MODULAR CONSTRUCTION & PREFABRICATION

Building (Approvals and Practitioners) Act 2026

Who Carries the Loss?

Modular construction, defects and recovery

The Unfinished Problem of Loss Allocation

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SECTION 1 · WHAT CHANGES

Value is built in a factory. The law was written for a site.

Between the factory and the site there is a period in which no participant clearly holds responsibility for inspection.

FACTORY

1

Design and manufacture - often offshore

HANDOVER GAP

!

No clear custodian

SITE

3

Installation and finish - in Australia

Traditional construction law assumes building work happens on site - where it can be seen, inspected and certified before it is covered.

THE CONSEQUENCE

The law is catching up. Until it does, the contract is the only instrument doing the work.

SECTION 1 · A WORKING VOCABULARY

Why a new vocabulary is needed

New language emerges because existing concepts no longer describe the underlying reality with sufficient precision. Industrialised construction is now developing such a vocabulary. These are examples of the terms in circulation, not settled terms of art.

Bifurcated work **Handover gap** **Sealed-in defects** **Production-run risk** **System defects**

Integrator liability **Residual bearer** **Craft defects** **Decennial insurance**

01

Not jargon

A problem that cannot be named is difficult to identify, allocate in a contract or address through regulation.

02

A transitional period

Many MMC concepts have labels, few have accepted definitions, fewer still have binding legal content. The contract frequently remains the operative dictionary.

03

Industry literacy

Every participant, from manufacturer to insurer to regulator, needs a shared language before deciding coherently about risks that move between factory, supply chain and site.

SECTION 2 · CONVERGENCE AND DISPERSAL

The traditional model worked because responsibility rarely fragmented

TRADITIONAL SITE-BASED **They converge**	THE ABRAHAMSON PRINCIPLE	INDUSTRIALISED CONSTRUCTION **They disperse**
The bricklayer lays the bricks himself	**Control**	Designer, manufacturer, component supplier, transporter and site assembler
Bricklayer is paid for the work he performs	**Benefit**	The developer who chose the production method
One identifiable party, backed by retention, security and a known trade risk	**Insurability** in the alternative, financial reach	Points at no one - neither the works nor product policy rectifies a module, leaving the designer's professional indemnity as the only path; securities, retention end at delivery
He is the obvious party to pursue	**Consequence**	The builder answers to the owner, whoever caused it

Traditionally any one limb was enough, because all four pointed the same way.

Now they don't - and the test returns four answers.

SECTION 4 · DEAKIN UNIVERSITY SYSTEMATIC REVIEW, 61 STUDIES

Modular defects by category

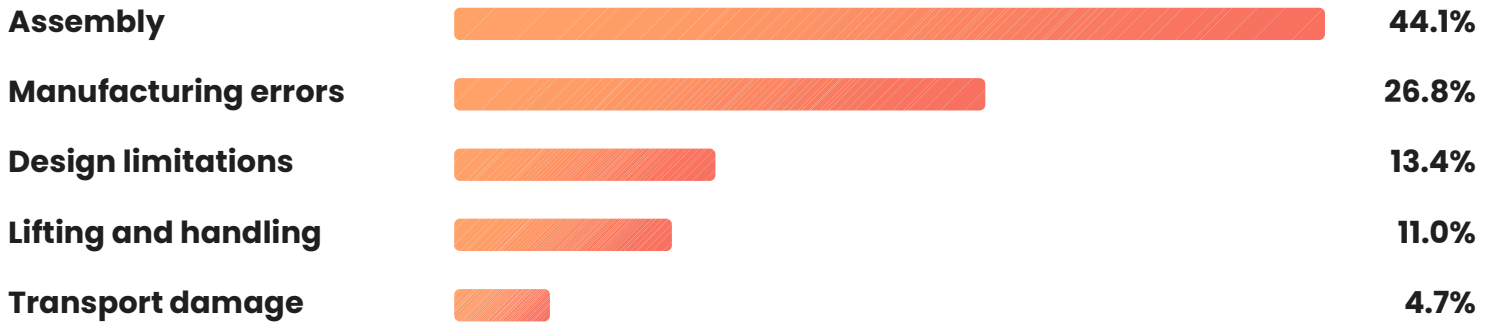
CATEGORY	SHARE	WHAT THE EVIDENCE SUGGESTS
Geometric and dimensional	26.7%	Tolerance management and interface coordination remain major quality challenges
Material and component	22.1%	Quality outcomes depend on procurement, manufacturing and material-control systems
Joint and connection integrity	18.6%	Inter-module and intra module connections remain critical points of failure
Structural	14.0%	S Structural defects are often linked to tolerance, connection and assembly decisions across the life cycle
Envelope performance	12.8%	Waterproofing, thermal bridging and durability issues frequently arise at interfaces
Mechanical, electrical, plumbing	5.8%	Service coordination remains challenging despite lower report defect deficiencies

Gurmu, Fallah Tafti, Mills and Kite, "Defects in Modular Building Construction: A Systematic Lifecycle Review", Sustainability 2026, 18, 4000. Root-cause distribution at §3.2.2, pp. 8–9.
https://dro.deakin.edu.au/articles/journal_contribution/Defects_in_Modular_Building_Construction_A_Systematic_Lifecycle_Revie w_and_Implications_for_Sustainable_Delivery/32049120?file=63916293

SECTION 4 · ROOT CAUSES

Defect risk is fragmented across the supply chain

Assembly remains the largest identified root cause but defects arise across the entire delivery chain.



Gurmu, Fallah Tafti, Mills and Kite, “Defects in Modular Building Construction: A Systematic Lifecycle Review”, Sustainability 2026, 18, 4000. Root-cause distribution at §3.2.2, pp. 8–9.
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SECTION 1 · WHERE THE PROBLEM SHOWS UP

The Metropolitan Remand Centre

460

modular cells manufactured off site and delivered to site

It was alleged that, on delivery, a number contained significant rust and mould.

The resulting Supreme Court proceedings concerned the operation of a payment regime. They determined nothing about modular construction itself.

The facts nonetheless expose a question the litigation did not answer.

SECTION 3 · CONCEPT ONE

Responsibility asks: who answers to the owner?

Four routes, all concentrating owner-facing liability at a single point even where many participants contributed to the loss.

01

Statutory duty of care

NSW leads: DBP Act s 37, replaced by Pt 8 of the Building (Approvals and Practitioners) Act 2026. Non-delegable, and reaching practitioners personally

02

Design and construct or EPC

Single-point responsibility for design and construction; the contractor wears the interfaces

03

Statutory warranties

Implied into residential contracts and running to subsequent owners

04

Australian Consumer Law

Consumer guarantees and misleading conduct - can reach a manufacturer directly

THE COMMON EFFECT

The owner never has to reconstruct the causal chain.
It sues the party who answers - and the burden of apportionment shifts to the defendant.

SECTION 3 · CONCEPT TWO

Recoverability asks: can that participant recover from the rest?

Not the existence of a right, but the practical capacity to realise value from it. Six conditions - and the claim fails if any one of them fails.

01 Solvency
Will the counterparty still be trading when the defect manifests?

02 Insurance response
Does a policy actually respond - to this loss, on these facts, in time?

03 Assets
Is there anything to execute against, or is the entity asset-light?

04 Jurisdiction
Is there an enforceable judgment at the end of it, and where?

05 Attribution
Can the defect be traced to one participant's act or omission?

06 Economics of enforcement
Is the cost and delay proportionate to the likely net return?

THE ASYMMETRY

Responsibility is a legal question. Recoverability is a practical one

SECTION 7 · THE NSW POSITION, AND WHY IT TRAVELS

Pafburn: no apportionment of the statutory duty

The owner-facing participant may be liable for the whole loss, notwithstanding the involvement of others. No other jurisdiction has an equivalent - yet.

The rule is method-neutral

Pafburn was not a modular case.

Its incidence is not

One overseas manufacturer holding most of the value is a very different position from a field of locally insured subcontractors within reach of cross-claims.

SECTION 5 · THE REGULATORY OBJECT

Products. Projects. Production systems.

PHASE ONE

Products

Is the material fit for its intended use? Product standards, evidence of suitability, duties on manufacturers and suppliers.

PHASE TWO

Projects

Approvals, inspections, occupation certification, practitioner registration, declared designs. New South Wales is its most developed form.

PHASE THREE

Production systems

Factory accreditation, manufacturer certification, process audits. Nationally the ABCB scheme remains proposed and voluntary and rollout anticipated 2028 subject to finalisation - and New South Wales has legislated ahead of it.

In each phase, regulation followed the dominant location of risk control.

SECTION 5 · THE NATIONAL WATCHPOINT

NSW Reform

New South Wales Building (Approvals and Practitioners) Act

WHAT IT REPLACES

Repeal and re-enactment

Assented to on 14 August 2026. Most provisions commence on proclamation. It repeals the DBP Act and re-enacts the duty of care in Part 8 - extending it, by ss 177–178, to **the manufacturer and the supplier**. The duty of care extends to an owner and subsequent owner –s179(2)

WHAT IT CREATES

A prefabrication regime

A defined prefabricated building (s 12), a manufacturer's declaration (s 48) and instructions (s 49), an approval condition for class 1 work (s 50), and a supply offence (s 51).

WHAT TO WATCH

The regulations, not the Act

Commencement is by proclamation and the regulations do not exist. Section 52 may exempt out-of-State manufacturers from Part 3 certification - but not from the Part 8 duty.

PART 3, SUBDIVISION 4 · HOW IT RUNS

Who hands over what, and who lodges it

SECTIONS AS PASSED

ss 12, 47

Is it prefab?

Made off site, can't be inspected inspected

→

ss 48–49

Factory makes two documents

BCA declaration · erection instructions

→

s 51 · all classes

Handed over at every supply

Offence to supply without them

→

s 50 · class 1 only

Lodged by approval holder

Work can't start until lodged

	Class 1	Class 2	Classes 3–10	Crown work
Handover · s 51	✓ yes	✓ yes	✓ yes	✓ yes
Lodged by · s 50	**Approval holder**	**Nobody**	**Nobody**	**Crown · s 45(2)(c)**

If the documents aren't handed over

s 51

Offence, not a right to sue

Penalty or discipline only

s 179

Liability if it causes a defect

No instructions → bad install

HBA s 18B · ACL

Contract & warranty

Breach of law · false declaration

s 50 · class 1

Work can't lawfully start

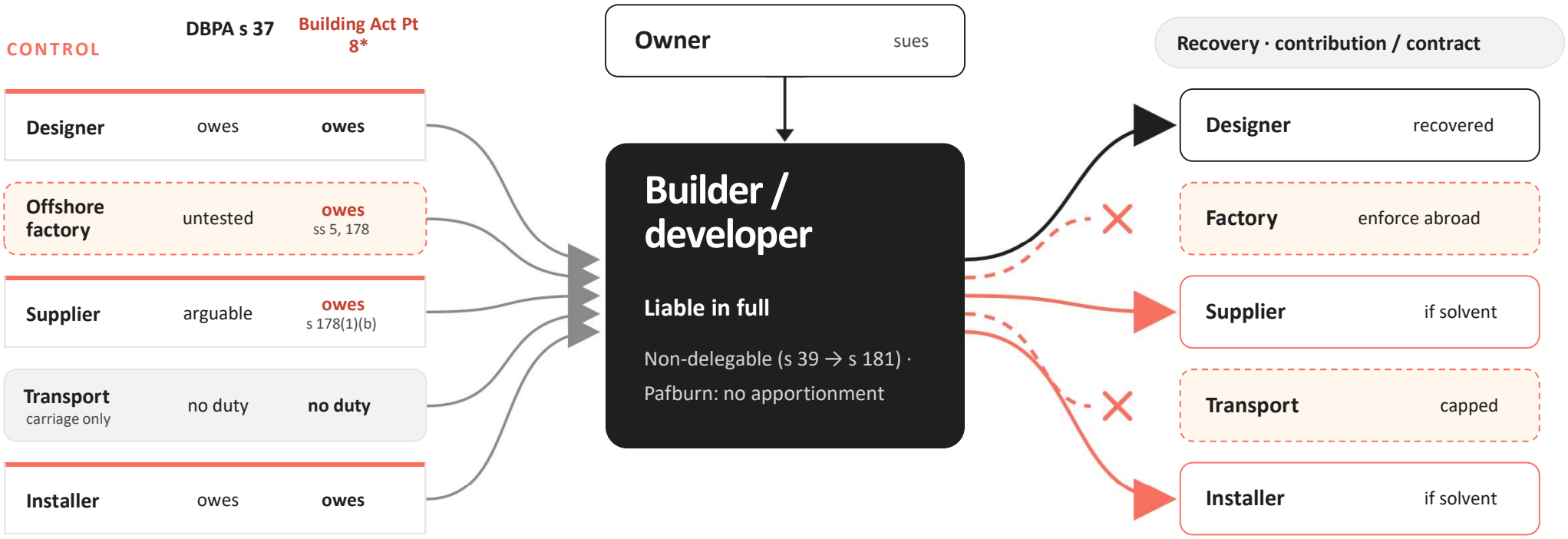
Delay costs pass up the chain

Class 2 has the full duty of care, but no lodgement gateway.

s 52 · regulations may exempt modules made outside NSW, including the s 51 supply offence

CENTRAL PROPOSITION · DBPA TO BUILDING ACT

Control fragments. Liability concentrates.



1 **Duty now reaches the factory**

2 **Liability concentrates**

3 **Recovery still stops**

* Building Act Part 8 (ss 177–182) passed, not yet commenced. Duty owed under s 179; who owes it, ss 177–178.

DECENNIAL LIABILITY INSURANCE

How it actually works

FOUR MECHANICS

01

Taken out before occupation

The developer obtains it before an occupation certificate issues - not after a dispute starts. Prior

02

Attaches to the building

Not to the builder. It transfers to the owners corporation and follows every successive owner.

03

Strict liability, first resort

The owners corporation demonstrates the damage. It does not have to prove who was at fault.

04

Ten years, full value

Ten years from first occupation, up to the full construction cost value of the works.

The DLI reforms commenced on 20 August 2026, but that does not mean every project underway on that date automatically moved into the DLI regime. DLI remains an alternative to the strata building bond, and a developer intending to use it must notify Building Commission NSW before construction commences

https://www.nsw.gov.au/departments-and-agencies/building-commission/industry-changes/ten-year-defect-insurance-for-apartment-buildings

THE TAKEAWAY

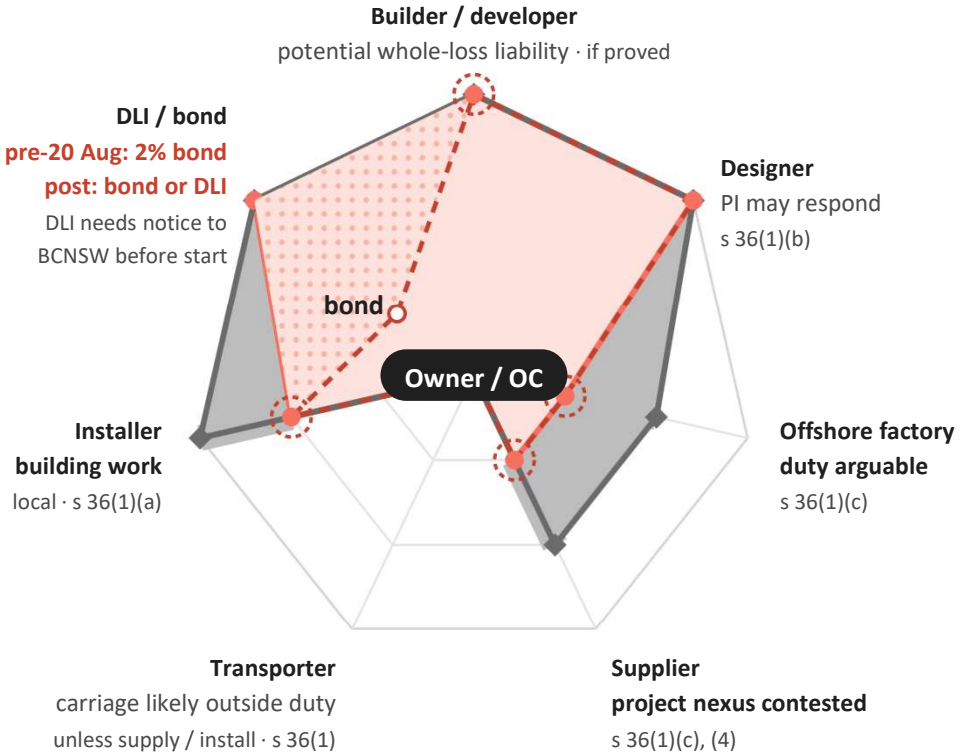
Insurance of first resort. The insurer pays, then looks for someone to recover from.

LIABILITY VS RECOVERABILITY · DBPA S 37 → BAP ACT 2026 PT 8

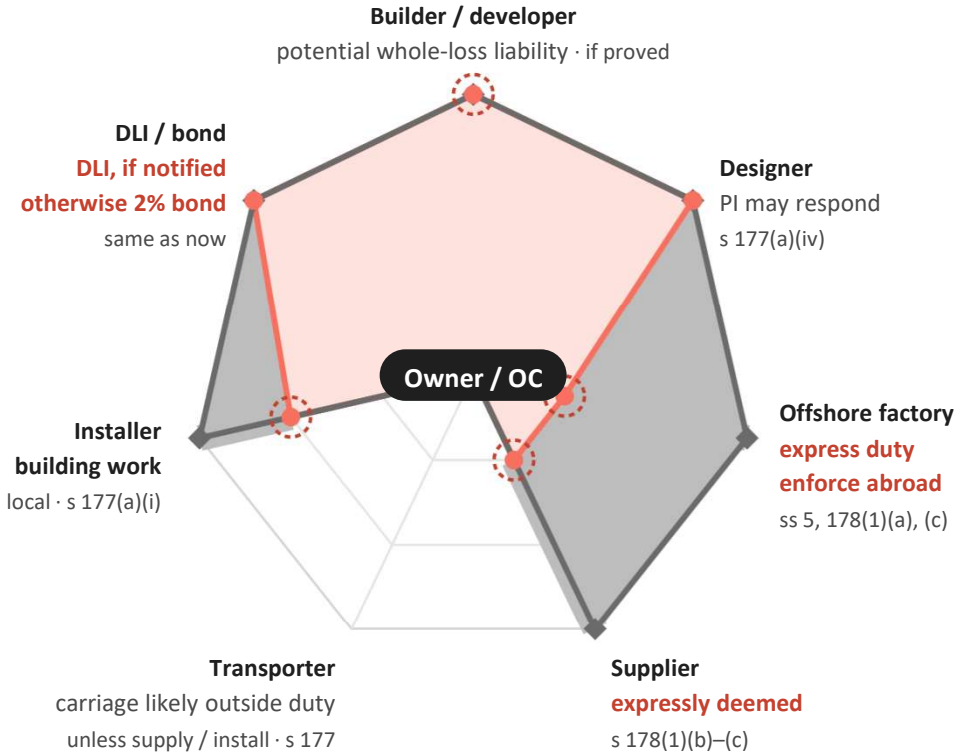
Liability expands. Recoverability may not – class 2.

Class 2 apartment building over 3 storeys · HBCF generally unavailable

Now — DBPA s 37



Next — BAP Act 2026 Pt 8 (not yet commenced)



Grey = potential recovery gap. liability · recoverability · recovery gap · pre-20 Aug · post-20 Aug · lost if insolvent

What widens it: Solvency · Reach offshore · Insurance limits · Caps, time bars & proof

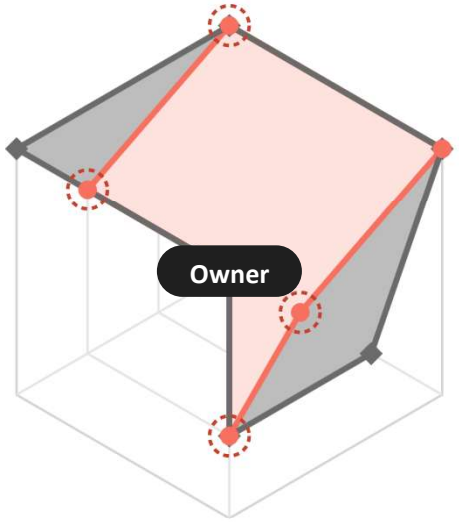
Duty may exist, but recovery can remain difficult.

DATA CENTRE PLANT · DBPA S 37 → BAP ACT 2026 PT 8

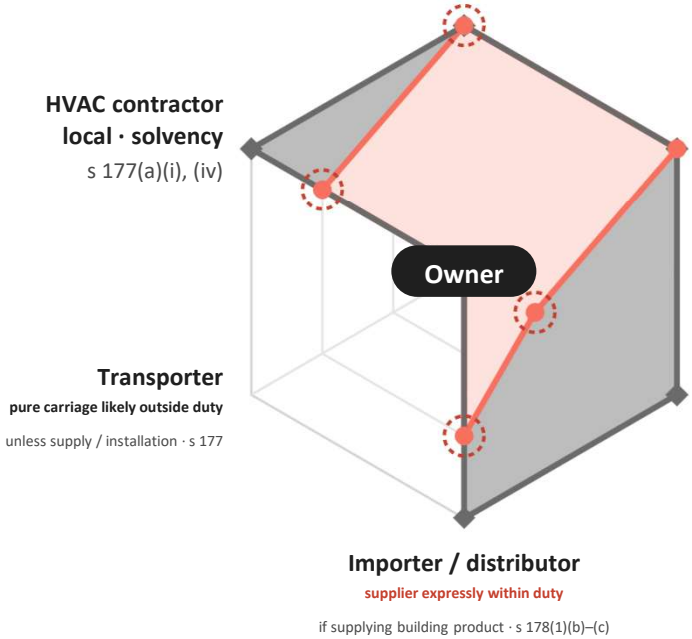
Plant is in the chain. OEM liability is clearer. Recovery is not.

OEM · original equipment manufacturer

Now DBPA s 37



New BAP Act 2026 Pt 8 (not yet commenced)



liability · recovery gap · recoverability · lost if insolvent

Solvency insolvent before judgment

Reach offshore OEM · enforce abroad

Insurance no equivalent DLI · PI limits

Scale operational loss, if recoverable

SECTION 10 · WHAT THE CONTRACT CAN DO

Six provisions the standard forms leave out.

	PROVISION	WHAT IT DOES
1	**Title transfer**	Progressive transfer of title on each progress payment, tied to specifically identified inventory.
2	**Access and inspection**	Factory access for the developer and financier; possession rights on default or insolvency.
3	**Interface management**	An interface control document allocating responsibility at the manufacture, transport and installation boundaries.
4	**Variation procedures**	Separate variation regimes, because a change during manufacture has different cost and time consequences from one on site.
5	**Insurance provisions**	Express cover for offsite manufacture, transport, lifting and installation - standard works policies may exclude all four.
6	**Arbitration clause**	International arbitration for overseas supply, enforceable under the New York Convention in over 170 states.

SECURITY · PAYING FOR MODULES BEFORE DELIVERY · PPSA 2009 (CTH)

A module is goods until it’s fixed. Protect your money first.

	1 In the factory	2 In transit	3 Installed on site
Made in Australia PPSA applies	**personal property · PPSA** ✓ Security agreement, registered on the PPSR before you pay ✓ Priority deed from the factory’s bank ✓ Pay on certified milestones; mark each module	**by road · still goods** ✓ Contract says when risk and title pass ✓ Insure the load	**part of the land · both routes** ✓ Landowner’s mortgage now covers it ✓ Release your PPSR registration
Made overseas local law first	**foreign law · PPSR may not reach** ✓ Bank guarantee for each payment, callable here ✓ Local security, with local advice ✓ Pay on certified milestones; mark each module	**by sea · pay against documents** ✓ Letter of credit: bank pays only on shipping documents and inspection ✓ Incoterm fixes risk; insure the cargo ✓ Register on the PPSR before arrival	✓ Overseas defects claim: arbitration and a parent guarantee

Made here: register before you pay. Made overseas: secure the payment.

IN CLOSING

Modular construction has industrialised production faster than the law has industrialised recourse.

The opportunity is to identify, secure and price the exposure before the recovery chain is tested.

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Thank you

Happy to keep the conversation going - on modular risk allocation, contracts or the 2026 reforms.

SPEAKER

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