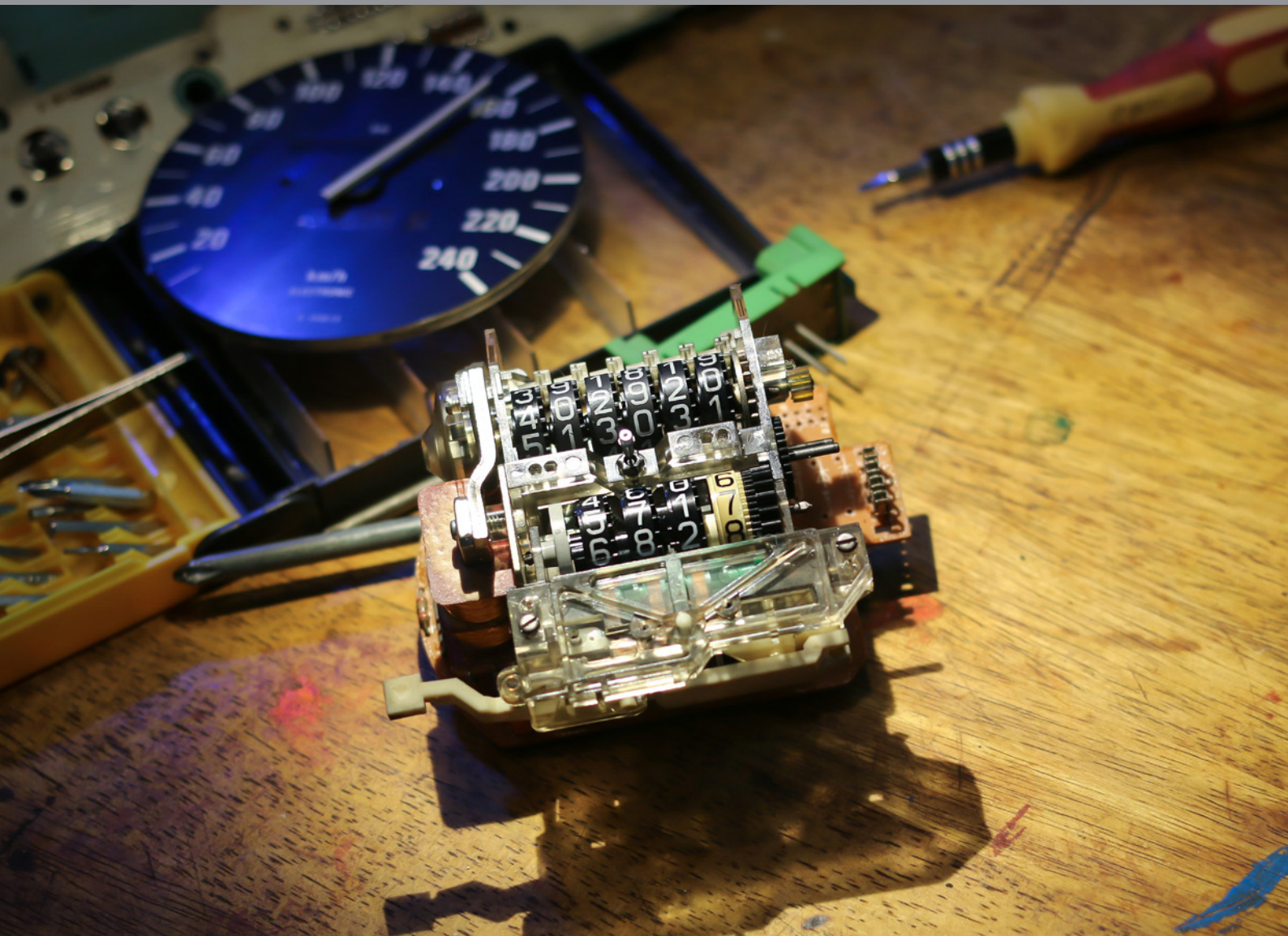


VACC Licensed Motor Car Trader guidance on recording odometer readings and dealing with odometer fraud.

June 2023



Contact



Michael McKenna MBA MBLaw

VACC Industry Policy Advisor

0418 822 939

03 9829 1280

mmckenna@vacc.com.au

Contents

| | |
|--|----|
| About VACC | 2 |
| 1 Purpose of this guidance | 3 |
| 2 How to read this report | 3 |
| 3 Preamble | 3 |
| 4 What VACC LMCT members tell us about trading in vehicles with wound back odometers | 4 |
| 5 What are the risks to community emanating from odometer tampering? | 6 |
| 6 What the Motor Car Traders Act 1986 (Vic) says about Odometer Tampering | 6 |
| 7 The LMCT legislated obligations to record odometer readings as the disposer, acquirer and service provider of a vehicle | 7 |
| 7.1 The consequences for a LMCT when a Motor Car Traders Guarantee Fund claim is admitted | 7 |
| 8 Statements about odometers dealers must make when retailing a used vehicle | 8 |
| 8.1 The dealings book | 8 |
| 8.2 Road User Tax Obligations for odometer declarations for Zero Low Emission Vehicles | 8 |
| 8.3 Advertisement of motor vehicle | 9 |
| 8.4 The window display Form 4 | 10 |
| 8.5 The contract of sale | 10 |
| 8.6 Rescission of contract | 10 |
| 8.7 The roadworthy certificate | 11 |
| 9. The obligation for LMCTs to comply with rulings from the Victorian State Revenue Office with regards to Trading, Demonstrator and Service Demonstrator stock. | 12 |
| 10. The consumer as the disposer of a vehicle | 13 |
| 10.1 Under what legislation can a consumer be held liable for odometer tampering? | 13 |
| 10.2 What the Crimes Act 1958 (Vic) says about deception | 13 |
| 10.3 The impact of odometer fraud on the LMCT and the purchasing consumer | 14 |
| 10.4 The private sale | 15 |
| 11. What are the potential solutions for LMCTs when they come into possession of such a vehicle? | 15 |
| 11.1 What has VACC done to assist LMCTs in the instance where they and their purchasing consumer has been victim to odometer tampering? | 16 |
| 11.2 Is there a digital solution available right now to help dealers? | 17 |
| 12. What is Consumer Affairs Victoria regulatory approach to consumers tampering with odometers? | 18 |
| 12.1 CAV data on calls received regarding odometer readings | 18 |

About VACC

The Victorian Automotive Chamber of Commerce (VACC) is Victoria's peak automotive industry association, representing the interests of more than 5,000 members in over 20 retail automotive sectors that employ over 50,000 Victorians. VACC members range from new and used vehicle dealers (passenger, truck, commercial, motorcycles, recreational and farm machinery), repairers (mechanical, electrical, body and repair specialists, i.e. radiators and engines), vehicle servicing (service stations, vehicle washing, rental, windscreens), parts and component wholesale/retail and distribution and aftermarket manufacture (i.e. specialist vehicle, parts or component modification and/or manufacture), tyre dealers and automotive dismantlers and recyclers.

VACC is also an active member of the Motor Trades Association of Australia (MTAA) and contributes significantly to the national policy debate through Australia's peak national automotive association.



Disclaimer

The contents of this document do not constitute legal advice, are not intended to be a substitute for legal advice and should not be relied upon as such. You should seek legal advice or other professional advice in relation to any particular matters you or your organisation may have.

1. Purpose of this guidance

The purpose of this guidance is to reaffirm with members of VACC's Licensed Motor Car Trader (LMCT) Divisions of the following:

1. LMCT obligations when acquiring, retailing, registering, advertising or preparing trading stock for sale where the recording of odometer readings is prescribed under the *Motor Car Traders Act 1986 (Vic) (the Act)*, *Motor Car Traders Regulations 2018 (Vic) (the Regulations)*, *Road Safety (Vehicles) Regulations 2021 (Vic)*, *Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic)*, *Duties Act 2000 (Vic)* and the *Australian Consumer Law 2011 (Cth)*.
2. To advise LMCTs of a process to follow as the aggrieved party when unwittingly taking into possession a vehicle that has had its odometer tampered with.
3. To advise LMCTs of a suggested course of action to consider when having acquired a vehicle under potentially fraudulent circumstances by a member of the public or body corporate.
4. To provide LMCTs with advice from the Victoria Police (VicPol) Vehicle Crimes Squad on how to approach the issue and what evidence LMCTs should provide when approaching VicPol when reporting the crime of odometer tampering.
5. To advise LMCTs of digital solutions that may assist in identifying vehicles with suspect odometer readings.
6. To further remind VACC members of odometer reporting obligations regarding Motor Vehicle Duty exemptions for demonstrator stock and Zero Low Emission Vehicles (ZELV) reporting obligations for the Victorian Road User Charge (RUC).

2. How to read this report

Throughout the paper the practice of odometer tampering is taken to mean a practice where a person winds back an odometer to make it appear that a vehicle has a lower kilometer reading than it actually does. Odometer fraud is taken to mean an occurrence when the seller of a vehicle falsely represents the actual kilometer reading of a vehicle to the buyer for the purposes of obtaining a greater sale or trade in price for their vehicle(s).

The terms 'wind back' or 'wound back' are populated throughout the paper and should be taken to mean 'odometer tampering'.

3. Preamble

Over the past 12 months VACC has communicated with many LMCT members who have been victim to acquiring a motor vehicle from a member of the public that has had its odometer tampered with (wound back).

A LMCT who participates in the act of tampering with an odometer for the purposes of misrepresenting a motor vehicles true condition is committing a heinous act against a consumer or fellow trader. It is one of the most serious breaches of the Act and one that a LMCT can potentially be subjected to a consumer claim, via the LMCT Motor Car Traders Guarantee Fund (the Fund).

It can also potentially result in the LMCT having their trading license suspended or cancelled.¹ Those LMCTs that are identified as having participated in such an action are dealt with expediently and severely by the Regulators.

In the same manner, the action of consumers presenting a vehicle to a LMCT with a tampered odometer must be treated with equal seriousness by the regulators, law enforcement agencies, the courts and industry. The sole purpose for consumers taking the approach to odometer tampering is to arrive at a lower kilometer reading on an odometer with the intended purpose of the consumer achieving a higher trade in price for their vehicle. Industry is at risk of greater exposure to odometer tampering by members of the public in recent times with the price of used motor vehicles enjoying favorable returns. LMCTs are often targeted as a convenient clearing house outlet for such vehicles, including vehicles traded in by organized crime gangs who often use scan tools or odometer adjustment tools that are available for purchase on the internet. LMCTs occasionally, unwittingly, buy a misrepresented and tampered vehicle as a trade-in from a consumer or other body corporate (e.g., an auction house). A system of the LMCT 'bouncing' the vehicle back to the vendor from a vehicle that has been acquired through an auction house at times provides a solution for the LMCT. There are times when the auction houses may not cooperate, which results in the LMCT potentially being stuck with such a vehicle.

VACC views this consumer behavior as particularly concerning. The behaviour extends to unlicensed traders selling those vehicles directly to people in the unregulated private-to-private market, leaving little to no recourse for a person who has bought an affected vehicle. This is as opposed to consumer protections available to consumers who purchase from an LMCT. A LMCT will potentially suffer severe consequences if found to be retailing vehicles with tampered odometers.²

VACC advice

It is from this perspective that VACC urges its 1,620 LMCT members to now get tough with people who would so defraud them and pursue those who tamper with motor vehicle odometers through civil and criminal legal actions.

4. What VACC LMCT members tell us about trading in vehicles with wound back odometers

VACC has surveyed its LMCT divisions to ascertain an industry informed position of persons or body corporates trading vehicles to LMCTs with a tampered odometer. The results of that survey revealed that 44.44 per cent of LMCTs have been victim to a consumer or a body corporate trading a vehicle with a wound back odometer, in the past four years. This equates to 967 of Victorian LMCTs being victim to this fraudulent behaviour.³ On average, LMCTs who responded to the survey report that they annually receive at least two vehicles per dealership with tampered odometers.

The survey also revealed at what point a wound back odometer is identified. Disturbingly, 75 per cent of identification of wind backs are discovered after a LMCT has paid for the vehicle.

The survey revealed that 60 per cent of LMCTs who took civil action against a person who traded a vehicle to them with a tampered odometer were successful in that action.

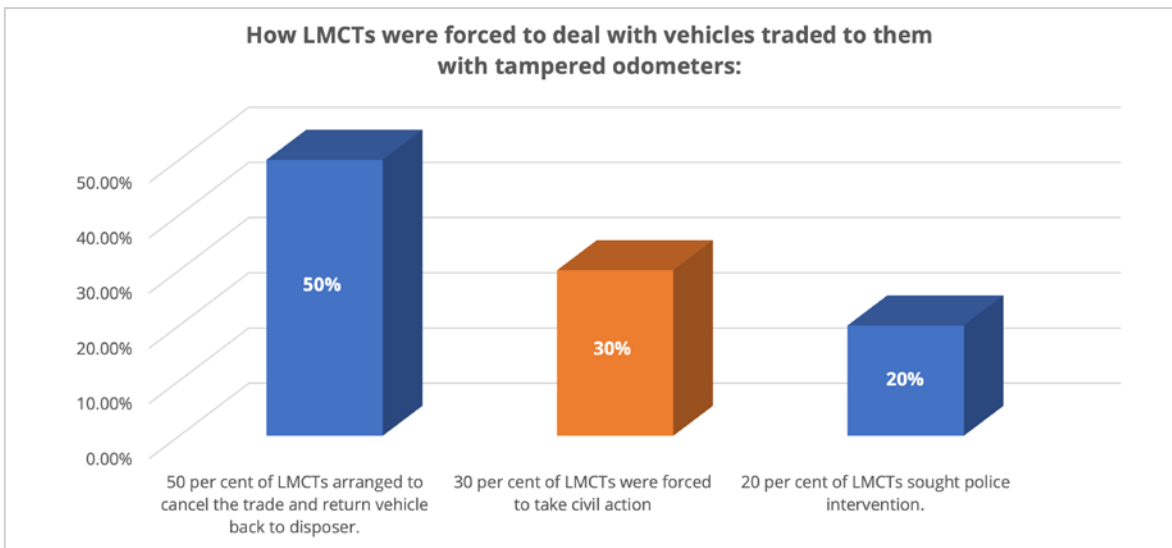
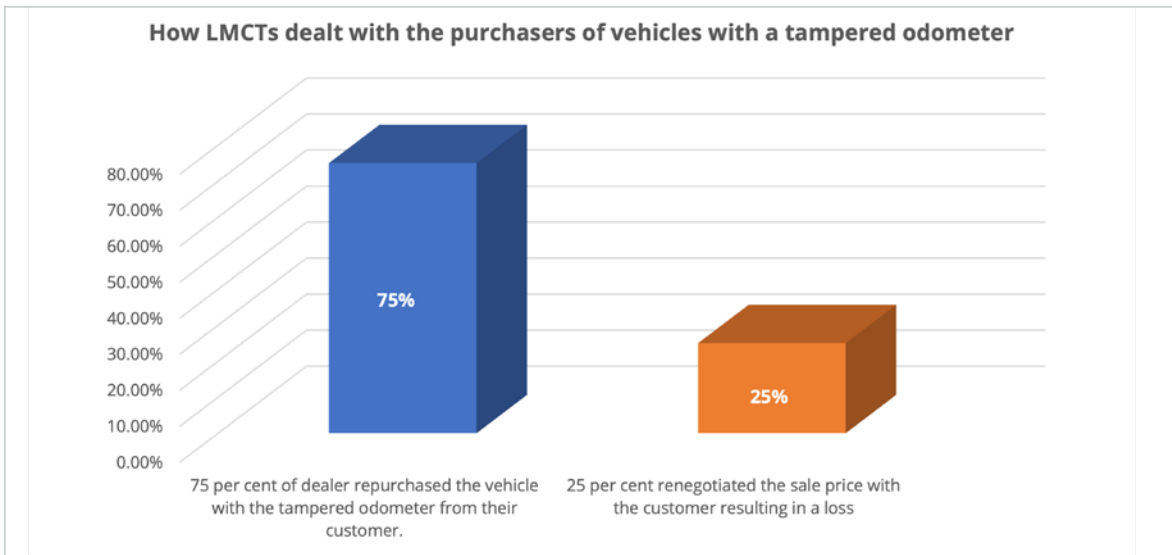
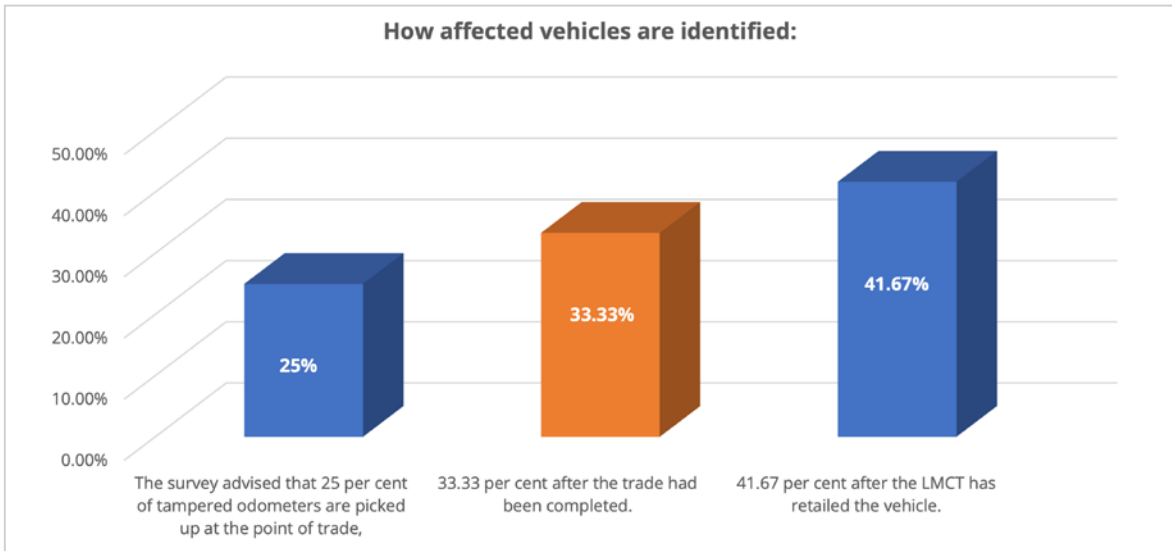
The survey revealed that after on-selling a vehicle with a tampered odometer that 75 per cent of LMCTs repurchased the vehicle with the tampered odometer that was on sold and 25 per cent of LMCTs renegotiated the sale price with the customer.⁴

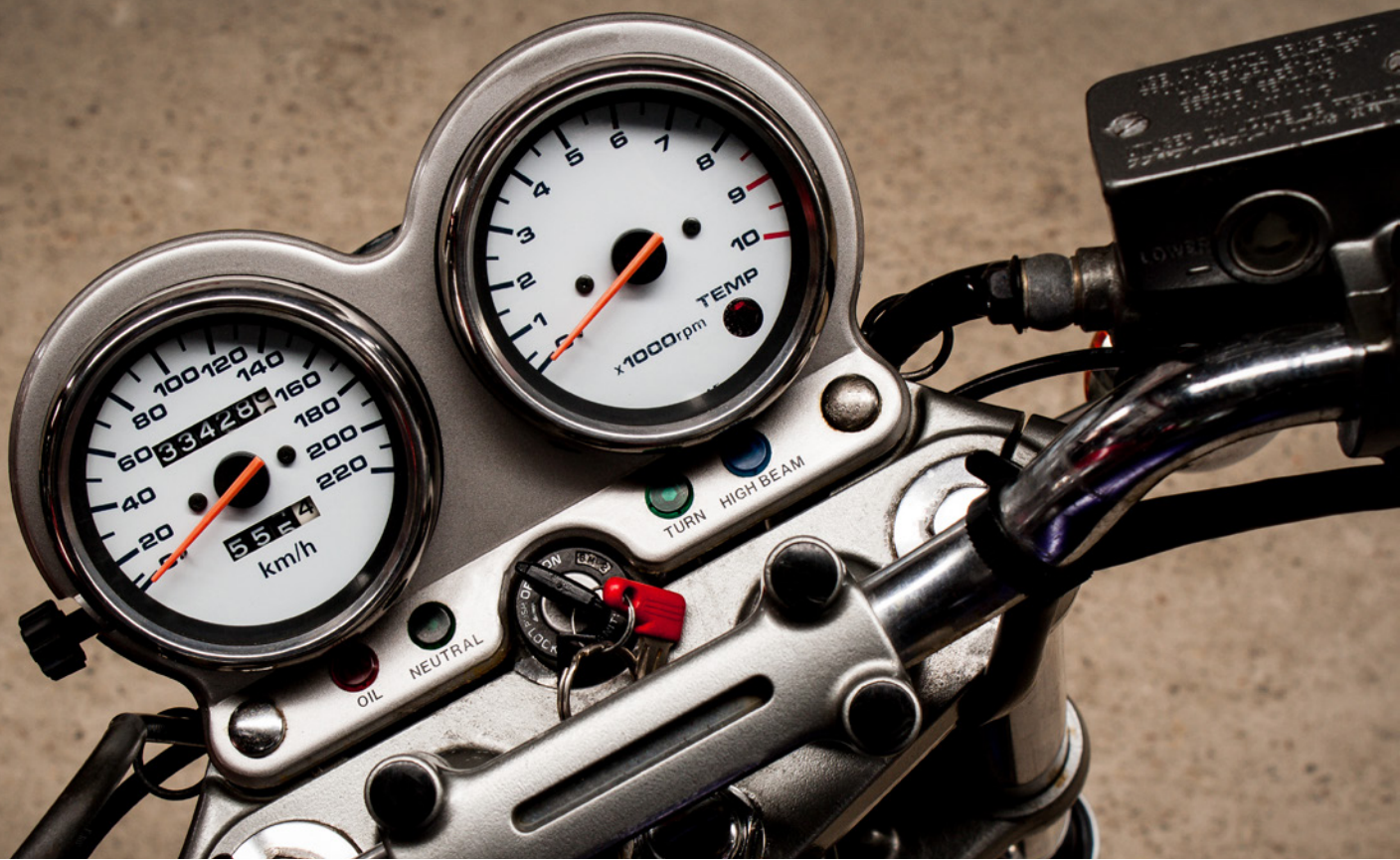
1. Motor Car Traders Act 1986 Vic (MCTA) Section 76(1)(a).

2. Ibid.

3. Consumer Affairs Victoria 201-22 Annual Report advises that there are 2199 LMCTs in Victoria pg. 12.

4. VACC LMCT Division Survey 3 April 2023.





5. What are the risks to community emanating from odometer tampering?

What must be considered are the very real community impacts that eventuate when a person fraudulently sells a vehicle to a LMCT with a wound back odometer. When an odometer is wound back, there is also an increased likelihood of mechanical repairs being required sooner rather than later with vital elements such as suspension, brakes, emissions, computer updates and other specific manufacturing servicing requirements being unwittingly prolonged. The purchaser has no clue that the original scheduled work would be required at that time as the false odometer reading does not correlate. Exacerbating the issue is that many vehicles that have wound back odometers are vehicles that are also sold with forged service records.

As vehicles age and odometer reading rise, service and repair costs increase. For instance, if a vehicle is misrepresented as having travelled less than 100,000 kilometers, the purchaser has assumed that significant service and repair costs will not be incurred for some time and may even be covered by manufacturer warranty.

VACC advice

The reality is that a vehicle with an odometer that has been wound back will incur major mechanical repair costs sooner rather than later. If those repairs are not conducted at the real odometer schedule the future purchaser can be left with expensive mechanical fixes. In instances such as this LMCTs can be often left exposed to various warranty and Australian Consumer Law claims. Be sure to thoroughly inspect vehicles traded without service books. Be on guard!

6. What the Motor Car Traders Act 1986 (Vic) says about Odometer Tampering

Section 38 (S 38) of the Act refers to a 'body corporate' and 'a person' when it announces the penalties applied for odometer tampering. This can be taken to mean that a private individual (a person) can also be held accountable to a civil action if the Regulator (Consumer Affairs Victoria) chooses to pursue such a person using the provisions of the Act. The Regulator can use a combination of legislative instruments and methods to pursue or prosecute a person for odometer tampering.

The maximum penalty applicable under the Act for a breach of S 38 can be as high as \$46,230 for a 'person' who tampers with an odometer,⁵ or to install an instrument in substitution of the original odometer.⁶ The penalty for a body corporate for tampering or substitution of an odometer can be as high as \$184,200.

S 38 also states that if it is proven that any instrument or device in a motor car for recording the distance travelled by the vehicle has been tampered with, or substituted, whilst the motor car has been on the premises, or in the possession custody or control of the LMCT, the tampering or substitution shall be deemed to have been done by or on behalf of the LMCT.⁷ It is within this area where LMCTs must take the utmost of care to ensure that what they are acquiring has not had a tampered odometer.

Importantly for LMCTs, when selling or exchanging a motor car, if you falsely represent the accuracy of an odometer reading of the car you cause an offence under the Act and the penalty applied can be high as \$92,400. For a 'person' that penalty is also significant and can be a maximum of \$18,492.⁸

7. The LMCT legislated obligations to record odometer readings as the disposer, acquirer and service provider of a vehicle

The fallout for an LMCT is compounded by the fact that if they unwittingly trade and on-sell a tampered vehicle it is not a defence under the Act and/or Section 18 of the ACL to say that '*they did not know*'.⁹ The LMCT will be held responsible for the misrepresentation of the accuracy of the odometer and most likely be required to refund the purchase price and take back into their possession a heavily devalued vehicle.

7.1 The consequences for a LMCT when a Motor Car Traders Guarantee Fund claim is admitted

It is worth noting that consumers that buy from a LMCT in Victoria are also protected from losses incurred as a result of odometer tampering under section 76(1)(a) of the Motor Car Traders Act and the operation of the Motor Car Traders Guarantee Fund (the Fund). If a claim on the Fund is successful the fallout for an LMCT can be catastrophic.

Ultimately where the vehicle proven to have been retailed by the LMCT with a tampered odometer is bought from an LMCT, the Fund will reimburse the consumer out of the accumulated LMCT cohort annual fees collected by the Government for that financial year. The Business Licensing Authority (BLA) advise LMCTs when issuing correspondence with regards to a claim that if a motor car trader is licensed at the time a claim is admitted that the licence is automatically suspended for 30 days after a claim is admitted unless,¹⁰ within that 30-day period, the LMCT applies to the BLA for the suspension not to take effect, and for permission to continue to hold a licence. The LMCT must then reimburse the fund for the amount of the paid out claim if they wish to continue to trade as an LMCT.¹¹

Correspondence regarding a claim on the Fund from the BLA will typically advise LMCTs that the Secretary to the Committee will institute proceedings to recover the amount paid out of the Fund (and the cost of the action) from the motor car trader, even if the trader is no longer licensed. Proceedings to recover the amount paid out will also be taken personally against the director(s) of a company licensee and all the partners of a partnership. These recovery proceedings can result in

5 A penalty unit in Victoria for 2022-23 has been gazetted at \$184.92 per unit.

6 MCTA s 38 (1)(a-b).

7 MCTA s 38(2).

8 MCTA s 38(4).

9 MCTA s 38(2).

10 MCTA s 29 (1).

11 MCTA s 29A (3).

the Secretary (BLA) taking bankruptcy proceedings against the licensee, directors of the licensee or the partners of the licensee.

The admission of the claim to the Fund may prevent a LMCT's future participation in the motor car trading industry. For example, a person against whom a claim is admitted is prohibited from working for a motor car trader in a "customer service capacity" unless permitted to do so by the BLA (see section 35A of the Act).

S 31 of the Act also allows for the Director of Consumer Affairs or the Chief Commissioner of Police to act against a LMCT for a variety of reasons regarding compliance with the Act, or that the LMCT is deemed to be trading in a manner that is dishonest or constituting unfair conduct.¹²

VACC advice

VACC would consider that the admittance of a claim by the Motor Car Traders Guarantee Fund Claim Committee against a LMCT for willful odometer tampering would decree the LMCT as behaving dishonestly and unfairly.

8. Statements about odometers dealers must make when retailing a used vehicle

8.1 The dealings book.

The Motor Traders Regulations 2018 (Vic) (the Regulations) Schedule 1, Regulation 9 'Form 2 Dealings Book' makes specific reference to the acquisition details of motor vehicles acquired by LMCTs. Part of those acquisition details is the obligation of the LMCT to record the odometer reading in the dealings book at the time of the acquisition.¹³

8.2 Road User Tax Obligations for odometer declarations for Zero Low Emission Vehicles

The requirement to provide photographic evidence of an odometer reading under the *Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic)* is legislated for all registered owners of Zero and Low Emission Vehicles (ZLEV) vehicles in Victoria.¹⁴

The ZLEV Road-User Charge (RUC) is calculated based on the distance travelled within a given registration period. To enable VicRoads to calculate the ZLEV RUC charge, registered operators of those vehicle types must provide VicRoads with a photo image of their vehicle's odometer at the start and end of a registration period and keep a photograph of that odometer reading for a period of 5 years.¹⁵ Those registration and transfer periods are:

Start period

- 1 July 2021 scheme commencement
- New or second-hand vehicle registration commencement
- Transfer of a ZLEV.

End period

- Registration renewal
- Registration transfer
- Registration cancellation.¹⁶

¹² MCTA s31(1)&(2)(a-i).

¹³ Motor Traders Regulations 2018 (Vic) Schedule 1, Form 2, Regulation 9.

¹⁴ Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic) Section 10(1)(a-b).

¹⁵ Zero and Low Emission Vehicle Distance-based Charge Act 2021 (Vic) Section 10 (2) (a).

¹⁶ VicRoads, ZLEV road user charge, (2021) < <https://www.vicroads.vic.gov.au/registration/registration-fees/zlev-road-user-charge#Odometer-declarations> [12-13].



VACC has negotiated with the Victorian government for LMCTs selling new or secondhand ZLEVs to be granted a 1,500 km exemption from the RUC. This allowance is for LMCTs to further promise the benefits of ZLEV technology for consumer test drives, as well as for the transportation of vehicles, for demonstration purposes and service loan-car purposes. VACC seeks further exemption to the RUCs that will help offset the massive infrastructure costs that dealers must absorb to transition to ZLEV technology.

VACC advice

It is important that LMCTs accurately record odometer readings when claiming the RUC exemption in the first instance so no further dealership or government resources are spent correcting errors or be the catalyst for an SRO audit of your dealership.

8.3 Advertisement of a motor vehicle

The regulations are silent on whether a motor vehicle must be advertised with a statement announcing an odometer reading. However, if you do provide an odometer reading it must be accurate at the time of advertisement. When you are advertising a new or used vehicle, it is important that the overall impression created by your advertisement is an accurate one.¹⁷

If you do not make an accurate statement as to the odometer reading in the advertisement you may have an issue to deal with under Section 18 of the Australian Consumer Law (ACL) which contains specific definitions on misleading and deceptive conduct – whether it actually misleads or is likely to mislead— that is prohibited by the ACL.¹⁸

Although there is no definition of the term ‘false and misleading conduct’ in the ACL,¹⁹ the ACL contains a specific prohibition on making false representations about goods and services. A false representation is one that is incorrect or contrary to fact. VACC interprets a deliberate false odometer reading by an LMCT in an advertisement to be incorrect or contrary to fact. As with the prohibition on misleading conduct, your intention (or not) to mislead is irrelevant.²⁰ There is case law precedent to be relied upon for this point.²¹ For the purposes of the false, misleading or deceptive conduct provisions of the ACL, it is necessary to identify the impugned conduct and then to consider whether that conduct, considered as a whole and in context, is misleading or deceptive or likely to mislead or deceive.²²

¹⁷ Australian Consumer Law 2011 (Cth) Section 18.

¹⁸ Australian Competition and Consumer Commission, Pricing manual for the motor vehicle industry (2011) 18[1].

¹⁹ Law Quarter, An introduction to Section 18 of Australian Consumer Law, (2023) <https://lawquarter.com.au/an-introduction-to-section-18-of-australian-consumer-law/#:-:text=Section%2018%20of%20Australian%20Consumer%20Law%20provides%20that%20a%2> [5].

²⁰ Australian Competition and Consumer Commission, Pricing manual for the motor vehicle industry (2011) 19[1].

²¹ Parkdale Custom Built Furniture Pty Ltd v Puxu Pty Ltd, (1982) 149 CLR 191 at 197.

²² Kristen Webb et al. Clayton Utz “Context is all”: Court confirms test and principles for false, misleading, or deceptive conduct, (2020), <[VACC Licensed Motor Car Trader guidance on recording odometer readings and dealing with odometer fraud.](https://www.claytonutz.com/knowledge/2020/october/context-is-all-court-confirms-test-and-principles-for-false-misleading-or-deceptive-conduct#:~:text=It%20is%20well%20established%20that,likely%20to%20mislead%20or%20deceive.>[8]>.</p></div><div data-bbox=)

Under the basis of intent, and that to be found in contravention of the ACL, the dealer intention does not matter, dealers should take care in the lodgment of on-line advertisements in particular and attempt to advertise as exact an odometer reading as possible. VACC research and dialogue with various regulators reveals that Regulators will use an array of legislative instruments to prosecute a dealer in the event of making false or misleading advertising statements with regards to odometers.

From time-to-time VACC receives calls from dealers who advise that they are instructed by their manufacturer(s) that they (the dealer) must not advertise a newly registered vehicle via on-line classified portals with an odometer reading of less than 1,000 kms (typically newly registered demonstrator vehicles and cyber cars have an odometer reading of less than 100 kms but more than 10 kms).

VACC advice

VACC advises LMCTs and manufacturers to advertise the car with the correct odometer reading for that vehicle at the time of an advertisement.

8.4 The window display Form 4

Schedule 1, PART B—USED MOTOR CAR NOTICE makes the following announcement:

'If the motor car is equipped with an odometer, the distance travelled by the motor car entered by the motor car trader in the dealings book when the trader acquired the motor car or received custody or possession of the motor car for the purpose of sale (as the case may be).'

This is taken to mean that the only odometer reading that should be on the Form 4 is the odometer reading taken at the point of the vehicle being entered into a LMCTs Dealings Book (Form 2) at the time of vehicle acquisition.

8.5 The contract of sale

The VACC Agreement for the Sale of a Used Motor Car, Clause 5, contains a prescribed term mandated under the Regulation that requires a statement as to whether or not the trader believes the distance so recorded on the odometer to be true.²³ To ensure this is met, the clause on the VACC Agreement for the Sale of a Used Motor Car makes the following statement:

*'The Trader being unable to satisfy itself absolutely as to the accuracy of the odometer reading as being the distance travelled by the Purchase Vehicle, cannot and therefore does not, believe the odometer reading accurately records such distance.'*²⁴

It is important to note that a statement such as this is a prescribed term under the Regulations and all used car contracts of sale must have a statement similar to that provided on the VACC Agreement for the Sale of Used Motor Car.

VACC advice

VACC reminds LMCTs that it is important to note that an odometer reading to be entered on the contract of sale should be the distance travelled by the motor car as recorded on the odometer in the motor car either when the purchaser signs the agreement, or at any earlier time at which the purchaser takes delivery of the motor car.²⁵ This is a regulatory requirement.

8.6 Rescission of contract

If a consumer seeks to rescind the contract for reasons connected to a false representation of an odometer by the LMCT, they have an option to make application to the Magistrates Court to

²³ Motor Traders Regulations 2018 (Vic) Regulation 23 A(7).

²⁴ VACC Agreement for Sale of Used Motor Car, Clause 5, Version 14, April 2019.

²⁵ Regulation 23, Schedule 2—Particulars, terms, and conditions for sale of used motor car, A[6].

rescind the contract of sale no later than 3 months after an agreement is entered into.²⁶ To do this the consumer must specify that a false representation has been made in relation to an odometer reading.²⁷ Whilst this is a legal process for the consumer to follow, it would be prudent for the LMCT to consider the resources it would take their business to defend such a challenge and make a business judgement on what the potential ramifications would be from a LMCT licensing retention perspective if the courts were to direct the intervention of the Regulator.

VACC advice

If a contract is to be rescinded VACC advice is that the refund remitted to a consumer should be less the actual amount of motor vehicle duty and other government charges paid by the consumer, and forwarded to the government by the LMCT, as part of the original sales process. The consumer should be advised by the LMCT that they (the consumer) can make separate application to the SRO for refund of those government charges.

8.7 The roadworthy certificate

VicRoads administers the Licensed Vehicle Testers (LVTs) scheme. The prime role of licensed participants on the LVT scheme is to examine and test vehicles against a set of approved guidelines. No person can sell a car that is registered in Victoria without having a current RWC issued by an LVT.²⁸ Section(s) 253-265 of the *Road Safety (Vehicles) Regulations 2021 (Vic)* mandate how a RWC can be issued.

Many LMCTs also participate in the LVT scheme. A dealer's pre-delivery and service and repair facility is a key element within a dealership infrastructure. It makes sense for a LMCT to also participate on the LVT scheme as it allows for the dealership to have a complete end-to-end process when it comes to delivering a car to market.

LVTs inspect and examine vehicles to certify that at the time of inspection a vehicle meets the requirements as mandated under Vehicle Standards Information 26 (VSI 26).²⁹ If successful in meeting the standard a LVT can provide a certificate of roadworthiness (RWC) to the vehicle owner that will be used as support in the registration and transfer application of the vehicle from a LMCT to a purchaser.

A key component of conducting a RWC inspection is an obligation of the LVT to compulsorily record an odometer reading at different stages of a vehicle inspection. Elements of those obligations include the compilation and storage of digital photographic evidence of a vehicle's odometer upon first and second inspection of the vehicle by the LVT.³⁰ There are obligations on the LVT to keep such photographic evidence for a period of 7 years and that those digital photographs must be made available to VicRoads inspectors upon request.³¹ This applies to light vehicle, motorcycle, and truck inspections.

The VicRoads document *'Roadworthy eCertificate, User Guide. The Licensed Vehicle Tester's guide to using VicRoads' online Roadworthy eCertificate system'* also clearly states the LVT obligations under the Roadworthy eCertificate.³²

LMCTs who have a workshop with an LVT attached are urged to work within the parameters of the guidance associated within the Regulations and subsequent documents such as VSI 26 for vehicles

²⁶ MCTA s 45 (1).

²⁷ Ibid.

²⁸ MCTA s 42A (1)(a).

²⁹ VicRoads, Vehicle Standards Information 26 Roadworthiness requirements 1 [4].

³⁰ A vehicle can be a light vehicle, a motorcycle or truck.

³¹ VicRoads LVT Update 'Roadworthy Inspection Photographs-Directions for Use', (2022)2-4.

³² VicRoads 'Roadworthy eCertificate User Guide. The Licensed Vehicle Tester's guide to using VicRoads' online Roadworthy eCertificate system (2020) 13.



with a GVM of less than 4.5 tonnes and record the odometer readings as mandated. There are other standards such as VSI 4 for motorcycles or mopeds and for Heavy Vehicles any guidance provided by the National Heavy Vehicle Regulator.³³

VACC advice

VACC advises LMCTs that are also on the LVT Scheme to store those photos as mandated and protect your dealership from the prospect of a potential show cause notice, suspension, cancellation, or loss of your dealership's LVT status.

9. The obligation for LMCTs to comply with rulings from the Victorian State Revenue Office (SRO) with regards to Trading, Demonstrator and Service Demonstrator stock

Chapter 9 of the Duties Act 2000 (Vic) outlines various exemptions for the payment of motor vehicle duty (duty) in the acquisition and conditional use of trading stock vehicles by an LMCT.

The legislative guidance for the exemptions is contained within Section 231 (s 31) of the *Duties Act 2000 (Vic)*. Those exemptions make specific reference to how a vehicle's odometer reading and kilometer usage will be treated when a LMCT uses trading stock, demonstrator and service loan vehicles for certain purposes.

For example, the Victorian State Revenue Office (SRO) in Revenue Ruling DA-035v2, the SRO advise that it can determine whether a vehicle has had a change in predominant use by examining the odometer reading,³⁴ amongst other things.

The SRO also outline under Revenue Ruling DA-034v2 that a motor vehicle is not considered to be used solely or primarily as a demonstrator vehicle where it has travelled a distance of more than 7,500 kilometers since its acquisition and initial registration in the name of the LMCT.³⁵ In this particular area LMCTs should be careful to not assume that they can use a demonstrator or service demonstrator vehicle for 7,500 km carte blanche. The SRO can decide that a vehicle has had a change in use,³⁶ irrespective of whether it had generated 7,500 kms on the odometer, and that the vehicle no longer applies for the exemptions outlined in s 231(2)(a)(i-ii) of the Duties Act 2000 (Vic).

33 VicRoads, Vehicle Standards Information 26 (VSI26) Roadworthiness requirements, (2023)1[1].

34. State Revenue Office (SRO) Victoria, Motor Vehicle Change of Use Provisions DA-035v2, (2019.) <<https://www.sro.vic.gov.au/legislation/motor-vehicle-change-use-provisions-0>>.

35. State Revenue Office Victoria Trading stock, demonstrator vehicle, service demonstrator vehicle exemptions DA-034v2,(2019) <<https://www.sro.vic.gov.au/legislation/trading-stock-demonstrator-vehicle-service-demonstrator-vehicle-exemptions>>.

36. SRO n 34.

The LMCT may be liable to pay the duty applicable, plus penalty duty and interest as prescribed under the *Taxation Administration Act 1997 (Cth)*, in each instance where the SRO determines that a change in use has occurred and the LMCT has not lodged the change in use statement with the SRO.

VACC advice

VACC's advice to LMCTs is to keep using those vehicles that are claiming the duty exemptions to the predominant usage for which they are claiming in the exemption. VACC also urges LMCTs to be vigilant regarding the kilometers being accrued on demonstrator and service demonstrator stock. If in any doubt LMCTs should refer to their financial or business advisors as to what process to employ.

10. The consumer as the disposer of a vehicle

10.1 Under what legislation can a consumer be held liable for odometer tampering?

From a criminal perspective, there are legislative terms connected to the *Crimes Act 1958 (Vic)* and *Motor Car Traders Act 1986 (Vic)* (the Act) that are potential courses of action for the LMCT to consider pursuing.

You can view below an example of a previous action taken by Consumer Affairs Victoria (CAV) and VicPol with regards to odometer tampering under breaches perpetrated by private persons. The prosecution of the person was obtained by CAV and VicPol successfully using breaches of both Acts (i.e., the Act and the Crimes Act) in the one case.³⁷ In this instance the defendant received jail time for the crime of odometer tampering and for obtaining property by deception. The opportunity for LMCTs to push law enforcement and regulatory agencies to pursue such actions is very real and one that should be actioned by industry.

10.2 What the Crimes Act 1958 (Vic) says about deception

Section 82 of the *Crimes Act 1958 (Vic)* deals with Obtaining a Financial Advantage by Deception. It is an indictable offence under the Crimes Act to obtain a financial advantage by deception with a 10-year maximum imprisonment potentially applied.³⁸

Consumer Affairs Victoria Press Release 2016

Hassan Al Dali - Court action

An unlicensed motor car trader will spend at least six months in jail, after an unsuccessful appeal hearing at the County Court of Victoria.

Hassan Al Dali, 32, of Glenroy, received a 12 month suspended sentence in December 2013 for 10 offences under the Motor Car Traders Act 1986, including 10 of odometer tampering.

The following month, Mr Al Dali committed further odometer tampering offences, plus new offences under the Crimes Act 1958, namely obtaining property by deception. As a result of this offending, his suspended prison sentence was restored at a hearing in March this year.

Mr Al Dali appealed this decision on 4 May and was unsuccessful in having his prison sentence suspended. He was sentenced to an aggregate term of 15 months' imprisonment, with a six-month non-parole period.

Mr Al Dali was also ordered to pay compensation of \$11,000 to two consumers, and a \$1,500 fine.

37. Consumer Affairs Victoria (2016) < Hassan Al Dali - Court action - Consumer Affairs Victoria >.

38. Crimes Act 1958 (Vic) Section 82 (1).

The requirements of deception and dishonesty have been given the same meaning as the other offences of fraud in Victoria. The term financial advantage has been given a broader interpretation. It should be interpreted as something that improves the financial situation of the person in question.³⁹ This would be the case in the instance of a person trading a vehicle to a LMCT with a wound back odometer and not declaring this to a LMCT or purchaser.

For an action to be considered deceptive the perpetrators conduct or words must be either intentional or reckless. For the purposes of clarity, a 'reckless' way is to say or do something knowing that there is a substantial risk that it might be deceptive but carrying on anyway.⁴⁰ Using the intentions of a person presenting a vehicle with a wound back odometer, it is VACC's view that LMCTs should at a minimum explore the option to pursue a person through the criminal justice system, who trades a car with a tampered odometer.

The point of whether that person who traded the vehicle to the LMCT was or was not aware of the tampered odometer should not be the LMCT's concern. The person who traded the vehicle to the LMCT has invariably received a greater trade in value as a result of the deception. It would be each LMCT's judgment call as to what angle to pursue in regard to being defrauded by a consumer. The level of the fraud committed against you, and loss to your business (both reputationally and financially) should be considered in any decision you make. VACC is happy to consult with you on this issue.

VACC advice

The fact is that the LMCT is a victim of a crime and should not have to carry the burden and that each instance of odometer tampering encountered by LMCTs be reported to Victoria Police.

10.3 The impact of odometer fraud on the LMCT and the purchasing consumer

The impact of odometer fraud on the LMCT who unwittingly buy vehicles that have been wound back with an intent to defraud is significant and impacts greatly on the legitimate auto industry.

In current times it is rare for LMCTs to be accused, or found guilty, of the practice of odometer tampering. That is attributed to the severe sanctions and measures applied by regulators when identifying such instances if conducted by an LMCT. In the most recently available public data issued by the BLA, it is advised that no LMCT had a claim on the Fund admitted for odometer tampering in 2021-2022, 2020-21, none in 2019-20, and none in 2018-19.⁴³

Odometer fraud is difficult to detect as information about odometer readings is not readily available. Vehicles that have been wound back are disguised from the purchaser (in this case LMCTs) and often the fraud can remain undiscovered for some time. Devaluation of the vehicle is caused by the fraud, the false information supplied and by the difficulty in the LMCT disposing of a known tampered vehicle.

Once discovered, the loss to the purchaser is often substantial (potentially thousands of dollars) and little can be done to recover the losses. Worse for LMCTs is the fact that in the instance where a vehicle sold by that LMCT is found to have its odometer wound back, the LMCT will invariably 'buy

39. Michelle Makela, *Fraud in Victoria, and Crimes of Deception*, (2023), < [40. Ibid \[10\].](https://www.gotocourt.com.au/criminal-law/vic/fraud/#:~:text=Fraud%20in%20Victoria%20includes%20a,of%20documents%20and%20false%20accounting.>[7].</p></div><div data-bbox=)

41. Motor Car Traders Guarantee Fund claims admitted 2020-21, < <https://www.consumer.vic.gov.au/licensing-and-registration/motor-car-traders/public-register/motor-car-traders-guarantee-fund-claims-register/motor-car-traders-guarantee-fund-claims-admitted-2020-21>>.

42. Motor Car Traders Guarantee Fund claims admitted 2019-20, < <https://www.consumer.vic.gov.au/licensing-and-registration/motor-car-traders/public-register/motor-car-traders-guarantee-fund-claims-register/motor-car-traders-guarantee-fund-claims-admitted-2019-20>>.

43. Motor Car Traders Guarantee Fund claims admitted 2018-20, < <https://www.consumer.vic.gov.au/licensing-and-registration/motor-car-traders/public-register/motor-car-traders-guarantee-fund-claims-register/motor-car-traders-guarantee-fund-claims-admitted-2018-19>>.

back' the vehicle from the consumer it was on-sold to at the original or inflated purchase price as the consequences for the LMCT to not do so could result in a loss of licence in Victoria. Those buy backs can often happen years after the original purchase.

VACC advice

It is on this basis that VACC urges LMCTs who have been victim to such instances to take the appropriate civil and criminal actions to restore themselves to a position where they have not incurred a loss.

10.4 The private sale

Where a wound back vehicle is bought at a private sale then the person who acquired the vehicle is most likely to incur all of the losses and the increased costs of ownership of a misrepresented vehicle. Consumers that buy privately take a greater risk than those consumers that buy from a Licensed Motor Car Trader.

VACC advice

VACC will lobby for an introduction of regulation within the private-to-private market including clear evidence of a vehicles provenance and odometer history. This would apply to vehicles passing through the mainstream auction processes.

11. What are the potential solutions for LMCTs when they come into possession of such a vehicle?

It is VACC's advice to LMCT members that when they believe they have been defrauded by a consumer with regards to odometer tampering that they take immediate action.

That action includes:

- Ensure the purchaser of the vehicle from your business is remedied in the most professional and precise manner as possible. Keep all communication open and consider implementing a process where all communications are to be in writing (email ,SMS etc.) that show your clear course of action.
- Establishing a clear line of evidence that shows the vehicle odometer was tampered with before the LMCT acquisition.
 - ▶ Alerting the person(s) or the body corporate from whom the car was acquired that the odometer reading at the time of acquisition was in fact incorrect and enter into negotiations with that person(s) or body corporate for the buyback of that car at the purchase price paid by the LMCT. You should consider all other reasonable out of pocket expenses as a form of damages.
 - ▶ In the instance that the person(s) or body corporate deny knowledge of any wind back, the maxim of 'ignorance is no excuse' should apply.⁴⁴
 - ▶ Reporting the incident to Victoria Police if all attempts to negotiate with the person from whom you acquired the vehicle fail.
 - ▶ Consider commencing a series of legal action(s) via VCAT (or similar) to recoup your LMCT losses.
 - ▶ Consulting with your own legal representatives to chart the best course of action available to you with the view to recoup your losses.
 - ▶ Advise VACC of all details for VACC to table such an incident with Consumer Affairs Victoria for their action under s 38 of the Act.

44. Criminal Code Act 1995 (Cth) Section 9.3 (1).

11.1 What has VACC done to assist LMCTs in the instance where they and their purchasing consumer have been victim to odometer tampering?

VACC has taken advice from the Victorian Police (VicPol) Vehicle Crimes Squad. That advice is below.

Table 1 Victoria Police Vehicle Crime Squad Advice to VACC (sic)

Victoria Police & the Vehicle Crime Squad is aware of these types of incidents though they are not commonly reported or come to the police attention.

As you are no doubt aware a person who alters the dashboard speedometer of the vehicle by manipulating an analogue or electronic odometer to reflect a significantly lower reading maybe attempting to falsely inflate the market value of the vehicle.

If a dealership believes that they have purchased or are aware of a motor vehicle where its odometer has been tampered with for the purpose of inflating its market value, then they should attend at their local police station and report the matter. Police will assess each reported incident on its merits and circumstances during any investigation.

There are potential deception criminal offences pursuant to the Crimes Act & offences available under the Motor Car Traders Act of tamper/alter with a motor vehicle instrument (odometer) and falsely represent the accuracy of an odometer reading during sale of a vehicle.

Reporting dealership should have the below relevant details (if available) when reporting the matter to the police:

- When did the dealership first realise about the odometer issue?
- What due diligence enquiries did the dealership make before agreeing to purchase the motor vehicle?
- What inspections did the dealership undertake with the vehicle?
- Where is the motor vehicle now?
- What conversation did the dealership have with the seller about the vehicle's history?
- Sellers details - Identification / driver licence / address / mobile number
- Vehicle identification details – registration number /VIN number / Chassis number/ engine number
- Vehicle history details / service history / vehicle warranty documents
- the vehicle's service and owner history.
- CCTV of sale
- previous mechanical repairs where the vehicle original odometer was recorded (mechanics service records)
- previous panel repairs/ accidents / insurance claims where the vehicle original odometer may have been recorded.
- previous online private or dealership sale where the odometer was recorded.
- VicRoads transfer papers
- VicRoads roadworthy certificate

I appreciate the frustration of these matters and impact on the industry, financial and time / effort incurred.⁴⁵

45. VicPol Vehicle Crime Squad advice to VACC March 2023.



11.2 Is there a digital solution available right now to help dealers?

VACC research has deduced that there is no one single product available to LMCTs right now that provides an absolute blanket coverage and certainty to LMCTs with regards to odometer readings. However, there are digital tools available to industry that may help in alerting LMCTs to the suspicious or irregular on-line history of a vehicle where an odometer reading has been captured.

In an attempt to provide VACC members with the best possible and most current solution to this problem, VACC has been in dialogue with automotive software business provider, and VACC member, Auto Grab, to view its portal. VACC was able to inform itself on exactly what features the Auto Grab portal provides for LMCTs to be alerted to the possibility that a vehicle has an odometer that may have questionable history.

VACC has ascertained that Auto Grab has been monitoring the entire Australian automotive market for 4 years with a view to provide more visibility and transparency to dealership on stock listed on various on-line classified portals. The data collected and live feed generated by Auto Grab has enabled a practical way for the detection of a potential fraudulent listing and odometer tampering. A user of the Auto Grab platform can be advised in matter of seconds if a vehicle they (the LMCT) are looking to acquire has been potentially subjected to odometer tampering or at a minimum has a questionable odometer history. Alerts to dealers are also generated if a particular car has been listed multiple times in the same year, or if a private seller is borrowing dealership photo(s) or images that do not represent their car for sale.⁴⁶

Other on-line platforms such as Car History and Car Facts also offer dealers and consumers advice as to whether a vehicle's odometer reading is consistent with what has previously been reported.⁴⁷ The on-line systems can at times advise if a vehicle may have a questionable odometer history using historical data recorded in on-line classified advertisements.⁴⁸

VACC has also been in constant dialogue with VicRoads progressing the development of a product that will provide LMCTs with the required odometer data as reported to the VicRoads Registration and Licensing (RandL) platform at the point of an individual vehicle registration or transfer. The access to such data would be considered as best practice and as close to a fool proof solution for

46. VACC meeting with Auto Grab (2023) to view Auto Grab Portal.

47. See <[48. See <](https://www.carfacts.com.au/?gclid=EAlalQobChMlic67vaF_glVWplmAh0RKAQIEAAYASAAEgJx9vD_BwE&gclid=aw.ds.>.></p></div><div data-bbox=)

LMCTs. It would be VACC's estimation that such a system for retrieving data may be made available by the new VicRoads Joint Venture (JV) Partners at some stage in the near future. It makes sense for such a tool to be made available. The introduction of such a tool is a positive outcome from the industry facing intensive dialogue VACC and the Victorian Automotive Dealers Association enjoys with the JV and VicRoads. However, dealers are advised that the delivery of such a service by the JV for this service would be monetised under a user pays arrangement.

VACC advice

It is VACC's advice to its members that until the industry is provided with access to a vehicle odometer reading history from VicRoads RandL that LMCTs should aim to protect themselves by investment in technologies such as Auto Grab. VACC urges all LMCT members to invest in the most current of digital technology to assist in the prevention of acquiring a vehicle with a potentially tampered odometer reading and/or provenance.

12. What is Consumer Affairs Victoria regulatory approach to consumers tampering with odometers?

VACC has had dialogue with Consumer Affairs Victoria (CAV) on the issue of odometer tampering and to ascertain what the CAV Regulatory approach to the issue may be. CAV have advised that their regulatory approach enables them to target conduct that poses the highest risk to Victorians, while making the best use of the resources available to them.

VACC was advised that CAV can exercise their regulatory powers in the public interest but a major consideration, or criteria of that public interest, is the efficient use of public resources. CAV advise that individual consumer odometer tampering is not something that CAV consider to generally meet that criterion or be within CAV's jurisdiction. Similarly, the way in which vehicle repairers deal with the issue of replacing an odometer/speedo cluster, is not a matter CAV would normally determine.

However, where the matter relates to regulating the licensed sector, CAV has acted against LMCT and unlicensed motor car traders.

12.1 CAV data on calls received regarding odometer readings

Consumer Affairs Victoria (CAV) has provided VACC with data sourced from the CAV consumer facing touchpoints where CAV has been advised by consumers about odometer readings and issues surrounding them.

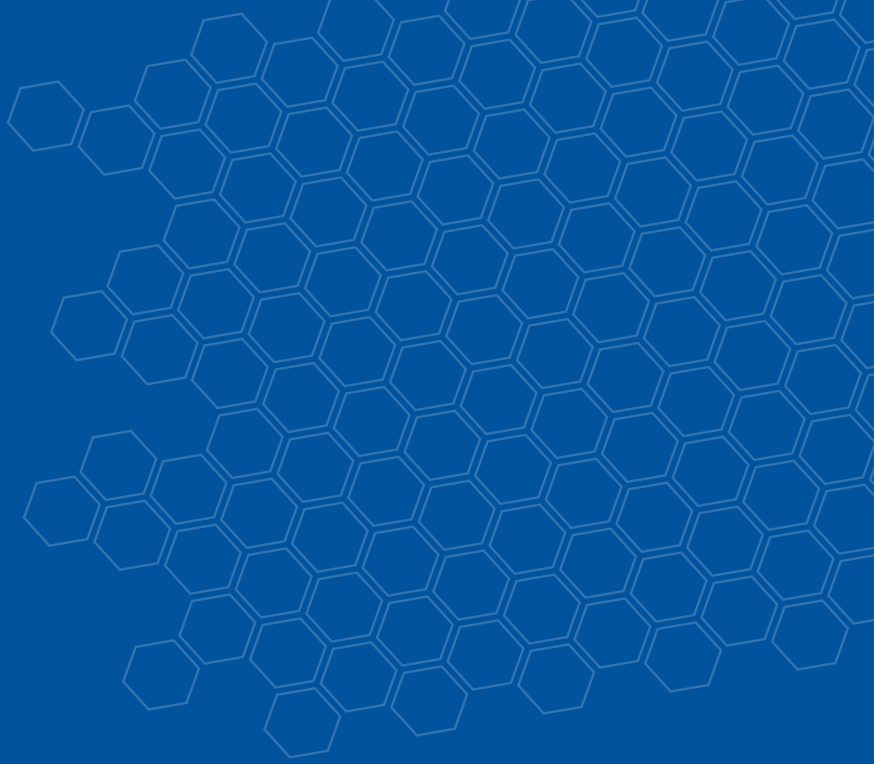
CAV data reveals that between January 2017 and April 2023 there were 180 consumer contacts regarding odometers. This does not specifically reflect or allege odometer tampering. That data showed that consumer queries relating to LMCT's totaled 149 contacts; private sales 13 contacts and vehicles acquired at auction 18 contracts.

CAV advised VACC that the majority of those contacts resulted in consumers being provided with general advice and information.

VACC advice

VACC does not agree with the interpretation of CAV that individual instances do not meet the criterion as mandated under the Act. The Act clearly outlines that a person involved in odometer tampering is in breach of the Act and that the administrators of the Act must pursue action against such a person. VACC will continue to have dialogue with CAV on every instance where such a transgression is advised.

Please reach out to me Michael McKenna on mmckenna@vacc.com.au with any issues you wish to discuss.



VACC
You're in good hands

VACC House • 650 Victoria Street, North Melbourne VIC 3051