

The legal right to solar access

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Cover image: Residential project by Enviroecture, NSW (Image: Dick Clarke, enviroecture.com.au) Even an award-winning home can have issues with solar collectors and passive design features being overshadowed by trees or neighbouring development

Abstract

Put simply, solar access is the availability of sunlight to a property. For architects, the need to consider solar access in the overall design of a structure is two-fold:

- Firstly, the structure must be designed and situated on the property to capture as much sunlight as required by the nature of the structure – particularly structures designed with passive solar techniques – to fit any applicable design brief and to comply with all development controls for the property required by the relevant consent authorities.
- Secondly, a building's height and its location on the property should not overshadow the living spaces and solar collectors of neighbouring properties, particularly to the south. The extent to which this tension requires compromise on the part of the architect of the new structure, and the owners and/or occupiers of the properties that may experience a decrease in their solar access, has not yet been adequately addressed by national, state or territory development control schemes nor by local development consent authorities such as councils.

It is this tension, and the specific principles in statutory and common law, that this article seeks to address for the benefit of architects designing new structures and those considering alterations and additions, particularly if passive solar design principles, such as thermal mass, are to be emphasised and solar collectors are to be fully utilised.

This note updates EDG 68 AB 'The legal right to solar access' by Adrian Bradbrook.

The need for solar access

Solar access to living areas of homes and commonly occupied areas of office buildings is a key consideration for achieving a sustainable and effective passive solar design. Not to mention an important factor in improving the physiological health and psychological wellbeing of those living and working in these buildings. Direct sunlight is also fundamental for the effective function of photovoltaic (PV) arrays, solar hot water systems and traditional or solar-powered skylights, as these solar collectors (particularly PV arrays) operate far more efficiently and effectively if they have direct access to sunlight for at least four hours in the middle of the day.

However, circumstances can arise where direct or prolonged sunlight into these important areas of a building, or onto these collectors, is partially or completely obscured by unchecked vegetation growth or development on nearby lots. This is particularly the case in winter where, due to the lower zenith of the sun, sunlight reaching a property with solar collectors or utilising passive solar design may have to pass through the airspace of northerly, easterly or westerly neighbour/s (Figure 1).

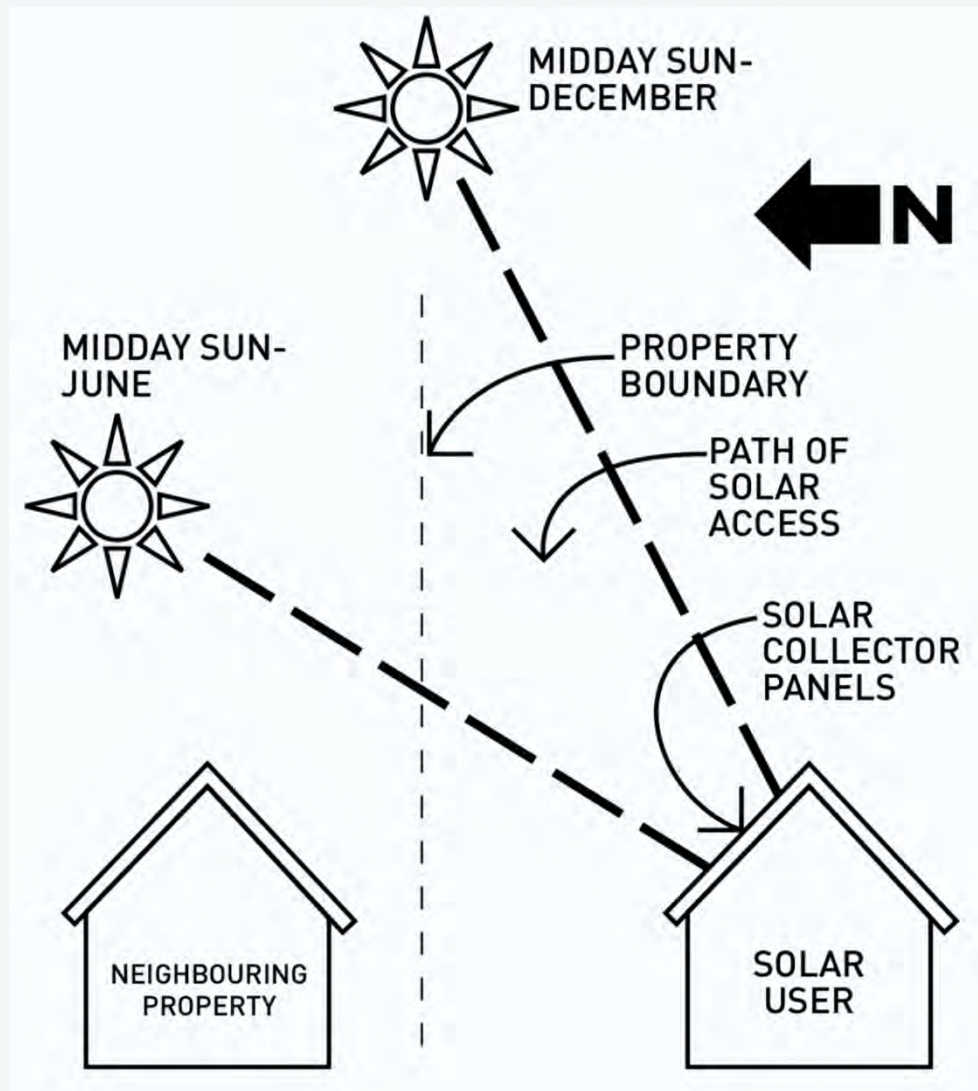


Figure 1. The distance between the sun and the northern horizon is significantly less in winter than in summer, with the consequence of reduced solar access due to trees and structures on neighbouring properties (Image: Bradbrook, 2011)

Solar access is significantly affected by the length of shadows cast upon a property by neighbouring buildings or trees. The ability for an owner to influence the extent of moderate overshadowing upon their property is often limited, although there are specific legislative thresholds in NSW that preserve a minimum amount of sunlight into residential living spaces, and in Victoria to consider the placement of current (but not future) solar collectors (*Salta Properties Pty Ltd v Yarra CC* [2019] VCAT 718 at [8]).

Conversely, a development application may be rejected by the relevant consent authority on the basis that the structure on the property, or the proposed landscaping along or near the boundary of the property, unreasonably or unnecessarily overshadows a neighbouring property.

The problem of solar access is most acute in built-up areas, where the majority of existing buildings and blocks of land have been built and orientated without concern for the need for solar access. Planning approvals have traditionally been given to new land developments without considering solar access requirements, although recent changes to the Victoria Planning Provisions (VPP) now require the location of solar collectors to be considered in the planning process.

The denser the development permitted in or near the zone your property is in, the less expectation you can have that your right to solar access can be protected. Many planning guidelines determined by councils, and a number of legal principles established through case law, have enshrined this presumption as almost certain, although consent authorities in Victoria are now required to consider the location of existing PV arrays in medium density residential areas.

There may also be some conflict between tree preservation or planting and solar access, particularly in areas — such as Beecroft in Sydney's north-western suburbs — where trees are included as heritage items and cannot easily be removed, if at all.

Most states have various development controls or statutory requirements that regulate solar access, but as will be discussed, an architect must consider a range of legal issues in designing a new or altered structure and needs to be open to negotiating with, and possibly compromising their design due to the concerns of an affected neighbour.

The legal framework

When it comes to the legal right to solar access, there are two different sources of applicable law. The first source is the common law: the decisions of judges of the United Kingdom that have been developed by the Australian courts over the past two hundred years.

The second source is legislation which, to the extent that it is inconsistent with prior common law, will prevail over the common law.

The Australian Constitution shares legislative powers between the Commonwealth and the states and territories.

The power and responsibility to make laws regarding solar access resides exclusively with the states and territories, despite the fact that the Commonwealth is a signatory to various international treaties on environmental concerns and has a national strategy for the implementation and adoption of the principles of ecologically sustainable development (ESD).

Solar access and passive solar design

As we move towards a low carbon future, it is important for architects to take measures to reduce the carbon footprint of the buildings they are designing, both in the embodied emissions generated in construction and in the operational emissions of the building.

Such measures include the use of solar collectors installed on north-facing (and secondarily west-facing) roof areas to minimise and otherwise offset the energy usage of the building, and the use of passive solar design principles to ensure that the structure requires minimal heating in winter and minimal cooling in summer.

Such design principles relating to solar access include, but are not limited to:

- Northerly orientation of daytime living areas
- Passive shading of glass
- Appropriate areas of glass on northern facades and
- Thermal mass for storing heat within northerly living areas.

Not all legal regimes regulating planning and development contain explicit protection of solar access to a building, although many architects would be aware of the various planning laws and design guides which control development in

respect of the construction of school buildings (and new apartment and TAFE buildings in NSW). Such laws and regulations include the requirement for limited overshadowing of neighbouring buildings to allow a minimum of two hours in Victoria and three hours in NSW of solar access to principal living spaces between 9am and 3pm on the winter solstice (the shortest day of the year).

This worst-case scenario for solar access is considered the acceptable standard for measuring overshadowing on existing buildings by trees or new development, as well as the standard by which new apartment buildings are approved, particularly in NSW. This is concerning for two reasons:

1. Effective passive solar design for living spaces situated along the northern (and, to a lesser extent, western) elevation of a building requires more than three hours of direct sunlight striking the thermal mass (eg insulated concrete floors, internal brick walls). Every hour of lost sunlight has an inverse impact on the enthalpy effect (the ability of the material constituting the thermal mass, ie concrete, to store heat) that provides passive heat to the room. Thermal bodies installed as part of a passive solar designed room or house are all but ineffective with only three hours of direct sunlight (Figure 2).

2. Many development controls relating to overshadowing do not consider any impact on the operation of solar collectors, with a sharp reduction in effectiveness of PV arrays, solar hot water heaters and skylights for every hour of lost sunlight. Most solar collectors generate a significant portion of their energy in a six-hour period centred around the sun being at its highest point in the sky.

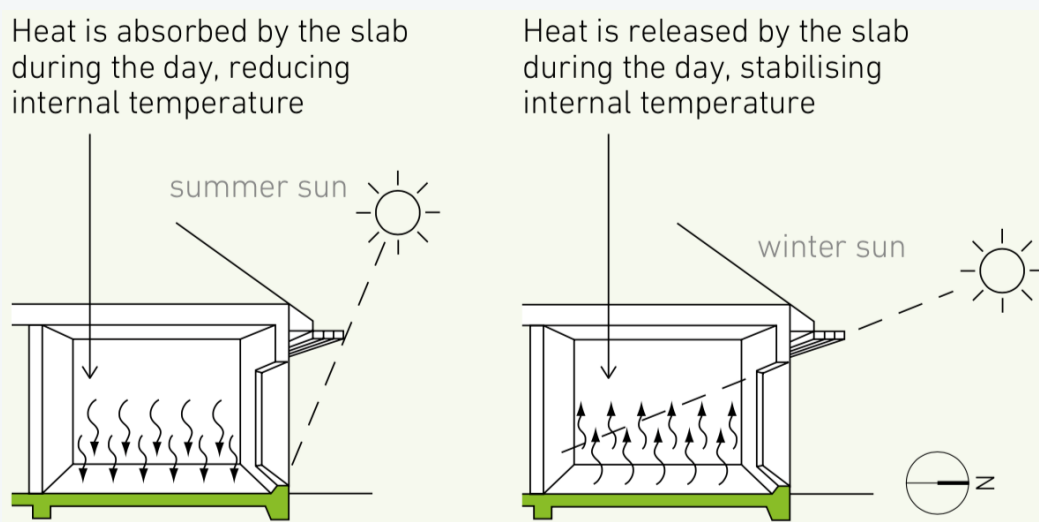


Figure 2. The enthalpy effect depicted in simple form. Unfortunately, this key feature of passive solar design is ineffective if a living area is only afforded three hours of sunlight in winter (Image: Sustainability Victoria, 2018)

Legal protection for solar access

Is there an automatic right to solar access for those who install solar collectors or construct a passive solar designed room (or entire building)? In the United States the law of nuisance may protect a solar user. For example, through an injunction granted to restrain a neighbour from constructing a house in a position that would overshadow solar panels (*Prah v. Maretti* (1982) 108 Wis. 2d 223, 321 N.W. 2d 182). No such line of authority has yet been established in Australian courts.

Disputes over solar access have been heard in New South Wales, South Australia, Victoria and Western Australia. These disputes have covered overshadowing of solar panels and living spaces by both trees and adjoining development and have resulted in a number of principles being established in these states. Such principles include but are not limited to the following:

- Overshadowing of a passive solar designed home arising out of poor design of a neighbouring development is not acceptable, even if it satisfies numerical guidelines such as a specific roof height in reduced levels (RLs) or side/rear setback in metres.
- Trees may be the subject of a height restriction if there is sufficient proof that their overshadowing compromises the passive solar heating of a neighbouring property.
- Shading of solar panels does not constitute damage to property, so the Land and Environment Court does not have jurisdiction to consider such an issue in Class 2 proceedings commenced pursuant to the *Trees (Disputes Between Neighbours) Act 2006*.
- At higher densities of development, sunlight is harder to protect and the claim to retain it is not as strong.
- A loss of sunlight to a solar array resulting in a total loss of energy generation greater than 50 per cent has been held to be unreasonable (*Chen v Melbourne CC & Ors* (Red Dot) [2012] VCAT 1909 (13 December 2012))
- Solar panels that are poorly placed will be unlikely to be protected from overshadowing by neighbouring development.
- Solar access *could* be defined as 'sunlight onto walls and other surfaces of a house'.
- Additional heating and cooling costs of less than \$100 a year, necessitated through lost efficiency in a passive solar-designed home, has been held to be grounds to order a neighbouring development to be adjusted to eliminate overshadowing.
- New high quality residential developments should consider if their surrounds include a number of buildings that exhibit passive solar design or feature solar collectors, even if development controls might otherwise permit overshadowing.

The above principles were not determined in consideration of factors such as the amount of sunlight that needs to fall on thermal mass within living spaces. It is apparent that this aspect of solar access has not been judicially considered in NSW to form a precedent that might be relied upon by home owners with passive solar design features. Indeed, no challenge to a development application in NSW or Victoria has considered overshadowing on a passive solar-designed room with any determinative weight, although such a decision has been made in South Australia.

It could be argued that bodies of thermal mass within living spaces (eg adequately insulated concrete floors) should be afforded the same protection as solar panels or solar hot water systems, given that such bodies are technically solar collectors. However, this is an avenue of law reform noted out of interest.

There is no enshrined right to solar access to the extent required by passive solar homes to remain effective in most states and territories. The common law does not generally recognise a neighbour's right to sunlight unless it is protected by an easement or covenant, which is an extremely undesirable arrangement for most private landowners and can be easily rendered void by state law. Even then, unless the terms of the easement are finely crafted, such a right is unlikely to be enforceable.

Further, in most states and territories there is no official right to protect a property owner against overshadowing of solar panels by neighbouring development (Figure 3). Some development controls make the reasonable permissibility of development and the reasonable protection of solar access competing factors in deciding whether a consent authority should grant consent to a proposed development.

The recent Amendment VC149 in Victoria represents the most significant change in this specific area of law and

is the first right afforded to a property owner in relation to their existing solar panels. However, this right only extends as far as the decision maker having to consider the impact of new dwellings on the solar panels on adjacent properties and does not equate to a right to have sunlight to solar panels protected in every case.

Again, even Amendment VC149 does not give any rights to the protection of living spaces for the amount of sunlight thermal bodies require over the course of a winter's day.



Figure 3. The north-facing rooftop of a passive solar home that might be at risk from an adjoining development of excessive height or with minimal southern setbacks. Residential project by Envirotecture, NSW (Image: Dick Clarke, envirotecture.com.au)

Protection by easement

In the UK, there are a number of cases where individuals have successfully protected their right to solar access to windows or a building under a common law doctrine of 'ancient lights'. This doctrine has not extended beyond that jurisdiction, so has no part to play in Australian disputes. In NSW, there is express provision in the *Conveyancing Act 1919* that there is no right to solar access to or for any building 'by reason only of the enjoyment of such access'. This provision alone is indicative of the historic position from which the law in Australia regards access to sunlight.

Although never approved by an Australian court, a theoretical option to protect solar access exists through the creation of an express easement over one property for the benefit of another property by means of:

- Protecting the amount of time for which solar collectors and thermal mass within living spaces receive sunlight in winter.
- Limiting the height of neighbouring structures and their setbacks to the relevant boundary.
- Protecting certain north-facing light corridors rather than unreasonably restricting the development potential of neighbouring properties.

However, such a right is unlikely to survive certain clauses and provisions contained within environmental planning instruments (discussed below) that negate the operation of any 'agreement, covenant or other similar instrument' that limit the ability for a development that otherwise complies with all relevant development controls from being approved on the property, unless such an agreement was imposed pursuant to a planning agreement (see, for example, cl 1.9A in all *NSW Local Environmental Plans*, or LEPs).

Protection by restrictive covenant

Similarly to an easement for solar access, an owner might negotiate with an adjoining neighbour to create a restrictive covenant creating a burden on the owner of the land affected by the covenant not to allow structures or trees to be constructed or to grow to a height that would cause overshadowing of solar collectors or thermal mass.

However, restrictive covenants suffer the same weakness as easements for solar access as discussed above. Indeed, cl 1.9A in most LEPs in NSW is known affectionately as the 'covenant-buster clause' due to its fatal application to many restrictive covenants.

However, a skilfully worded covenant that does not unreasonably limit the development potential for an adjoining property and that meets the statutory requirements for a valid restrictive covenant may survive the operation of any 'covenant busters' and may be an effective option for an owner to consider protecting solar access to their collectors and living spaces.

Protection by purchase of airspace

One extreme option utilised by some landowners as a means of ensuring that neighbouring properties do not increase the height of buildings on their properties, and that new or existing trees or hedges do not extend beyond a certain height, is to purchase the airspace above the neighbouring property.

In effect, the envelope of the neighbouring property (which, based on an ancient maxim, extends to the heavens above and the depths below a property) is limited at a set RL which is sold to a neighbouring owner without there being any Torrens title subdivision. This has the effect of limiting development above that RL without owner's consent first being obtained and can effectively impose a lower height of building control than the relevant environmental planning instruments would otherwise allow.

Importantly, this method of protection is immune from the operation of 'covenant buster' clauses or similar. The main drawback is the unlikelihood of a neighbouring landowner significantly limiting the value of their property by agreeing to such a sale.

However, for landowners with sufficient capital, this method is most effective in protecting solar access to a property.

Protection by environmental planning instruments

Local planning controls are made pursuant to state planning legislation, which differs widely from state to state. Examples in New South Wales and Victoria are further discussed below. Several local municipalities have amended their planning controls in recent years to make solar access a consideration when deciding whether to give approval to a proposed subdivision or building.

New South Wales

Some NSW councils have created development controls to protect, or at least inform, the installation of solar panels on residential and commercial buildings. The City of Sydney, for example, has a two-fold requirement in its *Development Control Plan 2012* that considers solar panels. Solar panel owners must take into account the potential permissible building form on adjacent properties when orienting the panels, while proponents of development applications for new buildings or alterations and additions to existing buildings are to maintain solar access to existing solar panels.

The most common relevant provision in NSW LEPs is a simple statement that overshadowing prevention is a relevant development objective. While the primary goal of these types of provisions is to ensure the amenity of sunlight, such provisions can benefit users of solar energy devices by guaranteeing solar access to collector panels. However, these provisions do not afford complete protection of solar access to solar collectors.

Other NSW councils include in their development control plans the requirement that direct sunlight onto existing panels is protected for a minimum period of time; for example, various controls within the *North Sydney Development Control Plan 2013* and the *Newcastle Development Control Plan 2012* provide that new development is to ensure that nearby solar panels have a minimum of three hours of sunlight access on the winter solstice. However, three hours of winter sun to a PV array is often inadequate, particularly if reverse-cycle air conditioning is being used or to adequately recharge a home battery unit.

In many jurisdictions, a development that has only a minor non-compliance with relevant development controls and has overshadowing impacts upon neighbouring properties may be unlikely to obtain development approval or consent.

However, in NSW a development that otherwise complies with the controls found in the applicable LEP may be approved in contravention of such controls, provided the council's discretion to do so is not unreasonable. Such recourse to proponents of inappropriate development suggests that this protection of direct sunlight onto solar collectors for a minimum of three hours is little better than many other aspirational controls that are frequently ignored by developers and consent authorities alike.

In NSW, high-level environmental planning instruments such as the *State Environmental Planning Policy No 65—Design Quality of Residential Apartment Development*, known as SEPP 65, require all new apartment buildings to comply with the Apartment Design Guide, which sets out a range of objectives, design criteria and guidance that ostensibly ensure that habitable rooms and private open spaces achieve sufficient solar access.

It is once again noted that sufficient solar access in the Apartment Design Guide is insufficient for effective passive solar design. The target amount of direct sunlight is stated to be 1m² of sunlight into living rooms and private open spaces measured at 1m above floor level for at least 15 minutes. This minimum must be substantially increased for the enthalpy effect on thermal bodies to effectively warm a living space in mid-winter.

The guide allows for 15 per cent of apartments in new residential apartment buildings to receive no direct sunlight between 9am and 3pm in mid-winter, which does not allow for any passive solar design elements to be incorporated into those apartments.

Further, the Apartment Design Guide makes no reference to solar collectors that might be overshadowed as a result of the construction of the residential apartment building to which it relates.

Interestingly, the Apartment Design Guide does not include trees as an impediment in its definition of solar access. This is, perhaps, an acknowledgement of the role played by the *Trees (Disputes Between Neighbours) Act 2006*.

Victoria

As an alternative to the NSW approach, a number of Victorian councils have published advisory notes to be considered in the assessment of development that might overshadow solar panels. One example is in the Moreland Planning Scheme clauses that direct new buildings to be orientated to make use of solar energy, and not to 'unreasonably reduce' the energy efficiency of existing adjoining dwellings. Even this guideline permits 'reasonable' overshadowing and gives minimal consideration to poorly placed solar collectors.

In 2017, clauses 55.07 Apartment Developments and Clause 58 Apartment Developments were introduced into all planning schemes. Both clauses contain objectives that specifically seek to protect existing energy efficient dwellings and buildings, complementing the existing objectives of ResCode (Clauses 54.03-5 and 55.03-5) that seek 'To achieve and protect energy efficient dwellings and to ensure the orientation and layout of development reduce fossil fuel energy use and make appropriate use of daylight and solar energy.'

More recently, a 2018 amendment to the VPP and all planning schemes has introduced requirements that new developments consider their impact on any existing solar energy facility mounted on the roof of an adjoining dwelling. Interestingly, these requirements do not apply to low density residential areas, perhaps suggesting that the Victorian Government does not consider two storey residential development to cause substantial overshadowing of neighbouring properties.

Protection by legislation

There are few pieces of state legislation that expressly provide protection of solar access to a property. Federal legislation does not and cannot address matters of planning and development, which leaves development proponents and opponents alike in a grey area rife for dispute and litigation.

However, a variety of statutory provisions exist in every state and territory which have the incidental and unintended effect of impeding the installation of solar devices and the adoption of passive solar design. In all cases it appears that the possible adverse impact of the legislation on the increased use of solar energy was not considered. Legislation of concern to solar users includes:

- Legislation that limits the redevelopment of historic buildings makes it difficult for a solar device, ie a roof-mounted solar collector to be installed or to retrofit for passive solar design ie double glazing or thermal mass. It is common for heritage agreements entered into between the government and the building owner to contain a clause restricting the owner's right to make internal and/or external alterations to the building.
- Pursuant to local government legislation, tree plantations may be established by local councils on streets and public land without the need to consider the impact the trees may have on the adjoining landowners' solar access. Furthermore, trees which have heritage or ecological importance are often protected from substantial pruning or removal to minimise or remove their impact upon a property with solar collectors installed or passive solar design utilised. The author notes, however, that protective listing of specific tree groups is mostly well-based and should not be opposed or sought to be circumvented.
- State planning legislation and policies designed to encourage urban development in designated areas invariably omit any reference to consider the impact of any such development on individual landowners' access to the sun beyond design guidelines such as those discussed above.

However, there are indications that various jurisdictions are moving towards legislation that expressly protects solar access; for example, the 2016 amendments to the ACT *Planning and Development Regulation 2008* allow for certain development to be exempt only if it does not overshadow solar collectors, the definition of which is sufficiently broad to capture all relevant installations. Unfortunately, there is no protection for thermal bodies within passive solar designed sections of a building.

Further, in 2016 the ACT amended its Territory Plan to reduce the size of new building envelopes at the southern boundary and the rear zone of the property to reduce the likelihood and extent of overshadowing of properties to the south. This amendment was for the express purpose of protecting the solar access of residential blocks, assisting and encouraging passive solar design and active solar technology, and improving the energy efficiency of homes in the ACT.

Refer to the [Appendix](#) for a summary of recent decisions of courts and tribunals throughout Australia.

Dispute resolution

As addressed above, there is no course of action in nuisance in Australia for overshadowing of solar collectors or thermal bodies. Accordingly, the main way that disputes arise regarding overshadowing issues is through an affected owner either lobbying the relevant consent authority (usually a council) to refuse the development, or in circumstances where a council has refused the development and the proponent commences a merit appeal to the relevant court or tribunal and the affected owner seeks to be joined to the proceedings as a party so that their concerns are taken into account.

An architect should make every effort to ensure that their design does not become the subject of litigation and should advise their clients accordingly. It is better to make a minor alteration to a proposed design to slightly increase side or rear setbacks, or to step back a first or second floor addition, to protect the solar access of a neighbouring property.

For larger projects, and for development in transitional locations where there is a large disparity in the height of adjacent buildings that would require significant overshadowing to occur, the possibility of paying for the relocation of solar collectors should be considered.

If a property was designed with passive solar design principles and a neighbouring design proposal would render the passive solar design elements ineffective, serious consideration should be given to an agreement by which the additional heating, cooling and lighting costs of the overshadowed project are offset by the developer or owner of the overshadowing property.

Future developments in solar access law

There is a clear need for reform in this area of law from the standpoint of the solar user. The statutory frameworks and common law principles lack clarity and do not apply consistently across all states. Even though this need for reform was identified as early as 1978 by the Law Reform Committee of South Australia, no significant changes have occurred, although there are signs of improvement on an ad hoc basis in certain areas of Australia.

The cases cited show the piecemeal approach taken by courts and tribunals in protecting an owner's legal right to solar access. Overshadowing appears to be an ancillary issue that might partially contribute to the refusal to grant development consent or approval to a development that, among other impacts, causes overshadowing of solar collectors or thermal bodies. However, there has been an increase in cases where overshadowing is the sole reason for which a development application or proposal is rejected.

While an ad hoc and far from preferable approach in addressing this issue, consent authorities in NSW can impose conditions of consent on a proposed development provided the discretionary measures set out in section 80A of the *Environmental Planning and Assessment Act 1979* are satisfied and a common law test of reasonableness is applied (known as the Newbury test).

It is generally accepted that a council can impose a condition of consent on a proposed development that would require solar access to neighbouring buildings to be protected over the life of the development to which consent has been granted.

Further work on the ideal model for solar access rights can be found in Kapnouras (2011).

Conclusion and recommendations

It is apparent that neither the relevant state-level statutory framework, nor the common law, have substantial or generally effective measures by which solar access to a property may be protected. Conversely, there is ambiguity around the ability for a property to be developed to its maximum potential when a neighbouring property has a solar collector or utilises passive solar design and may experience some, or significant, overshadowing.

It is recommended that architects of new or altered structures place any rooftop solar collectors as close to the ridgeline as possible to minimise overshadowing, and as far back as possible from side and rear boundaries.

For passive solar designed spaces, particularly those located on the ground floor of a new or altered structure, an architect should consider the potential building envelope, height of building limits and side/rear setbacks of adjoining properties in determining the best location along the northern elevation for a kitchen or lounge room.

Architects engaged in large precinct projects should work with the project town planners to ensure that the project locates communal open spaces and parklands in a way that allows the maximum possible duration for sunlight to access these spaces during winter. Precinct plans in NSW, such as the recently released St Leonards and Crows Nest 2036 Plan, give an example of the extent to which architects should consider topography, height of building controls and surrounding residential and community spaces — particularly those with heritage importance — in managing overshadowing impacts.

Architects engaged in small-scale residential projects should carefully consider if their proposed design that may cause overshadowing of a neighbouring property is the most skilful design, particularly if the neighbouring property utilises passive solar design principles.

Above all, architects should encourage their clients to negotiate with affected neighbours to minimise, mitigate or offset the impact that their architectural design might have on solar collectors or passive solar designed spaces. Litigation is costly and emotionally draining for all involved and should be avoided at all costs. Engaging in mediation at a community legal centre can be a helpful alternative if a private arrangement cannot be reached between the parties. Offering to pay

for the relocation of solar collectors that would be overshadowed by an otherwise compliant building design might be one element of such a private arrangement.

It is hoped that consent authorities and state governments will put clearer rules in place to deal with solar access protection, particularly as Australia moves towards a carbon neutral economy. Certainty around fixed development controls and options for dispute resolution will help balance the ability for a landowner to reasonably develop their property with the expectation that a neighbouring landowner will not have their property adversely affected in terms of solar access as a result. This certainty, along with an increased importance being placed on the protection of solar access to private open living spaces and solar collectors, will contribute to facilitating structures that are both comfortable to live and work in and ecologically sustainable.

Appendix

Recent decisions of courts and tribunals

Australian Capital Territory

In *Blackshaw & Evans v Campbell (No. 2)* [2016] ACAT 108, the ACT Civil and Administrative Tribunal held that nine evergreen trees growing on a property that had the effect of overshadowing a neighbouring property ought to be removed based on the nuisance caused by the trees.

One ground of nuisance was the significant overshadowing of part of the applicants' home that was designed with passive solar principles in mind; however, this was not a determinative factor in the mind of the Tribunal member in ordering the trees to be removed. It was noted by the Tribunal in this decision that in relation to overshadowing of PV arrays by trees, 'a neighbour does not have a right to good winter sunlight with reliance on the law of nuisance'.

New South Wales

In *Kelly & anor v Dehnert & anor* [2015] NSWLEC 1173, being a neighbour dispute pursuant to the Trees (Disputes Between Neighbours) Act 2006, the Land and Environment Court of NSW held that a stand of trees originally planted as a windbreak were causing an unreasonable degree of overshadowing onto a part of a dwelling constructed in accordance with passive solar design principles.

Importantly, the Court held that although two to four hours of direct sunlight on the winter solstice is a 'general requirement', the particular circumstances of each case must be assessed on the merits, and accordingly the owner of the trees was ordered to remove individual trees from the windbreak to allow more morning sun to the thermal mass within the passive solar designed home while still allowing the windbreak to function.

In *The Benevolent Society v Waverley Council* [2010] NSWLEC 1082, Senior Commissioner Moore held that, in relation to a proposal to erect two residential flat buildings (of ten and five storeys respectively) that were numerically compliant with all applicable development controls, the Court (as the consent authority) would only consider approving the development if the ten storey block was reduced to six storeys and the five storey block was reduced to four storeys.

These reductions were required by the Court due to unreasonable impacts not only on the views enjoyed by neighbouring residents, but importantly due to the loss of sunlight that a considerable number of neighbouring properties would experience. In handing down this decision, the Court restated the planning principle that controls access to sunlight for residential properties in NSW.

South Australia

In *Ned Ritan Design v Corp of the City of Adelaide* [2016] SAERDC 32, the Environment, Resources and Development Court of South Australia held that a neighbouring development of substantial bulk and scale would have, among other amenity impacts, an unreasonable overshadowing effect on a passive solar designed community immediately to the south.

The community, Christie Walk, was designed to utilise the maximum amount of winter sun falling on open community living spaces and into private internal living spaces with thermal mass. The neighbouring proposal, although compliant with the development controls for the subject lot, was still refused by the Court on appeal due to the clear intent of the planning regime for the area at large, rather than just the subject property, meaning that the nature of Christie Walk's sustainable design needed to be taken into account when adjacent properties were being developed.

Victoria

A number of recent decisions in the Victorian Civil and Administrative Tribunal (VCAT) have considered various planning policies for local councils and have, in turn, influenced subsequent policies regarding overshadowing of solar collectors and passive solar designed buildings.

The decisions of *Chen v Melbourne CC & Ors* (Red Dot) [2012] VCAT 1909, *John Gurry & Associates v Moonee Valley CC and Ors* (Red Dot) [2013] VCAT 1258, *Babaniaris v Greater Geelong CC* [2015] VCAT 1793 and *Bagnato v Moreland CC* [2016] VCAT 5 collectively set out the following reference points:

- The ultimate test of whether a development should be approved or refused is one of 'reasonableness', rather than having a proposed development avoid any overshadowing altogether.
- The 'legitimate expectations' for the redevelopment of the property in light of the strategic planning controls and policies affecting the subject land and area.
- Whether the position of the solar panels on the host building is due to constraints arising from heritage planning controls or a heritage covenant.
- The model and type of solar panels.
- The amount of supporting evidence that a party has provided.
- When the solar panels were installed on the host building.

Ultimately, the VCAT approach is that the relevant planning policies and controls that guide the scale of buildings set the expectations of what is reasonable in terms of overshadowing solar panels, and that development should not be unreasonably compromised on the basis that it might overshadow solar panels on neighbouring properties. However, these principles are not directly tied to thermal bodies within passive solar designed living spaces, so there remains some ambiguity as to whether VCAT will apply these same principles to those circumstances.

Useful recent decisions concerning a range of solar collectors are as follows:

- *Pearce Street Development Pty Ltd v Glen Eira CC* [2019] VCAT 798 – a three storey residential flat building was conditionally approved with the developer required to install a new 3kW solar array on the roof of an adjacent overshadowed dwelling house.
- *Architectural Matters v Mornington Peninsula SC* (Corrected) [2019] VCAT 696 (13 May 2019) – a set of solar panels installed part-way down the north-western facing roof were allowed to be overshadowed in the afternoon due to the potential for additional panels to be installed closer to the ridge of the roof.
- *OP Webb Pty Ltd v Yarra CC* [2019] VCAT 663 (13 May 2019) – a proposal for a seven-floor residential flat building in a high density residential area of Melbourne was permitted to overshadow the private open area and a select number of solar panels of a neighbouring property due to the nature of the locality and the fact that the overshadowing only occurred during winter.

Western Australia

In *Lewis v City of Subiaco* [2007] WASAT 237, the WA State Administrative Tribunal decided not to refuse development consent to a proposed two storey dwelling that caused overshadowing impacts on a neighbouring property as the proposal evidenced a skilful design by the architect.

The alignment and design of the building had been fine-tuned to cause the smallest impact on the neighbouring property while still allowing the subject property to be reasonably redeveloped. The Tribunal held that this balance was satisfactory, notwithstanding the adverse impacts that it would reasonably cause.

References and further reading

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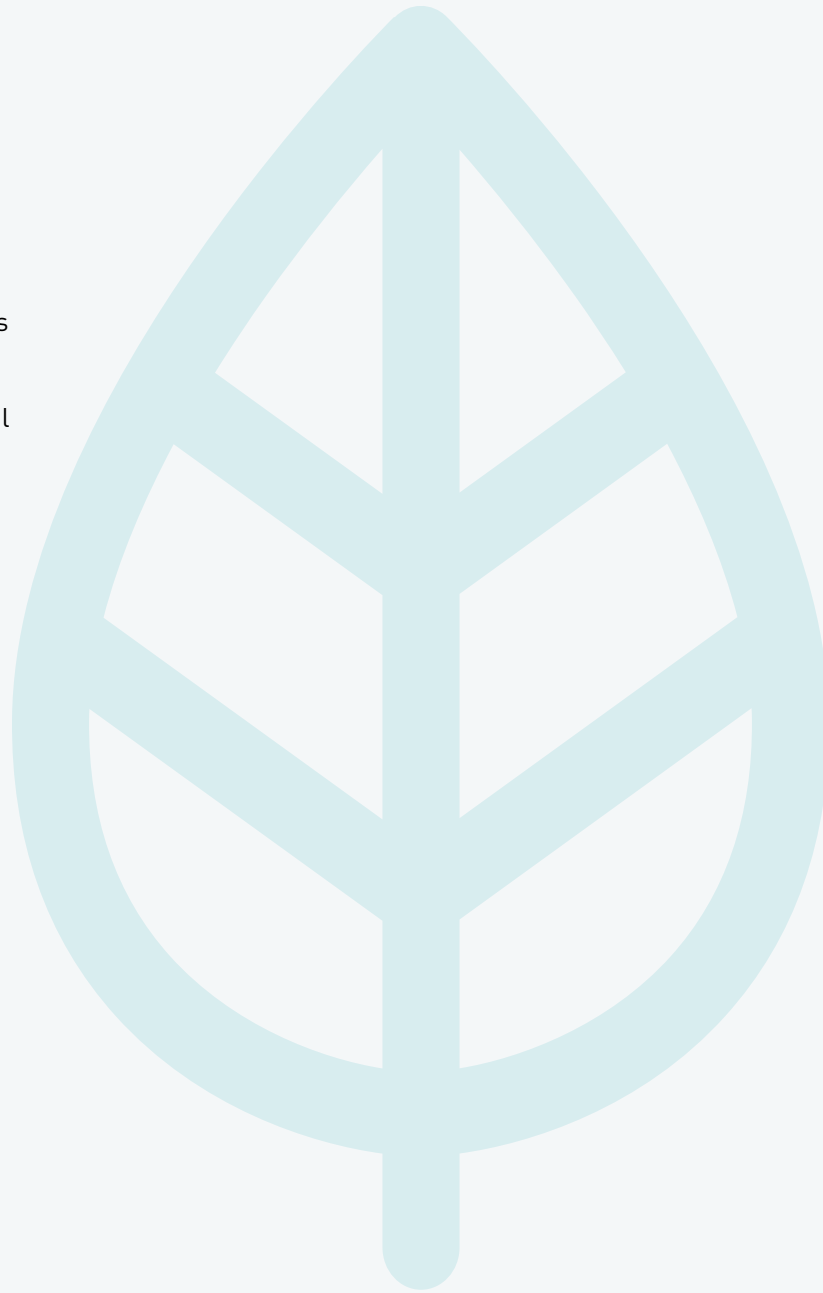
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Peter Clarke is a solicitor at Hones Lawyers based in Sydney and practices exclusively in environmental, planning and development law in areas of New South Wales. He is an alumnus of the University of Sydney having graduated with a Master of Environmental Law, focusing particularly on the utilisation of conditions of development consent to enforce net zero emissions development. He is the Vice Chair of the NSW Young Lawyers Environment and Planning Law Committee and a coordinating editor of the seminal NSW Young Lawyers publication, *A Practitioners Guide to the Land and Environment Court*.

The author recognises the work of Emeritus Professor Adrian Bradbrook in this area of law, particularly in respect of his updates to previous versions of this note.



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