

## Article Information

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# Consequences of not “fixing” a price for a “fixed” term energy contract

**In December 2014, Justice White of the Federal Court made a finding that AGL South Australia Pty Ltd made false or misleading representations and engaged in misleading or deceptive conduct in contravention of the Australian Consumer Law (ACL)**

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### Background

AGL South Australia Pty Ltd (AGL SA) is a wholly owned subsidiary of AGL Energy Limited, one of the top 50 ASX listed companies. AGL SA is the largest retailer of electricity to residential consumers in South Australia, supplying approximately 50% of the market.

The ACCC brought proceedings against AGL SA in December 2013 as part of its strategy of focusing on specific priority areas each year. In 2014, one of those priority areas was consumer protection in the energy sector with a focus on savings, referred to as the “Discounts off what?” issue.

The ACCC’s investigations into AGL SA revealed that between January and mid-July 2012 (Relevant Period), AGL SA offered residential electricity consumers an energy plan which included a percentage discount off of the consumer’s electricity usage charges. The discounts included between 3% and 15% and up to 25% for employees of AGL SA or one of its related entities and multi-site customers.

During the Relevant Period, 75,633 customers agreed to commence an energy plan with AGL SA and 31,451 (42.9%) of those customers did so during a telephone conversation with a Customer Service Representative (CSR) of AGL SA. It is the representations and conduct of AGL SA to those 31,451 consumers which the ACCC’s claims related to.

During telephone calls from customers to AGL SA during the Relevant Period, the Court found that CSRs variously represented that customers would obtain an advantage by way of a percentage discount by entering into the offered energy plan with the associated commitment to sign up with AGL SA for a fixed period (generally 2 years).

In mid-2012, AGL SA wrote to its customers to advise of a rate increase (the mid-2012 Rate Increase). However, in this correspondence, AGL SA represented to those customers who had received the discounted rate that they would still receive the discount, by way of one of two representations, either:

- “Sites that have Energy Plans with discounts or rebates will **continue to receive these**” or
- “Any discounts or rebates you currently receive on your energy usage charges will **continue to apply.**”

(emphasis added)

Despite these representations, these customers did not continue to receive their discounts. Following the mid-2012 Rate Increase, the new increased rate for these customers became:

- *higher* than the rate applied to otherwise similar consumers who entered into energy plans with AGL SA after the mid-2012 Rate Increase
- *higher* than the rate they would have received if they had not opted to commence a fixed term energy plan during the Relevant Period
- *higher* than the rate applied to otherwise similar consumers who entered into a standard retail contract/standing contracts (i.e. contracts which were not for a “fixed term”).

The Court held that this amounted to misleading and deceptive conduct and to the making of false or misleading representations by representing to these consumers that:

- the discount they had received would continue to apply, when this was not the case
- (for the class of consumers that may not have been aware that AGL SA could still supply electricity to them in the event that they did not enter into an energy plan) they would continue to receive their percentage discount from the energy usage charges calculated by rates which AGL SA applied generally to consumers like themselves.

The ACCC also made a number of other contentions, but it failed to make these out, including:

- an allegation that AGL SA engaged in misleading or deceptive conduct by omitting to disclose certain information to consumers in the mid-2012 Rate Increase letter, as well as in a further rate increase letter in mid-2013 – the Court found that consumers would not have had a reasonable expectation of being informed about these matters
- an allegation that the further rate increase letter in mid-2013 also amounted to false or misleading representations – the Court found that the mid-2013 letter was different to the mid-2012 letter in that it did not contain any statements to the effect that customers would “continue” to receive their discounts.

## **Penalty**

The Court ordered AGL SA to:

- pay a pecuniary penalty of **\$700,000**
- **publish a corrective notice** in ‘The Advertiser’ newspaper
- **distribute a corrective notice** by mail or email to all of the relevant consumers who entered into an energy plan with AGL SA during the Relevant Period by way of a telephone call with a CSR and who then received the mid-2012 Rate Increase letter
- pay **refunds** (by way of a credit to their account) to consumers affected by the contravening conduct
- pay **\$300,000** towards the ACCC’s costs.

AGL SA estimates that it will have to offer refunds to approximately 23,000 consumers totaling more than **\$780,000**.

## **Lessons to be learned**

This case (and other recent cases against businesses in the energy sector) was brought before the Courts by the ACCC in order to send a clear message to the industry. Rod Sims, Chairman of the ACCC, announced in a media release about the case that *“other retailers should sit up and take note – they must not mislead consumers about the savings they will achieve under energy plans”*.

Of note, Justice White stated in his judgment that consumers *“reposed some trust in AGL and would have relied on it to charge no more than that to which it was entitled under the arrangements which the consumer had made with it. They would have expected a reputable retailer not to depart from the representation on which it had induced them to contract with it.”*

Businesses need to bear in mind the serious ramifications of being found to have misled or deceived consumers and/or to have made false or misleading representations about issues such as “discounts”, “fixed term contracts” and any “increases” to these fixed term contracts.

Some take home messages include:

- always give current and correct information
- always be truthful in business dealings
- correct any mistaken representations you make or any misunderstandings as soon as possible
- make sure the overall impression is correct
- avoid ambiguous statements
- don’t mislead anyone in any transaction
- don’t leave out vital facts and relevant information

- don't guess the facts
- don't exaggerate - make sure any claims made can be justified
- don't use reassuring language which actually distorts the truth of the statement.