

Office of Fair Trading

# Odometer tampering claims against the claim fund policy

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## 1. Purpose

To ensure the Office of Fair Trading (OFT) accurately determines claims made against the *Agents Financial Administration Act 2014* (AFAA) claim fund for financial loss suffered as a result of having purchased a vehicle with an incorrect odometer reading.

## 2. Scope

This policy is specific to the OFT's claims process and is relevant to claims involving a financial loss that is identified from the representation of the vehicle having travelled fewer kilometres than represented by the relevant person. In determining the net financial loss, this policy aims to take account of both actual loss, as well as any actual advantage the claimant may have gained from the situation.

Section 82 of AFAA provides for events giving rise to a claim. For the purposes of this policy, section 216 of the *Motor Dealers and Chattel Auctioneers Act 2014* (False representations about goods) is noted as a claimable offence.

This policy will be reviewed annually or following legislative or internal procedural changes.

## 3. Responsible officers

All **OFT claims and recovery officers** and the **Director, Industry Licensing and Registrations** are responsible under this policy as a whole.

The following officers are responsible under section 5.1 of the policy:

- Executive Director, OFT
- Director, Investigations and Enforcement
- Director, Complaint and Program Coordination
- Director, Regional Operations and Engagement
- Manager, Case Assessment and Response
- Manager, Claims and Recoveries
- Manager, Program Strategy and Development
- Regional Managers, Regional Operations and Engagement
- All OFT inspectors appointed under the *Fair Trading Inspectors Act 2014* (FTIA)

## 4. Definitions, terms and acronyms

**AFAA:** *Agents Financial Administration Act 2014*

**Capital loss:** The purchase price paid by claimant **minus** market value of vehicle with correct odometer reading as at date of claimant's purchase

**Claims against the fund:** See Part 7, section 80 of AFAA

**Claim form:** AFAA Form 1 – Claim against the claim fund

**Claim fund:** The claim fund as established under sections – 78 and 155 of AFAA

**Claim Notice:** See section 91 of AFAA

**Claimant:** Person making a claim against the claim fund

**FTIA:** *Fair Trading Inspectors Act 2014*

**Inspector:** A person appointed as an inspector under section 13 - FTIA

**MDCAA:** *Motor Dealers and Chattel Auctioneers Act 2014.*

**Odometer:** The instrument in a vehicle for measuring the distance that vehicle has travelled

## 5. Actions

### 5.1. Advising person of possible claim

If an inspector has a reasonable belief a claim exists, i.e. a person may have suffered financial loss because of an event listed under legislation noted at section 82 of the AFAA caused by a relevant person, the inspector must as soon as possible:

- (a) inform the person possibly affected that they **may** have a right to make a claim against the claim fund
- (b) note the advice as a file note, and
- (c) forward the contact details of the person possibly affected to the Claims and Recoveries (C&R) unit via email to [claimsandrecoveries@justice.qld.gov.au](mailto:claimsandrecoveries@justice.qld.gov.au).

This will minimise the risk of claims being lodged outside the time limitations noted in section 85 of AFAA. The inspector must not give any advice to the person possibly affected about whether or not they have a valid claim against the claim fund.

### 5.2. Method of determining capital loss

In cases of odometer tampering, a claimant usually suffers a financial loss because they have incurred a direct capital loss by purchasing the vehicle. The loss arises because the vehicle's actual value on the open market is lower than the claimant was led to believe.

As a general rule, the loss is to be calculated using the following formula:

*Capital Loss (CL) = Purchase Price (PP) paid by claimant **minus** market value of vehicle with correct odometer reading as at date of claimant's purchase (Value at Purchase (VP)).*

i.e.,  $CL = PP - VP$ .

Market value may be determined by a written valuation obtained by the claimant from an independent motor vehicle valuer. If the motor vehicle was purchased at auction, an auction market valuation is required to evidence the loss that occurred in that market. In all other circumstances, a retail market valuation is required. The valuation will evidence what a person would have paid for the vehicle, had the odometer been correctly displayed. The cost of obtaining the valuation is claimable.

### 5.3. Exception

An exception to the method noted at 5.2 is where the claimant has on-sold the vehicle prior to the claim being determined **and** has not remedied the incorrectness of the odometer **and** has obtained a financial advantage from not correcting the odometer. In these circumstances, the formula is to be varied to take account of this advantage.

### 5.4. Legitimate profit

When determining the claimant's net capital loss, any profit made on the sale of the vehicle **should not** be automatically offset against the initial capital loss incurred by the claimant on purchase of the vehicle. Where such profit is legitimate, the claimant should not be deprived of it. Such circumstances may arise where the vehicle has been sold with the correct odometer reading but has legitimately appreciated in value e.g., special collectors editions, vintage cars, or as a result of substantial restoration.

## **5.5. Trade-in vehicles**

Care should be taken by the assessing officer when determining whether to apply any financial advantage deduction where the vehicle has been on-sold as a trade-in prior to the claim being determined. This should include ensuring the trade-in price obtained was not artificially generated, resulting in a claimable figure that may be misleading.

## **6. Determining other losses**

The claimant may be further financially disadvantaged through incurring ancillary losses e.g., stamp duty, loan interest, and/or consequential losses such as cost to correct odometer, solicitors fees in preparing claim etc.

### **6.1. Interest on finance obtained to purchase the vehicle**

Where finance was obtained by the claimant to purchase the vehicle, the claimant is permitted to claim the difference between the actual amount of interest paid, and the amount of interest that would have been paid had the size of the loan taken out to purchase the vehicle been reduced by the amount of the capital loss. If the loan is current, the calculation is to be based on the amount of interest paid as at the date of determining the claim.

### **6.2. Stamp duty**

Claimants are allowed to claim the difference between the actual amount of stamp duty paid and the amount of stamp duty that would have been payable had the vehicle been sold at market value with correct odometer reading.

### **6.3. Vehicle maintenance and repair costs**

Any repairs to, or replacement of items, which would have been readily visually assessable at the time of purchase are not claimable. Examples of such items includes tyres / wheels, windows, windscreen, window tinting, interior fittings, rust, aerial, spare wheel covers, hubcaps, weather strips, tow bars, and floor mats.

In general, any vehicle maintenance and repair costs will not be claimable unless the claimant can demonstrate that the circumstances in which the costs were incurred were directly attributable to the claimant believing the misrepresentation regarding the car's odometer. This approach is based on the need to avoid "double-dipping" on the part of the claimant. The capital loss component of the claim recognises the claimant will incur higher than expected vehicle maintenance and repair costs.

### **6.4. Odometer resetting**

The claimant should be fully compensated for the cost of resetting the odometer. Where this is not claimed initially by the claimant, the C&R officer will write to the claimant advising of their entitlement in this regard. Where the vehicle has been sold prior to the claim being lodged, the officer responsible for preparing the investigation report is to obtain particulars of the sale, to determine whether the claimant was aware of the incorrect odometer prior to selling the vehicle and whether the odometer was reset prior to the sale.

### **6.5. Solicitor's costs**

Solicitor's costs incurred by the claimant to assist in the preparation and lodgement of the claim may be claimable if they are reasonable in the circumstances. Solicitor's costs are assessed on a case-by-case basis.

## **7. Non-claimable costs**

Claimants are not entitled to claim potential costs of any type, e.g. increased servicing costs due to higher than indicated distance travelled for a motor vehicle. Only actual costs which have already been paid in association with the claimable event may be considered for the claim. Compensation in regard to capital loss inherently takes into account anticipated future vehicle maintenance and repair costs given the remaining true useable life of the vehicle. Thus a vehicle with higher mileage is worth less than the same vehicle with lower mileage.

In regard to odometer resetting, the OFT seeks to ensure resetting occurs prior to the vehicle being on-sold. Any claim for the cost of correcting the odometer reading must be considered only after the actual odometer correction has occurred. This cost cannot be claimed at a later time if the claimant elects to leave the odometer with the incorrect reading at the time of making a claim.

## **8. Consumer's contribution to claimed loss – reasonableness test**

Where the claimant could reasonably have been expected to have taken steps to avoid or mitigate the claimed loss, may be taken into account in calculating the appropriate quantum of the claim. This should be done on a case by case basis.

## **9. Claim elements not specifically provided for by this policy**

This policy does not provide prescriptive advice on how every possible element of these types of claims are to be decided. The policy aims to address those elements which might be **commonly** experienced in such claims. If a claim is made regarding an item not specifically provided for in this policy, the assessing C&R officer is to evaluate the item by considering it on its merits e.g. determine the item in a manner consistent with the spirit of this policy.