



ACT
Government

Chief Minister, Treasury and
Economic Development

Freedom of Information Publication Coversheet

The following information is provided pursuant to section 28 of the *Freedom of Information Act 2016*.

FOI Reference: CMTEDDFOI 2020-117

Information to be published	Status
1. Access application	Published
2. Decision notice	Published
3. Documents and schedule	Published
4. Additional information identified	No
5. Fees	N/A
6. Processing time (in working days)	25
7. Decision made by Ombudsman	N/A
8. Additional information identified by Ombudsman	N/A
9. Decision made by ACAT	N/A
10. Additional information identified by ACAT	N/A

From: [REDACTED]
To: [CMTEDD FOI](#)
Subject: Freedom of Information request
Date: Friday, 19 June 2020 8:44:11 AM

Please find online enquiry details below. Please ensure this enquiry is responded to within fourteen working days.

Your details

All fields are optional, however an email address OR full postal address must be provided for us to process your request. An email address and telephone contact number will assist us to contact you quickly if we need to discuss your request.

Title:

First Name:

Last Name:

Business/Organisation:

Address:

Suburb:

Postcode:

State/Territory:

Phone/mobile:

Email address:

Request for information

(Please provide as much detail as possible, for example subject matter and relevant dates, and also provide details of documents that you are not interested in.)

Under the Freedom of Information Act 2016 I want to access the following document/s (*required field):
Written response to Access Canberra (reference Leoni Marshall complaint no: 200406-002244) from Construction Control builders. This letter was received week beginning 15th June 2020 regarding denying any liability for repairing/replacing defective windows at the Pearl apartment complex in Kingston.

I do not want to access the following documents in relation to my request::

Thank you.
Freedom of Information Coordinator



ACT
Government

Chief Minister, Treasury and
Economic Development

Our ref: CMTEDDFOI 2020-117

[REDACTED]
via email: [REDACTED]

Dear [REDACTED]

FREEDOM OF INFORMATION REQUEST

I refer to your application under section 30 of the *Freedom of Information Act 2016* (the Act), received by the Chief Minister, Treasury and Economic Development Directorate (CMTEDD) on 19 June 2020, in which you sought access to a written response to Access Canberra.

Specifically, you are seeking: *“Written response to Access Canberra (reference Leoni Marshall complaint no: 200406-002244) from Construction Control builders. This letter was received week beginning 15th June 2020 regarding denying any liability for repairing/replacing defective windows at the Pearl apartment complex in Kingston.”*

Authority

I am an Information Officer appointed by the Director-General under section 18 of the Act to deal with access applications made under Part 5 of the Act.

Timeframes

In accordance of section 40 of the Act, CMTEDD was required to provide a decision on your access application by 7 August 2020.

Decision on access

Searches were completed for relevant documents with the document requested being identified.

I have decided to grant full access to the relevant document. The document released to you is provided as **Attachment A** to this letter.

Charges

Processing charges are not applicable for this request because the total number of pages to be released to you is below the charging threshold of 50 pages.

Online publishing – Disclosure Log

Under section 28 of the Act, CMTEDD maintains an online record of access applications called a disclosure log. Your original access application, my decision and the document released to you in response to your access application will be published in the CMTEDD

disclosure log 3 days after the date of my decision. Your personal contact details will not be published. You may view CMTEDD disclosure log at <https://www.cmtedd.act.gov.au/functions/foi/disclosure-log-2020>.

Ombudsman Review

My decision on your access request is a reviewable decision as identified in Schedule 3 of the Act. You have the right to seek Ombudsman review of this outcome under section 73 of the Act within 20 working days from the day that my decision is published in CMTEDD disclosure log, or a longer period allowed by the Ombudsman.

We recommend using this form [Applying for an Ombudsman Review](#) to ensure you provide all of the required information. Alternatively, you may write to the Ombudsman at:

The ACT Ombudsman
GPO Box 442
CANBERRA ACT 2601

Via email: actfoi@ombudsman.gov.au

ACT Civil and Administrative Tribunal (ACAT) Review

Under section 84 of the Act, if a decision is made under section 82(1) on an Ombudsman review, you may apply to the ACAT for review of the Ombudsman decision. Further information may be obtained from the ACAT at:

ACT Civil and Administrative Tribunal
Level 4, 1 Moore St
GPO Box 370
Canberra City ACT 2601
Telephone: (02) 6207 1740
<http://www.acat.act.gov.au/>

Should you have any queries in relation to your request please contact me by telephone on 6207 7754 or email CMTEDDFOI@act.gov.au.

Yours sincerely



Daniel Riley
Information Officer
Information Access Team
Chief Minister, Treasury and Economic Development Directorate

24 July 2020

From: [Carolyn Coventry](#)
To: [Marshall, Leoni](#)
Cc: [Nicholas Andrew](#)
Subject: Complaint against Construction Control | Your ref 16610 [BN-General.FID318343]
Date: Tuesday, 16 June 2020 7:16:19 PM
Attachments: [image001.png](#)
[Ltr to Access Canberra 16.06.2020.PDF](#)

Dear Ms Marshall,

We act for Construction Control Holdings Pty Ltd.

Please find **attached** our letter of today's date responding to your notice dated 2 June 2020. We confirm that on 12 June 2020 you granted an extension of time until 18 June 2020 for a response to the notice to be provided.

Kind regards,
Carolyn

Carolyn Coventry
SPECIAL COUNSEL

T +61 2 8651 0207

E carolyn.coventry@bnlaw.com.au



Professional Services Firm of the Year, 2016, 2017, 2019 ANZIIF Australian Insurance Industry Awards

COVID-19 ALERT: BN staff are working remotely as a preventative measure to safeguard the health and wellbeing of our people and support social distancing to slow the spread of COVID-19. We remain fully operational and clients are able to reach us as normal by phone or email. Please send correspondence by email wherever possible, rather than mail to ensure a timely response. We are committed to delivering the same high level of service you have come to expect from BN without disruption in these unprecedented circumstances.

This email is confidential and may be subject to legal professional privilege. Click [here](#) for further information. Liability limited by a scheme approved under Professional Standards Legislation.

Visit our website [here](#). We have offices in every major capital city across Australia, get in touch [here](#).

16 June 2020

Ms Leoni Marshall
Acting Senior Case Manager
Complaints Management Team
Access Canberra

By email: leoni.marshall@act.gov.au

Dear Ms Marshall

Complaint against Construction Control Holdings Pty Ltd

1. We act for Construction Control Holdings Pty Ltd (**Construction Control**) and have been instructed to respond to your letter dated 2 June 2020 advising of a complaint made by [REDACTED] on behalf of the Owners Corporation of Unit Plan 3487 (**Owners Corporation**).
2. As we understand from your letter, the allegations made by [REDACTED] are:
 - 2.1 Construction Control offered at an executive committee meeting held on 3 February 2016 to replace Viridian Glass windows installed at The Pearl apartments (**Premises**) but has failed to do so (**Replacement Representation**). We confirm you provided Construction Control with an extract of the minutes of the meeting of the executive committee relied upon by Mr Buriski on 12 June 2020.
 - 2.2 The fault with the Viridian Glass windows installed at the Premises is due to their incorrect installation during the construction of the apartments (**Installation Fault**).
3. Construction Control's response to these two issues is set out below. However, at the outset we note that the relevant legal entity involved in the construction of the Premises was Construction Control 2601 Pty Ltd, not Construction Control Holdings Pty Ltd. We are instructed that all relevant communications have been made by persons in their capacity as representatives of Construction Control 2601 Pty Ltd (now known as ACN 125 121 164 Pty Ltd) not Construction Control Holdings Pty Ltd. References in this letter to Construction Control should be taken to be references to Construction Control 2601 Pty Ltd.

Replacement Representation

4. Construction Control denies it made any representation at the meeting of the executive committee of the Owners Corporation held on 3 February 2016 that it would replace the windows at the Premises. Although there is a record in the

Contact
Nicholas Andrew
Direct Line: (02) 8651 0201
Nicholas.Andrew@bnlaw.com.au

Principal
Nicholas Andrew
Direct Line: (02) 8651 0201
Nicholas.Andrew@bnlaw.com.au

Our reference
NJAXCXC:123828-1

Your reference
16610

- minutes of the meeting to this effect, Construction Control denies that the minutes are an accurate record of what was said by the representatives of Construction Control at the meeting. It is not known who prepared the minutes and they were never provided to Construction Control after the meeting (or at any time prior to you providing an extract of the minutes on 12 June 2020) to confirm their accuracy or otherwise.
5. The context around Construction Control's attendance at the meeting of the executive committee of the Owners Corporation held on 3 February 2016 is informative. Construction Control was invited to attend the meeting of the executive committee of the Owners Corporation held on 3 February 2016 to provide an update in relation to litigation relating to the failure of double glazed windows that had occurred on another construction project by Construction Control known as "Molonglo". The Molonglo development used identical windows that were supplied and manufactured by CSR Building Products Ltd t/as Viridian Windows. The subcontractor to Construction Control that installed the windows at the Molonglo development was GGA Glass and Aluminium Pty Limited (**GGA**). GGA replaced the windows at the Molonglo development and then commenced proceedings in the Supreme Court of NSW against Viridian Windows, claiming damages for the cost of the replacement. The insurer of GGA that funded the replacement costs and the Supreme Court proceedings against Viridian Windows was QBE Insurance (Australia) Limited (**QBE**).
 6. Construction Control provided an update on the recovery action by GGA against Viridian Windows at the meeting of the executive committee of the Owners Corporation held on 3 February 2016. As some of the bullet points listed in the minutes allude to, Viridian Windows denied responsibility for the failure of the windows and investigations into this issue were being carried out by QBE on behalf of GGA, to whom Construction Control was providing assistance.
 7. In circumstances where the reason(s) for the failure of the windows at the Premises and other locations was still being actively investigated, in combination with the matters set out in paragraph 8 below, it would have been premature to suggest that Construction Control agreed, without any qualification, to replace all of the windows at the Premises at the meeting held on 3 February 2016. Rather, Construction Control was assisting an insurer of a subcontractor on another development try to establish fault on the part of Viridian Windows, which might have assisted the Owners Corporation in pursuing that entity in relation to the window failures that occurred at the Premises, and updating the Owners Corporation about this. Construction Control did not agree to replace the windows at the Premises.
 8. More broadly, Construction Control never accepted liability to the Owners Corporation for the failure of the windows at the Premises. Indeed, it cannot have such a liability. Construction Control did not have any contract with the Owners Corporation, rather it was contracted by Mainore Pty Ltd to build the Premises. The Owners Corporation did not exist until after the works were completed. No duty of care at common law in favour of the Owners Corporation could arise having regard to *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* [2014] HCA 36. In any event:
 - 8.1 The installation of the windows was subcontracted by Construction Control to All Points Glass ACT Pty Ltd (**APG**), an independent contractor for whose acts Construction Control cannot be held vicariously liable.

- 8.2 The manufacturer and supplier of the windows was Viridian Glass, which is also a separate legal entity; and any claim that the Owners Corporation might have had in relation to the supply of defective windows is now statute barred.
9. We do not intend to respond to the general reference in your letter dated 2 June 2020 referring to potential breaches of the *Trade Practices Act 1974* (Cth) as we do not understand this to be a part of Mr Buirski's complaint, nor have any particulars of such breaches been provided. However, for the avoidance of any doubt, Construction Control denies that it breached the *Trade Practices Act 1974* (Cth) in any respect.
10. The Owners Corporation was well aware of Construction Control's denial of liability and therefore cannot have relied upon the erroneous statement in the meeting minutes that it would replace all of the windows at the Premises. There was extensive communication between Construction Control and the Owners Corporation on this issue, including at a meeting in February 2017 where Construction Control informed the Owners Corporation that the defects with the windows at the Premises were either an installation issue (for which APG was responsible) or a manufacturing issue (for which Viridian Glass was responsible). At this meeting, Construction Control also noted that the limitation period for the Owners Corporation to bring a claim against APG and/or Viridian Glass was likely to expire in the near future.
11. The Owners Corporation never pressed for Construction Control to replace the windows until what we understand was a change in the membership of the Executive Committee earlier this year. This is consistent with Construction Control's position that the Owners Corporation did not rely upon the erroneous statement in the meeting minutes that Construction Control would replace the windows at the Premises.

Installation Fault

12. Construction Control has not been provided with a copy of any documents from Viridian Windows that purportedly establish the fault with the windows at the Premises is due to their manner of installation. Accordingly, we are not in a position to respond to this allegation in any meaningful way although we make the following observations:
- 12.1 A similar issue arose in relation to the Molongo development and there was a substantial dispute as to whether the failure of the windows was due to a manufacturing fault or installation fault. Construction Control was not a party to the Supreme Court proceedings in which this dispute was litigated and understands the proceedings settled on confidential terms.
- 12.2 Viridian Windows is clearly not an independent expert.
- 12.3 Any installation fault is not the responsibility of Construction Control as this work was subcontracted to APG.

Next steps

13. Construction Control denies that it has any legal liability to the Owners Corporation for the defects in the windows at the Premises. We trust this letter explains Construction Control's position in relation to the allegations made by Mr Buirski.

Yours faithfully
Barry.Nilsson.



Nicholas Andrew
Principal