Lloyd’s service of suit clauses. A service of suit clause specifies that, in the event of a dispute, proceedings must be served on a nominated person, in the case of Australia, Lloyd’s General Representative in Australia. It is not therefore in accordance with any provision for resolution of disputes through methods other than court proceedings.

We consider that underwriters may find it advantageous to consider using this clause on many of their commercial contracts. It will ensure access to methods of settling disputes that are cheaper, more efficient and more up-to-date than the traditional resort to the courts.

Appendix 1 provides guidelines in relation to the Australian contracts in which underwriters can/cannot include the ADR clause; how a dispute will be resolved under the ADR clause and Ins-sure’s approach to these requirements.

## General

If you have any queries about this please contact any of the following:

### Lloyd’s Worldwide Markets

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### Lloyd’s General Representative in Australia

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We have sent this bulletin to underwriters, Lloyd’s brokers and managing agents,

James Walmsley  
Manager  
Worldwide Markets Compliance

## **Guidelines in relation to the Australian contracts in which underwriters can/cannot include the ADR clause**

### **Australian contracts in which underwriters can include the ADR clause**

- Reinsurance contracts.
- Insurance contracts with large and medium sized commercial clients.

### **Australian contracts in which underwriters cannot include the ADR clause**

- Personal lines contracts.
- Contracts with smaller commercial clients.

These contracts are covered by the *Insurance Enquiries & Complaints Scheme* (“IECS”), an existing method of dispute resolution. Consequently these contracts should follow these rules:

*If written under a binding authority* – the coverholder must use the Australian personal lines certificate, NMA 2837. This incorporates the required reference to the IECS.

*If written on an open market basis* – the underwriter must include a service of suit clause and a reference to the IECS (as shown in NMA 2837).

### **How a dispute will be resolved under the ADR clause**

#### **All references to ‘days’ mean calendar days, unless the parties agree otherwise.**

- Either party can give a written notice to the other party requiring them to negotiate how the dispute can be resolved (“the Dispute Notice”).
- If the dispute is not resolved by negotiation within 10 days one party can ask the other party to agree either:
  - A process for resolving the dispute through means other than litigation or arbitration, such as further negotiation, mediation or any other alternative dispute resolution process; or
  - Referral of the matters in dispute to an independent expert for an expert determination.
- The parties agree that they will not initiate litigation without pursuing these informal techniques in good faith. However if the dispute is not resolved by informal processes within 35 days of the Dispute Notice the dispute shall be referred to litigation.
- Following either mediation or an expert determination either party may initiate proceedings in any competent Court in Australia.

It will normally be appropriate for disputes involving matters such as policy interpretation to be referred to an expert determination and for dispute relating to matters such as quantum of a claim to be referred to mediation.

### **The parties' obligations**

If an insurance contract contains the ADR clause, then both parties are bound by the processes it sets out in the event of a dispute.

The option to go to litigation subsequently remains open to both parties. The dispute resolution method chosen – whether a mediation, an expert determination or another alternative – is not binding on the parties. Nevertheless, as the mediator or expert hearing the dispute is likely to be someone who is legally qualified then it is probable that a court will come to a similar conclusion, so in many cases a subsequent court hearing will not benefit either party.

### **Costs**

Whilst the attached clause does not specifically make reference to costs in relation to mediation, these are normally shared equally between the parties. This would be a matter for the mediator and the relevant parties to agree upon.

### **What Australian contracts should contain regarding dispute resolution**

**A reinsurance contract:** may contain either:

a service of suit clause (NMA 1854); or  
the new ADR clause (LSW 1145); or  
an alternative clause such as a reference to arbitration.

**A direct insurance contract:**

#### **1. open market:**

**1.1 for a larger or medium sized commercial client:** may contain either:

a service of suit clause (as contained within NMA 1854); or  
the new ADR clause (LSW 1145)<sup>1</sup>; or  
an alternative clause which may be acceptable to the insured.

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<sup>1</sup> Where the LSW1145 is used in conjunction with NMA1856(a), or certificates based thereon, reference therein to service of suit provisions must be deleted to avoid any conflict with the ADR.

### **1.2 for a smaller commercial or personal client:**

a service of suit clause (NMA 1854); or  
an alternative clause, provided the insured's rights under the IECS are not compromised.

*The new ADR clause may not be included.*

NMA 1854 does not refer to the insured's rights under the IECS. A reference to those rights should be included separately.

## **2. binding authority:**

**2.1 for a larger or medium sized commercial client:** may contain either:

a service of suit clause (NMA 1856(a)); or  
the new ADR clause (LSW 1145); or  
an alternative clause which may be acceptable to the insured.

**2.2 for a smaller commercial or personal client:** should use NMA 2837.

*The new ADR clause may not be included.*

These requirements are set out in Appendix 2.

## **Ins-sure's approach to these requirements**

### **1. Reinsurance contracts and direct contracts for larger and medium sized commercial clients**

Ins-sure will not question the inclusion of a service of suit, ADR or similar clause in a policy submitted for signing.

Ins-sure will reject a policy that contains more than one of these options.

Ins-sure will not reject a reinsurance policy that contains none of these options, although the inclusion of one of these options is recommended.

Ins-sure will reject a direct policy that contains none of these options.

### **2. Direct contracts for smaller commercial and personal clients**

Ins-sure will reject a policy that contains an ADR clause.

Ins-sure will reject a policy that does not refer to the insured's rights under the IECS.

**Definition of a “smaller commercial client”**

The IECS’s current definition of a “smaller commercial client” is one that employs less than five employees, has a turnover of less than A\$400k per annum and where the shareholders/owners of the business is a natural person or persons. The turnover of a particular business may change periodically so consequently a client may qualify as a “smaller commercial client” one year and not the next. Given that the IECS definition for a “smaller commercial client” is subject to change and also currently excludes certain classes of business (such as legal liability and professional indemnity), you may wish to check whether a client is or is not “smaller commercial”, in which case you should contact the Lloyd’s Australia office with details of the client (see page 2 of the bulletin for contact details).

Ins-sure will take a prudent approach in deciding whether a client is “smaller commercial” and will normally accept the inclusion of an ADR clause in a contract as evidence that the client is not “smaller commercial”.

**SUMMARY**

	Direct Insurance [Large/Medium Sized Commercial]		Direct Insurance [Small Commercial and Personal Lines]		Reinsurance
	OMC	Binder	OMC	Binder	
Is a dispute resolution or service of suit clause required? †	YES	YES	YES	YES	Recommended
Can NMA 1854 be used?	YES	NO	YES ❖	NO	YES
Can NMA 1856(a) be used?	NO	YES	NO	NO	NO ★
Can NMA 2837 be used?	NO	NO	NO	YES	YES
Can LSW1145 be used? †	YES	YES	NO	NO	YES
Can an alternative dispute resolution or service of suit wording be used? †	YES	YES	YES ❖	NO	YES

❖ Personal lines and smaller commercial contracts are provided for within the Insurance Enquiries & Complaints Scheme, an existing alternative method of dispute resolution and therefore reference to this Scheme should be used in conjunction with, or be included in, any service of suit wording. NMA 2837 includes a suitable form of words that can be adopted in conjunction with NMA 1854 or incorporated within any other service of suit wording used.

† Ins-sure will query where there are conflicting provisions within the same policy or wording.

★ Other than where it forms the basis of reinsurance certificates issued under a binding authority.

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## Lloyd's Australian Alternative Disputes Resolution Clause

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In the event that a dispute arises between Underwriters and the Insured/Reinsured out of or otherwise in relation to this agreement, then:

- (a) Any party to the dispute shall, without prejudice to any other right or entitlement they may have, give written notice to the other party (the “**Dispute Notice**”) requiring them within 7 days of this notice to negotiate (whether in a face to face meeting or by teleconference) in good faith as to how the dispute can be resolved;
- (b) If a dispute is not resolved within 10 days of the Dispute Notice, either party can request the other party within a further 10 days to agree on either:
  - (1) a process for resolving the dispute through means other than litigation or arbitration, such as further negotiation, mediation, or any other alternative dispute resolution technique. The rules governing any such technique shall be agreed as between the parties and where no such agreement as to the process and or guidelines is reached within 10 days, then it shall be by mediation by a mediator selected by the Chairperson for the time being of Lawyers Engaged in Alternative Dispute Resolution (**LEADR**) (or other appropriate professional body as agreed by the parties); or
  - (2) referral of the matters in dispute to an independent expert for an expert determination. The parties agree that they will not be bound by the determination of the expert. The expert:
    - (a) will be a person agreed between the parties within 10 days of the dispute being referred to expert determination or failing this, the expert will be a person appointed by the Australian Insurance Law Institute (or other appropriate professional body as agreed by the parties);
    - (b) will act as an expert and not as an arbitrator;
    - (c) will proceed in such a manner as he or she thinks fit without being bound to observe the rules of natural justice or the rules of evidence;
    - (d) will take into consideration all documents, information and other written and oral material that the parties place before him or her including documents, information and material relating to the facts in dispute and to arguments and submissions upon the matters in dispute; and
    - (e) will act with expedition to provide the parties with a determination in writing within 35 days of the referral to him or her of the matters in dispute.

Both parties must use their best endeavours to achieve resolution by the selected process and further agree that neither party will initiate litigation (as set out in clause (c) below) without first pursuing such informal resolution techniques in good faith;

In the event that the dispute is not resolved by such informal process within 35 days of the Dispute Notice (or such other period as agreed in writing between the parties) the dispute shall be referred to litigation.

- (c) Following either a mediation or an expert determination pursuant to clause (b) of this provision, either party may then initiate proceedings in any competent Court in the Commonwealth of Australia in relation to the matters in dispute.



Such proceedings may only be commenced on 14 days written notice to the other party and shall be determined in accordance with the law and practice applicable in such Court.

Any summons, notice or process to be served upon Underwriters may be served upon:

Lloyd's Underwriters' General Representative in Australia  
Suite Q  
Level 12  
55 Hunter Street  
Sydney NSW 2000

who has authority to accept service and to appear on Underwriters' behalf.

If proceedings are instituted against any one of the Underwriters, all Underwriters participating in this insurance will abide by the final decision of such Court or any competent Appellate Court.

- (d) Except where the dispute renders it impossible to do so, the parties will continue performing their respective obligations under the Policy while the dispute is being resolved, unless and until such obligations are terminated or expire in accordance with this agreement.
- (e) Each party must use its reasonable endeavours to ensure that where a dispute is reasonably foreseeable, it is dealt with at a sufficiently early stage to ensure that there is a minimal effect on the ability of either party to perform its obligations under the Policy.
- (f) Notwithstanding anything in this schedule, either party may at any time commence Court proceedings in relation to any dispute or claim arising under, or in connection with the Policy where the party seeks urgent interlocutory relief.

LSW1145

20 February 2002