

1. Definitions

Agreement means these Terms and Conditions, together with any Authority and Customer credit application.

Authority means the authority by which the Customer appointed the Company to act on its behalf.

Company means Stockwell International Pty Ltd, ABN 19 000 871 330 and its nominees, agents and employees.

Connected Party means in relation to the Goods the Owner, exporter, importer, supplier, purchaser, carrier or any agent of any of the aforementioned parties, other than the Company.

Consequential Loss means any loss or damage which:

- (a) does not arise naturally or in the usual course of things; or
- (b) constitutes, or arises from or in connection with, a loss in revenue, profit or opportunity or a loss of goodwill or business reputation, even if such loss or damage arises naturally or in the usual course of things.

Customer means:

- (a) Where there is an Authority, the customer named in the Authority, including its employees, officers, agents and contractors.
- (b) Where there is no Authority, the person instructing the Company to provide the Services; and

for the avoidance of doubt, the Customer may also be the Owner.

Dangerous Goods means any Goods which are, or may become, hazardous, volatile, explosive, flammable, radioactive, likely to harbour or encourage vermin or pests, or capable of posing a risk or causing damage to any person or property.

Goods means the goods, including packaging, pallets or containers, the subject of the Services.

Government Authority means any government agency, authority, department or body, exercising jurisdiction in any nation, state, port or airport.

Law means any law, regulation, rule or international convention.

Loss means any loss, cost, damage, expense, claim, demand, action, proceeding or liability of any kind, (including legal costs on an indemnity basis) and whether actual, prospective or contingent and whether ascertained or unascertained.

Owner means the owner, importer or exporter of the Goods, or a person authorised to act on behalf of the owner or importer of the Goods.

Perishable Goods means any Goods liable to waste, deterioration or spoilage, and includes without limitation fruit, vegetables, dairy products, meat, and animals.

PPSA means the *Personal Property Securities Act 2009* (Cth).

Services means the work performed by the Company in relation to the Goods, including facilitating the import, export, transport, or storage of the Goods; and any ancillary acts for those purposes, including preparing any documentation or providing any information to a Government Authority.

SBC contract means a contract that is either a "small business contract" or a "consumer contract" as defined in section 23(3) of Schedule 2 to the *Competition and Consumer Act 2010* (Cth), but does not include:

- (a) a contract of marine salvage or towage;
- (b) a charter party of a ship;

- (c) a contract for the carriage of goods by ship;
- (d) a contract that is not a standard form contract; or
- (e) a "small business contract" where the Customer does not employ fewer than 20 persons

Subcontractor means a third party (and their employees, agents and contractors) engaged to provide all or part of the Services.

Terms and Conditions means these terms and conditions.

Transport Document includes a bill of lading, waybill, consignment note, or similar carriage document.

A reference to the Company's fees includes any taxes, including goods and services tax, payable in respect of the Services.

2. General

- 2.1 The Company is not a common carrier. The Company will not be liable as a common carrier.
- 2.2 These Terms and Conditions take priority over and will prevail to the extent of any inconsistency with the Authority, any credit application made by the Customer, the Customer's terms and conditions or other document issued by the Customer, and any terms and conditions set out in any Transport Document, except a Transport Document issued by the Company.
- 2.3 The Agreement is governed by the laws of New South Wales, Australia. The Company and the Customer submit to the jurisdiction of the courts of New South Wales and of the Federal Court of Australia.
- 2.4 A variation of these Terms and Conditions will only be valid if in writing and signed by each party or signed by a person with the authority to bind each party.
- 2.5 The Company may assign its rights and obligations under the Agreement without the Customer's consent. The Customer must not assign its rights and obligations under the Agreement without the Company's written consent.
- 2.6 Any notices under these Terms and Conditions must be in in English and in writing.
- 2.7 Subject to clause 14, all rights, indemnities and limitations of liability contained in these Terms and Conditions will have their full force and effect, despite:
 - (a) any breach of term or condition of these Terms and Conditions, the Agreement, or any collateral agreement by the Company;
 - (b) the performance of the Services;
 - (c) the delivery of the Goods; or
 - (d) the expiry or termination of the Authority.
- 2.8 Without limiting the effect of clause 2.7, clauses 2.5, 3.14, 4.2, 6.10, 7.3, 7.4, 7.5, 9, 11, 12, 13, 14.6, 14.8, 14.9, 14.10, 14.11, 14.12, and 14.13 of these Terms and Conditions will survive termination.
- 2.9 If a condition or part of a condition of this Agreement is unenforceable, it must be severed from and does not affect the rest of the Agreement.
- 2.10 The Company is not bound by any waiver, discharge or release of a condition or any agreement which purports to change this Agreement, unless it is in writing and signed by or for the Company.
- 2.11 A reference in this Agreement to any law includes any statutory modification, substitution or reenactment of it.
- 2.12 If the Customer is a trustee of a trust, the Customer:

- (a) will provide the Company with a copy of the trust deed and any documents amending that trust deed;
- (b) notify the Company of any change in trustee of the trust;
- (c) agrees that these Conditions apply to, and all requests for Services placed by the Customer with the Company are placed by, the Customer in its personal capacity and as trustee of the trust.

2.13 Any party that enters this Agreement as a disclosed or undisclosed agent agrees to be joint and severally liable for the debts, liabilities and obligations of the principal under this Agreement.

3. Services

3.1 Services are provided by the Company subject to these Terms and Conditions.

3.2 Without limitation to other methods of acceptance, by instructing the Company to provide the Services the Customer agrees to be bound by the Terms and Conditions.

3.3 The Goods are at the risk of the Customer.

3.4 The Company may agree or refuse to provide Services at its discretion.

3.5 The Company is authorised by the Customer to choose the method for performance of the Services at the Company's complete discretion.

3.6 The Customer authorises the Company to open any package containing Goods, and do any other thing in order to inspect or weigh the Goods.

3.7 The Customer agrees that:

- (a) the value of the Goods will not be declared or inserted into a Transport Document or contract for the purpose of extending a carrier's liability unless the Customer provides express written instructions to the Company to do so, and if required, the carrier agrees;
- (b) where a Subcontractor's or carrier's charges may be determined by the extent of liability assumed by the Subcontractor or carrier, no declaration of value will be made for the purpose of extending the liability of the Subcontractor or carrier, and the Goods will be dealt with at the Customer's risk for minimum charges, unless the Customer provides written instructions to the contrary to the Company;
- (c) the Company reserves the right to not make any declaration or take any action in respect of the Customer's Goods unless the Customer has provided the Company with sufficient notice, written instructions and the documents necessary to take that action in relation to those Goods.

3.8 At any time, the Company may, acting reasonably, deem that certain Goods are Dangerous Goods.

3.9 The Company at its reasonable discretion may destroy or otherwise deal with any Goods the Company considers are Dangerous Goods, without notice or compensation to the Customer.

3.10 The Company's delivery obligations are satisfied if the Company delivers the Goods to the delivery address instructed by the Customer, and a person at that address provides a receipt or signs a delivery docket, or if authorised by the Customer, the Goods are left at the delivery address without obtaining a receipt or signed delivery docket.

3.11 If a person at the delivery address cannot or refuses to take delivery of the Goods, or the Goods cannot be delivered for any other reason, the Customer authorises the Company to deal with the Goods at the Company's reasonable discretion, including storing, disposing of, or returning the Goods.

3.12 The Goods may be stored at any place at the absolute discretion of the Company at the Customers' expense.

- 3.13 If the Company stores the Goods, the Company may require that the Customer remove the Goods from storage by giving notice delivered to an address provided by the Customer to the Company.
- 3.14 If the Customer, Owner or consignee of the Goods is insolvent, placed under external administration, bankrupt or deceased, the Company is authorised to return any Goods to the Shipper, exporter or supplier of those Goods, where the Company has not received authority from the Shipper, exporter or Supplier of the Goods to release the Goods to the Customer, Owner or consignee.
- 3.15 The Customer irrevocably appoints the Company with the power and authority to take any action and execute any document in the name of and on behalf of the Customer as required by the Company to provide the Services.
- 3.16 The Customer agrees that the Company may receive and retain for its own account allowances, brokerages and commissions from shipping and forwarding agents, shipping lines, insurance brokers, airlines and any other person with whom the Company deals and that the Company is not required to disclose the receipt and retention of such amounts to the Customer, even, without limitation, if acting as agent for the Customer.

4. Customer Obligations

- 4.1 The Customer will provide the Company with all assistance, information and documentation necessary to enable the Company to provide the Services, and punctually comply with any Law or request from a Government Authority.
- 4.2 The Customer is under a continuing obligation to provide any information which may materially affect the capacity of the Customer to perform its obligations under the Agreement.
- 4.3 The Customer will keep confidential the Company's fees or charges and any waiver, discount, release or indulgence provided by the Company in relation to the provision of the Services.

5. Instructions

- 5.1 Any instructions given by the Customer must be in writing in English and be legible.
- 5.2 The Company has the discretion to refuse to accept the Customer's instructions.
- 5.3 Sufficient notice of instructions must be given by the Customer to the Company to enable the Company to follow those instructions. If insufficient notice is given and the Company attempts to adopt the Customer's instructions, the Company is not deemed to have accepted the instructions.
- 5.4 If the Company accepts the Customer's instructions on one occasion, the Company will not be bound by those instructions when providing Services in the future.
- 5.5 If the Company accepts the Customer's instructions to perform the Services in a particular way, it will give priority to that method, but may depart from that method at its reasonable discretion.

6. Fees

- 6.1 The Company's fees are earned on the earlier of the commencement of the performance of the Services (or part thereof), or when the Goods are delivered to the Company or its subcontractors.
- 6.2 The Company's fees may include any disbursements and other amounts that the Company is required to pay third parties in connection with the Services. The Company at its discretion may vary its fees if the amount of any such disbursements change.
- 6.3 The Company's fees must be paid within 7 days of an invoice or as otherwise agreed in writing (the **Due Date**).
- 6.4 The Company at its discretion may determine its fees, including by weight, measurement or value, including without limitation, by volumetric conversion.

- 6.5 The Company may re-weigh, re-measure or re-value the Goods at any time, and amend its fees at its reasonable discretion.
- 6.6 Any information contained in a quotation provided by the Company in relation to the fees applies to the specific item, weight and volume quoted, designated Services and standard of Services, and is only valid until the earlier of 14 days after being provided, the quote being withdrawn or the quote expiring.
- 6.7 A quotation is not an offer and is not binding on the Company. A quotation may change based on changes to freight, insurance, warehousing, fees, and any other charges, with or without notice to the Customer.
- 6.8 Unless otherwise stated, the Company's fees are exclusive of goods and services tax.
- 6.9 The Customer remains responsible for the payment of fees:
- (a) even where an arrangement is made for the fees to be paid by another person;
 - (b) whether or not the Goods are delivered or damaged or the Services performed as instructed.
- 6.10 If the fees are not paid in full within 7 days of the Due Date then, without limitation to its rights, the Company may charge interest on the late payment at the published business overdraft rate of the Commonwealth Bank of Australia.
- 6.11 The Customer will not defer, set-off or withhold payment of any amount payable to the Company by reason of any claim the Customer has, or claims it has, against the Company.
- 6.12 Any credit terms provided by the Company may be terminated at any time by the Company.
- 7. Subcontractors**
- 7.1 The Customer authorises the Company to:
- (a) subcontract all or part of the Services to a Subcontractor; and / or
 - (b) as the agent of the Customer, contract with a third party service provider on behalf of the Customer on any terms whatsoever, including terms that limit or exclude the liability of the third party service provider.
- 7.2 The Customer authorises a Subcontractor to subcontract all or part of the Services.
- 7.3 All exclusions or limitations on the liability of the Company in these Terms and Conditions extend to protect:
- (a) all Subcontractors;
 - (b) the agents, employees and servants of any Subcontractor or the Company; and
 - (c) any person engaged to provide all or part of the Services.
- 7.4 The Customer undertakes that it will not make any claim against, or impose any liability upon, any Subcontractor in connection with the provision of the Services or the Goods.
- 7.5 The Customer undertakes that it will indemnify any Subcontractor from and against any Loss if a claim is made against a Subcontractor by any party (including the Customer) in connection with the provision of the Services or the Goods as a result of a breach of contract by the Customer, or a negligent, unlawful, reckless or wilful act or omission by the Customer or its employees, agents and contractors.
- 7.6 For the purpose of clauses 7.3 and 7.5, the Company acts as trustee on behalf of and for the benefit of any Subcontractor, and to this extent each Subcontractor is deemed to be a party to this Agreement.

8. Intellectual Property

The Customer agrees that the Company retains all copyright and intellectual property subsisting in all documents and things created by, or for, the Company in connection with the performance of the Services, including copyright and intellectual property that now exists or that later comes into existence.

9. Warranties, liability and indemnity

- 9.1 The Customer (on behalf of itself, the Owner, and any Connected Parties) warrants to the Company that:
- (a) it is the owner of the Goods, or is the authorised agent of the owner of the Goods and is authorised to complete and sign documentation related to the Goods and the Services;
 - (b) it enters into the Agreement on its own behalf, or in its capacity as the authorised agent of the owner of the Goods;
 - (c) it and all Connected Parties have complied with all Laws relating to the Goods, including the nature, condition, packaging, handling, storage and carriage of the Goods;
 - (d) in engaging the Services from the Company, it will not procure the Company to perform any act in breach of any Laws;
 - (e) it and all Connected Parties will observe all Laws and requirements of Government Authorities;
 - (f) all information and documentation provided by the Customer and Connected Parties to the Company is accurate and complete, and neither it nor a Connected Party has omitted to provide any requested or material information;
 - (g) the Goods are packed to endure the ordinary risks of handling, storage and the Services, having regard to the nature of the Goods;
 - (h) the Goods are not Dangerous Goods, unless the Company has agreed in writing to provide the Services in respect of those particular Dangerous Goods, and in which case, warrants that it has made full disclosure of Dangerous Goods and such Goods are distinctly marked; and
 - (i) all Goods are adequately and accurately marked, labelled or branded.
- 9.2 To the extent permitted by Law, the Company excludes all liability in respect of any claim made against the Company, its employees, agents and Subcontractors except to the extent that such liability was incurred as a direct result of a fundamental breach of this Agreement by the Company, or a negligent, unlawful, reckless or fraudulent act or omission of the Company.
- 9.3 The Company excludes from this Agreement all conditions, warranties, terms and consumer guarantees implied by Laws, general law or custom except any the exclusion of which would contravene any Laws or cause this condition to be void (**Non-Excludable Condition**).
- 9.4 The Company's liability for any breach of a Non-Excludable Condition is limited, at the Company's option, to supplying the Services again, or the cost of supplying the Services again.
- 9.5 The Company will not be liable for omitting to inspect or take any other action in respect of Goods where Goods have been damaged or pillaged, unless the Customer provides the Company with written instructions to take that action in relation to those Goods and the Company accepts those instructions.
- 9.6 Where the liability of the Company is not excluded by the Agreement, Law or otherwise, the liability of the Company is limited to the lesser of the invoiced value of the particular Services provided by the Company relating to the Goods or the value of the Goods which related to the failure of the Company to comply with the Terms and Conditions.

- 9.7 The Company will not be in breach of any of its obligations to the Customer or liable for any Loss (including Consequential Loss) suffered by the Customer arising from or connected with the Company's compliance with any Law, including without limitation disclosing confidential information to a Government Authority.
- 9.8 Without limitation to any other clause of the Agreement, the Company will be discharged from all liability in connection with the performance of the Services or the Goods unless:
- (a) notice of any claim is received by the Company within 7 days of the earlier of the delivery of Goods, the date the Goods should have been delivered, or where the claim does not relate to loss or damage to Goods, the event giving rise to the claim; and
 - (b) suit is brought and written notice is received by the Company within 9 months of the earlier of the delivery of the Goods, the date the Goods should have been delivered, or where the claim does not relate to loss or damage to Goods, the event giving rise to the claim.
- 9.9 The Company will not be liable for any delay or failure to perform an obligation under the Agreement caused by an event beyond the control of the Company (**Event**).
- 9.10 If an Event causes a delay in the performance of a Company's obligation exceeding 10 days, the Company may terminate the provision of the Services by notice to the Customer.
- 9.11 The Customer indemnifies the Company from and against (and must pay on demand for) all Loss arising directly or indirectly from or in connection with the Goods or the performance of the Services (including Consequential Loss), including Loss in connection with a breach of contract, or a negligent, unlawful, reckless or wilful act or omission by the Customer or its employees, agents and contractors except to the extent that any such Loss was incurred as a direct result of a fundamental breach of this Agreement by the Company, or a negligent, unlawful, reckless or fraudulent act or omission of the Company.
- 9.12 Without limitation to clause 9.11 the Customer indemnifies the Company from and against (and must pay on demand for) any Loss arising from
- (a) the Customer's or Owner's failure to return any container or transport equipment involved in the performance of the Services by the date required under any Contract between the Company and the supplier of that container or transport equipment;
 - (b) any claim against the Company by a person who claims to have an interest in the Goods;
 - (c) breach of this Agreement, including any warranty provided by the Customer;
 - (d) any Loss, cost or liability incurred or suffered by the Company as a result of releasing or delivering the Goods to the Customer or at the direction of the Customer;
 - (e) any claim for general average and will provide any security requested by the Company for the release of any Goods that are the subject of a claim for general average.
- 9.13 The Customer indemnifies the Company from and against (and must pay on demand the amount of) all duty, GST, and any other fees and taxes incurred in connection with the Goods payable to a Government Authority.
- 9.14 The Customer indemnifies the Company from and against (and must pay on demand for) all costs payable to third parties in relation to the carriage, storage, treatment or entry of the Goods.
- 9.15 The indemnities in clauses **9.11**, **9.12**, **9.13** and **9.14** continue whether or not the Goods are pillaged, stolen, lost or destroyed.
- 9.16 The Company is not liable for Consequential Loss suffered by the Customer, regardless of whether or not the Company had knowledge that such damage may be incurred.

10. Insurance

- 10.1 On request by the Customer, the Company at its complete discretion may arrange insurance in respect of the Goods.
- 10.2 Without limitation to clause 10.1, the Company will not arrange insurance in respect of the Goods, unless the Customer provides:
 - (a) written instructions to the Company to arrange insurance; and
 - (b) a written declaration of the value of the Goods; before the Goods are delivered to the Company.
- 10.3 Any insurance will be at the expense of the Customer and the Company may charge the Customer a fee for arranging the insurance.
- 10.4 Any insurance arranged by the Company is subject to the exceptions and conditions of the insurer or underwriter taking the risk.
- 10.5 When arranging insurance in respect of the Goods, the Company has the discretion to name the Customer as the insured.
- 10.6 If a dispute arises relating to liability under an insurance policy arranged by the Company, the Customer will have recourse against the insurer or underwriter only.
- 10.7 The Company will not be liable for any insurance arranged in relation to the Goods.

11. Lien

- 11.1 The Company has:
 - (a) a particular and general lien on all Goods and documents relating to the Goods; and
 - (b) a right to sell those Goods and documents by public auction or private sale (at the Company's discretion) without notice and apply the proceeds of sale;in respect of all sums due and owing from the Customer.
- 11.2 The lien will also cover the Company's costs and expenses relating to the exercise of its lien and right of sale, including the Company's reasonable legal fees.
- 11.3 For the purposes of the lien, the Company will retain constructive possession of the Goods and the lien and rights granted by this clause will survive delivery of the Goods. The Company is entitled to retain the proceeds of sale of the Goods in respect of all sums due and owing from the Customer.

12. PPSA

- 12.1 Terms used in clause 12 that are defined in the PPSA have the same meaning as in the PPSA.
- 12.2 Without limitation to other rights of the Company, from the time the Goods are in the possession of the Company or a Subcontractor, the Goods are subject to a continuing security interest in favour of the Company for the payment of all amounts due and owing by the Customer under the Agreement.
- 12.3 The Customer acknowledges and consents to the Company's registration and perfection of the Company's security interest under the Agreement for the purposes of the PPSA.
- 12.4 The Customer will not grant a security interest to another person, or allow any encumbrance to arise, in respect of the Goods.
- 12.5 To the extent permitted by law, the Customer irrevocably waives any right it may have to:
 - (a) receive notices or statements under sections 95, 118, 121(4), 124(4), 125, 130, 132(3)(d) 132(4) and 135 of the PPSA; and

- (b) redeem the Goods under section 142 of the PPSA;
- (c) reinstate this Agreement under section 143 of the PPSA; and
- (d) receive a verification statement.

12.6 The Customer will do all things and execute all documents reasonably necessary to give effect to the security interest created under this Agreement or comply with any reasonable request by the Company in connection with the PPSA.

13. Uncollected goods

13.1 The Company may at its discretion sell or otherwise dispose of Perishable Goods without notice to the Customer where the Goods are not collected immediately upon arrival, are insufficiently or incorrectly addressed or are not identifiable.

13.2 Without limitation to clause 13.1, the Company may at its discretion sell or return Goods that cannot be delivered because they are insufficiently or incorrectly addressed, are not identifiable, are uncollected or not accepted after 21 days' notice to the Customer or where the Customer fails to pay any cost or do any action reasonably necessary for the Company to deliver the Goods.

13.3 Where the Company sells Goods under clauses 11, 13.1 or 13.2;

- (a) it does so as principal, not as agent, and is not the trustee of the power of sale;
- (b) the Customer must pay all costs, charges and expenses incurred by the Company in connection with the storage, sale or return of the Goods, which may be deducted from the proceeds of the sale of the Goods;
- (c) the Company is entitled to recover any deficit from the Customer where the proceeds of sale of the Goods do not satisfy the amounts payable to the Company.

14. SBC Contracts

The Company does not exclude or limit the application of any compulsory applicable Laws, including Schedule 2 of the *Competition and Consumer Act 2010* (Cth), where to do so would contravene those Laws or cause any part of this Agreement to be void.

If the Agreement is a SBC Contract, then:

- 14.1 The definition of "Loss" is amended to mean any actual or ascertainable loss, cost, damage, expense, claim, demand, action, proceeding or liability of any kind (including legal costs on an indemnity basis).
- 14.2 Clause 2.5 is modified, so that neither party may assign its rights or obligations under the Agreement without the written consent of the other party, which consent must not be unreasonably withheld.
- 14.3 Clause 3.12 is amended so that "absolute" is replaced with "reasonable".
- 14.4 Clause 6.1 is modified, so that the fees are earned when the corresponding Service is performed or attempted to be performed, or where applicable, the corresponding disbursement is incurred.
- 14.5 If a variation to a quote or fee under clauses 6.4 or 6.5 is material, where it is reasonably practical, the Company shall give notice to the Customer of that variation.
- 14.6 If the Customer objects to a variation to a quote or fee under clauses 6.4 or 6.5, but does not provide the Company with acceptable alternative directions in respect of the goods, the Company in its discretion may, deliver, return, store or otherwise deal with the Goods, and the Customer shall be liable for all fees earned and costs incurred by the Company in doing so.
- 14.7 Clauses 7.4 and 7.5 are modified, so that the Customer:

(a) may make a claim against or impose liability upon any Subcontractor; and

(b) is not required to indemnify any Subcontractor from and against any Loss,

to the extent that the claim, liability or Loss was directly caused by, or in connection with, a grossly negligent, unlawful, or wilful act or omission by the Subcontractor.

14.8 Clauses 9.2 and 9.3 are modified so that the Company's liability is not excluded to the extent that it was directly caused by or in connection with a grossly negligent, unlawful, or wilful act or omission by the Company or its employees, agents and contractors.

14.9 Clause 9.6 is modified so that the Company's liability is limited to the lesser of the actual loss suffered by the Customer or the value of the Goods at the time the Goods were received by the Company.

14.10 Clause 9.8 does not apply, and, without limitation to any other clause of the Agreement, the Company will be discharged from liability in relation to any claim:

(a) where the loss to the Customer results from the act of a Subcontractor; and

(i) the Company's right to make a claim against that Subcontractor is subject to time limitations; and

(ii) the Customer does not make its claim against the Company within a period reasonably sufficient to allow the Company to make a corresponding claim against the Subcontractor within any applicable time limitation period, or

(b) in all other cases, where the Customer does not make its claim within 2 years from the earlier of the delivery of the Goods, if the Goods are not delivered, the date the Goods should have been delivered or where the claim does not relate to loss or damage to Goods, the time of the event giving rise to the claim.

14.11 The Customer is not required to indemnify the Company under clause 9.11 or 9.12(b), unless the Loss was caused by or in connection with a breach of contract, or a negligent, unlawful reckless or wilful act or omission by the Customer or its employees, agents and contractors or due to the Company following a specific direction provided by the Customer.

14.12 Clause 9.16 is modified so that the Company will not be liable for Consequential Loss or indirect Loss, unless the Company had actual knowledge that such loss might be incurred.

14.13 Clause 11.1(b) is modified so that the Company may only exercise its right of sale under a lien over Goods after the Company has given 21 days' notice in writing to the Customer of its intention to do so.