



## Modification provisions

### Key Points



A **modification provision** is a provision made under a modification power that *notionally* modifies the text of legislation, but does not *actually* amend the text in the same way as a traditional amendment.



**Both Acts and Instruments can be modified** by modification provisions made under modification powers contained in Acts and Instruments.

Modification provisions can **potentially mislead users of the law** because, where a legislative instrument modifies the operation of an Act under a head of power conferred by that Act, the modification is not apparent on the face of the Act (see example). These provisions are sometimes also referred to as *Henry VIII clauses*.



Modification powers are **likely to attract scrutiny** by the Senate Standing Committee on the Scrutiny of Bills and the Senate Standing Committee for the Scrutiny of Delegated Legislation. Accordingly, there should be strong policy justification and appropriate safeguards for the use of modification powers (see links to the guidelines below).



### Definitions

Section 2B of the *Acts Interpretation Act 1901* defines '**modifications**': **modifications**, in relation to a law, includes additions, omissions and substitutions.

Subsection 5(2) of the *Legislation Act 2003* defines '**modify**': In this Act, **modify** an Act or instrument means modify the operation of the Act or instrument without amending its text.

### Example modification

The following is an example of a modification power contained in the fictional *Fruit Salad Act 2026* that empowers the making of modifications to that Act:

#### 15 Modification by legislative instrument

The Minister may, by legislative instrument, modify the operation of this Act, or specified provisions of this Act.

A specified provision of the *Fruit Salad Act 2026* being modified is as follows:

#### 8 Definition of *fruit salad*

A *fruit salad* means a meal made up of each of the following kinds of fruit cut up and mixed together:

- (a) apple;
- (b) banana;
- (c) grape.

The modification provision made by the fictional *Fruit Salad (Modifications) Instrument 2026* under the modification power in section 15 of the *Fruit Salad Act 2026* is as follows:

#### 1 Modification of section 8 of the *Fruit Salad Act 2026*

Section 8 of the *Fruit Salad Act 2026* is modified as if the following paragraph were added to the definition of *fruit salad*:

- (d) melon.

### Drafting modifications

To ensure that modification provisions are clear, accessible and avoid confusion for readers of the legislation, it is **good practice to do the following** when drafting these provisions:

- ✓ Ensure there is **strong policy justification and appropriate safeguards** for the use of the modification provision;
- ✓ Consider **appropriate limitations** when instructing on modification powers—e.g. as to how long the modification can be in force; the subject matter of the modification; whether the rule-maker needs to be satisfied of anything before exercising the modification power;
- ✓ In the **heading** to the modification provision:
  - use the word '**modification**'; and
  - where appropriate, include a reference to the provision being modified;
- ✓ In the **modification provision**:
  - use the word '**modify**' or '**modified**'; and
  - use the expression '**as if**';
- ✓ **Avoid using** terms such as '**amend**' or '**vary**', to ensure that the provision is identified as a modification and not an amendment;
- ✓ **Notify OPC's Publications Team** at [lobby@legislation.gov.au](mailto:lobby@legislation.gov.au) when lodging the legislation containing the modification provision that it contains such a provision, so that OPC can indicate the modification on the Federal Register of Legislation under the 'Interactions' tab for the relevant legislation making the modification and being modified.