

Leaking Balconies: The New High-Rise Paradigm

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With the vertical development of our communities over the last few decades by the advent of hi-rise apartment living we are able to enjoy the great out doors from our balconies.

Balconies for many are a new type of construction paradigm, both for the builder and for the owner. They are an external element of the building but must be properly integrated to work with the internal elements of the building.

Accordingly, balconies require appropriate drainage and isolation from the internal elements of the building.

Typically balconies are constructed such that the floor slopes gently towards a stormwater outlet/drain and the balcony has a water barrier or membrane mechanism to prevent the ingress of water and dampness into internal living areas.

The failure of a waterproofing membrane or device can occur at any stage of the life of a building, it may fail straight away or after 1, 5, 12 or 20 years.

The failure of a waterproof membrane may in some cases constitute a building defect and in others it may be a maintenance issue.

The failure of a waterproof membrane where it is a defect may be actioned against the relevant builder for up to 10 years, and/or where the waterproof membrane is a proprietary product that carries a guarantee to the life of the warranty.

Insurance will not typically cover balcony water leaks in high rise developments, but the circumstances and extent of cover depends on the relevant insurance scheme and the terms of the applicable policy.

In the case where there is no claim against a builder for rectification of a failed membrane it becomes the responsibility of the owner of the apartment to maintain and/or rectify the integrity of their balconies. In that regard, a balcony is just like any other building element of a building and it will require periodic maintenance, This is particularly so given that balconies are continuously exposed to the elements.

Additionally hi-rise apartment buildings are designed to have a degree of flexibility or movement and the higher the apartment building the greater the level of flexibility or movement. Waterproof membranes are in many cases designed to be flexible but overtime that can fail.

A significant issue is when the waterproof membrane of the balcony fails and the ingress of water/moisture affects the apartment immediately below.

In such a case the law of negligence and/or nuisance is applicable and in some jurisdictions there is a legislative scheme such as in Victoria where Part II of the **Water Act 1989** applies.

Owners of apartments must be responsible in their attitudes and conduct towards other apartment owners.

Where ones apartment balcony has a failed waterproofing mechanism, it is incumbent upon the apartment owner to initiate maintenance and arguably the maintenance should have taken place prior to the failure.

Where water leaks into an apartment below the owner of the balcony may be liable in negligence, nuisances and/or pursuant to any legislative provisions regarding the flow of water from one property to another. In Victoria the legislation speaks of a flow of water that is not 'reasonable'.

In determining what is 'reasonable' there are stated categories for consideration but the legislation provides that all the circumstances are to be taken into account.

Given the ever rising nature of city living one may say that as a matter of public policy the law needs to address and provide redress to apartment owners from other apartments and balconies that fall into a state of disrepair or whose water isolating/drainage mechanisms cease to function effectively resulting in the damage or interference with the innocent apartment owners use and enjoyment of their apartment.

Each case needs to be considered on its own individual merits as to the rights and remedies of the apartment owners and possibly the body corporate in the instance of undesirable flows of water.

Lovegrove Solicitors have significant experience in dealing with the flow of water and moisture legal issues and disputes. It is incumbent upon owners/occupiers to take proactive steps in addressing such matters, as experience has shown that where a moisture/water issue has arisen it typically spreads or gives rises to the potential for far greater damage if not immediately arrested.

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