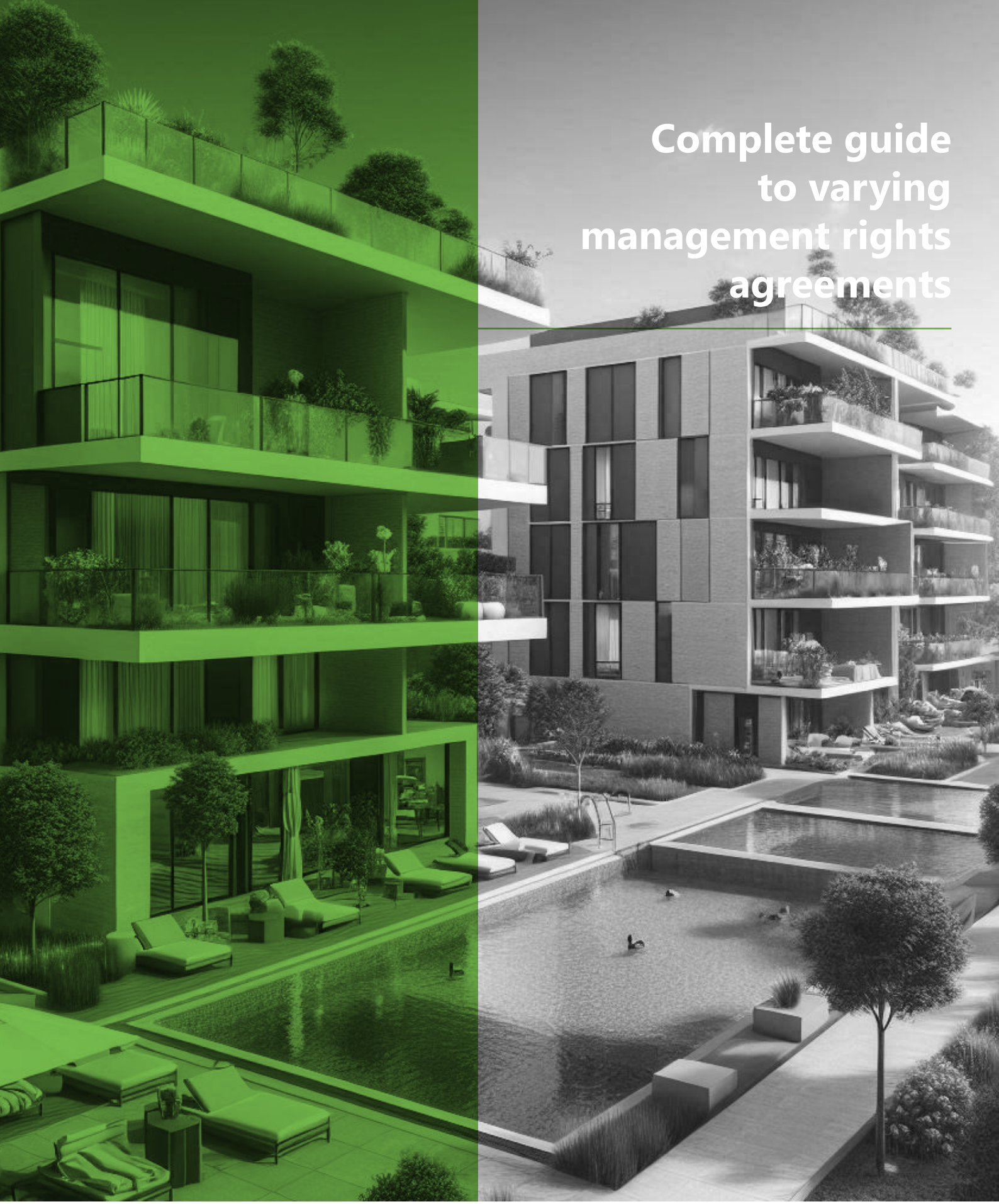

Complete guide to varying management rights agreements

mahoneys

Introduction

Varying and extending contracts is not limited to management rights. The process and requirements for changing management rights agreements is the same as changing any other contract (such as an employment agreement or contract to purchase land). This involves both parties agreeing to the change separately.

It is relatively easy for the manager to agree to a change as most managers operate as individuals, partnerships or through small companies.

However, it is more complicated for the body corporate to agree because of the need to comply with the terms of the Body Corporate and Community Management Act 1997 (Qld).

In this guide we cover:

- what does it mean to vary or extend a management rights agreement;
- why management rights agreements are varied and extended;
- how a management rights agreement can be varied or extended;
- what are the body corporate's rights and obligations; and
- who pays the body corporate's costs for any variation of the management rights agreement.

Mahoneys is recognised as one of Australia's leading body corporate law firms – having been awarded the "Strata Law Firm of the Year" at both the 2023 and 2024 Strata Community Association (QLD) awards.

Our dedicated Body Corporate team is made up of industry-leading lawyers with experience in providing body corporate advice, transaction support and dispute resolution services.

Feel free to contact us if you have any questions about varying or extending a management rights agreement.

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What is a variation?

A variation is simply changing the terms of an existing contract. For a change to be legally binding it needs to be agreed by both parties – so any variation to a management rights agreement needs both the manager and body corporate to agree to the change.

Body Corporate agreement

The regulation modules provide that a management rights agreement can only be varied if the following requirements are met:

- an ordinary resolution without any proxies is passed approving the amendment;
- the agenda for the general meeting includes the "terms and effect" of the variation;
- if the variation is to amend the management rights agreements to grant an option to extend the term the following additional requirements must also be met:
- the motion is considered by secret ballot. A returning officer is required which increases the costs of the meeting;
- an approved explanatory note, in the form of a BCCM Form 20, must be circulated prior to the meeting.

Why do they happen?

Variations can happen for any number of reasons including:

- a change to the manager's duties;
- a change to the residential obligations of the manager;
- the manager seeking an increase to their remuneration;
- the removal of invalid or unwanted clauses, for example, mandatory dispute resolution clauses or termination clauses;
- to address changes in legislation or the interpretation of particular sections of the BCCMA, for example, "Gallery Vie"; or
- an increase in the term of the agreements or creation of an option to extend the term.

Committee's position

Any properly submitted motions must be included on the agenda of the upcoming general meeting (assuming it has been submitted on behalf of a lot owner and within the correct timeframes). If the motion is submitted on behalf of the manager who is not a lot owner, it is up to the committee whether the motion will be included on the agenda of the general meeting.

The committee:

- can seek to negotiate changes but the manager does not need to agree to them, but often will if they are reasonable;
- cannot seek or accept payment of an amount or a benefit in exchange for granting an extension;
- can support, lobby against or have no view on the variation.

The committee should make sure that the variation is properly considered at the general meeting with the necessary requirements. Otherwise it may be forced to reconsider the variation at another general meeting at a further cost to the body corporate.

If it is approved, the body corporate has an obligation to advise the manager's financier of any change.

Costs

The starting position is that each party will bear their own costs. This means the:

- manager would pay for the costs of their lawyers to prepare and negotiate the variation documents; and
- body corporate would pay for its own cost of the:
    - general meeting;
    - returning officer; and
    - any legal costs.

However, it is common for the manager to agree to bear all or some of the body corporate's costs as a trade off with any benefit the manager may receive as a result of the variation (for example, a further 5 year extension of the agreement).

Top ups

A top up is simply a variation to the agreement by including a new clause that adds a further term starting the day after the current expiry.

A top up can only be for a maximum of either:

- 5 years; or
- to the relevant module's limit (Standard = 10 years, Accommodation and Commercial = 25 years).

The clause that is inserted usually requires the manager not to be in breach of the agreements at certain time periods and either:

- be an automatically exercised option; or
- require notice to be given during a timeframe.

Gallery Vie

Gallery Vie is a scheme at Robina that had a dispute with their caretaker in the Queensland Civil and Administrative Tribunal (QCAT). In summary:

- a manager breached the agreement and the body corporate had the right to terminate the agreements;
- the financier took control of the business which meant (due to legislative protections) that the body corporate could not terminate the agreement because of the manager's breach unless another breach happens during this control period;
- another breach happened during the control period even though it was not the financier's fault;
- the financier (and the wider industry) thought that because the second breach was not the financier's fault the body corporate could not terminate the agreement;
- QCAT disagreed and said that the second breach allowed the body corporate to terminate the agreement and there was no protection to the financer.

As a result, all financiers then required any management rights agreements to now amend the termination rights of the Body Corporate.

This is achieved by varying the management rights agreements to adjust the rights of the body corporate on the second breach to not allow termination if the financier wasn't at fault.

The issue has now been slowly filtered out and most agreements will have had the one-time fix completed by now.

Separating manager's lot from the business

It is becoming more and more common for managers wishing to separate their business from their lot.

This is primarily due to market forces where the property value has increased but the management rights value has not. As a result it has created a barrier of entry into the market – for example, having to buy a $2m unit in order to buy a $200k management rights business.

Any variations of this type also need to consider a variation to the by-laws – so that the person buying the separated lot does not have any special rights granted to them.

Consideration also needs to be given to any office or reception that would have been owned or used by the manager (e.g. who owns it and what will be done with it).

Pros for the body corporate of separating the lot from the business include:

- reducing the investment required, leading to a larger pool of available contractors;
- reducing the risk of putting a manager under financial distress.

Cons for the body corporate of separating the lot from the business include:

- the manager residing offsite which makes them harder to get in contact with;
- the manager may not be as interested as if they were an onsite manager leading to poor service levels.

Submitted documents and what to look for

A variation will usually require the following documents:

- a motion;
- a deed of variation; and
- a BCCM Form 20 (if it is a top up).

These documents should be reviewed by a lawyer to make sure they are appropriate for the body corporate to consider. For example:

- is the motion made subject to the manager paying the body corporate's costs;
- does the motion properly approve entry into the exact deed attached to the agenda;
- does the motion accurately explain the terms and effect of the variation;
- is the deed made subject to the manager paying the body corporate's costs;
- is the deed limited to what the motion says it is going to do (i.e. nothing else has been slipped in);
- what assurances and warranties is the body corporate providing in the deed; and
- is the information in the BCCM Form 20 factually accurate.

What is an extension

An extension is the mechanism for giving effect to an existing option that was previously created by a variation.

A top up may be automatic. In this case there is no need for anything to take place. Sometimes the committee will be asked to sign a deed of extension acknowledging that the term be automatically extended.

What is an extension (cont.)

On most occasions, a top up will require notice – if that is the case, what needs to happen is that notice must be given:

- within the correct timeframes contemplated in the option clause (which is strict – 1 day late means it is not exercised); and
- in the correct manner (the agreement will set out a process to serve notices).

This process can unfortunately sometimes be seen as rudimentary. However it can be a very technical area of law when the conditions of an option being exercised are examined.

A deed of extension is commonly prepared, as it records, for the benefit of both parties, whether the notice was correctly provided to avoid future uncertainty.

A motion is also usually prepared to authorise the body corporate to enter into the deed. This motion can be approved at committee level.

Similar to a variation, costs are by default borne by each party. However, the manager will usually agree to bear the body corporate's costs.

It is important to ensure that the:

- deed does not seek to include agreements, acknowledgements or warranties that are beyond the simple recording of the option being exercised; and
- options are properly exercised and there are no outstanding conditions that are not yet satisfied prior to the deed being signed.

About the firm

Mahoneys is an independent law firm offering a range of commercial advice, transaction support, and dispute resolution services. With offices in Brisbane and the Gold Coast, we have a dedicated team of lawyers who specialise in body corporate and strata law.

We have a long history of acting for bodies corporate - our work includes acting for lot owners and bodies corporate on all matters relating to the Body Corporate and Community Management Act and associated legislation – including in the following areas:

- Management rights assignments and variations
- Common property subdivision and sales
- General disputes and advice
- Community management statements
- By-law enforcement and by-law reviews
- Selling schemes to developers
- Caretaker performance issues
- Debt and levy recovery
- Lot entitlement issues
- Building defect disputes
- Building management statements
- Laan access notices
- Defamation
- Neighbouring development issues

Mahoneys was named "Law Firm of the Year" at both the 2023 and 2024 Strata Community Association (Qld) awards.

The "Strata Services Business Legal Firms Award" acknowledged firms who delivered exceptional client services, relationships built on identifying and meeting expectations, and a seamless client experience with an unwavering commitment to providing a high level of services (including cost, quality of legal advice and added value to everyone).

About the Team

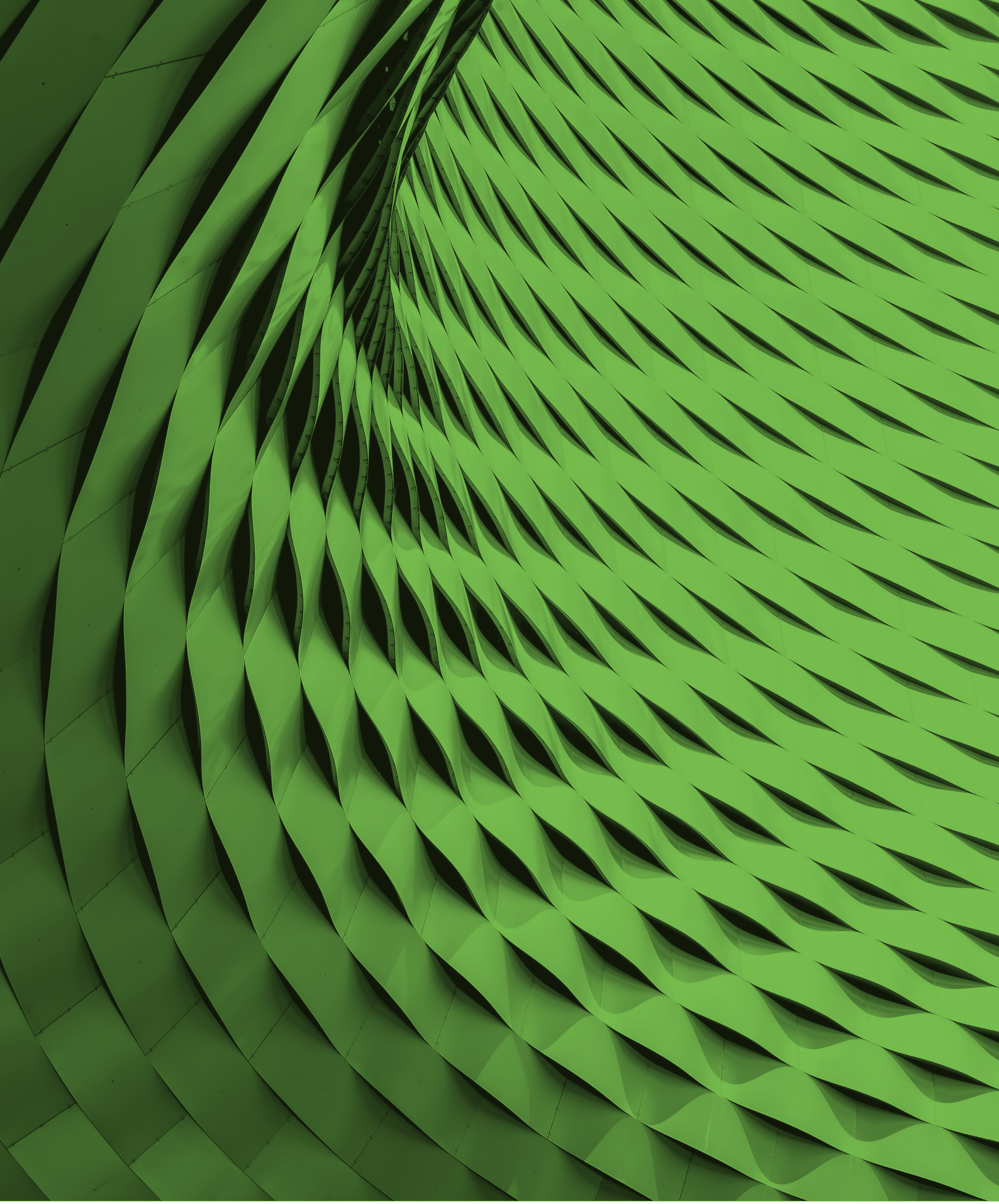
A key to our success has been the quality of our team and our unwavering commitment to providing market leading legal services. Our dedicated body corporate team is made up of leading industry lawyers, led by 2 experienced partners:

Todd Garsden who heads up Mahoneys' body corporate practice is an industry-leading body corporate lawyer who predominately acts for bodies corporate, body corporate managers and lot owners on all matters affecting bodies corporate.

Ben Seccombe who heads up the Mahoneys' Dispute Resolution team, is a nationally recognised litigator with significant experience advising bodies corporate including on contract issues between resident manager and body corporate, by-laws, building and construction (including defect management), statutory compliance and insurance. Ben also has significant experience helping bodies corporates terminate and sell body corporate schemes to developers.

Want to know more?

To receive updates on body corporate matters, you can visit our dedicated body corporate page **www.mahoneys.com.au/industries/bodies-corporate-strata**, follow us on LinkedIn **www.linkedin.com/company/mahoneys** or sign up to our body corporate focused newsletter **www.mahoneys.com.au/subscribe**.



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