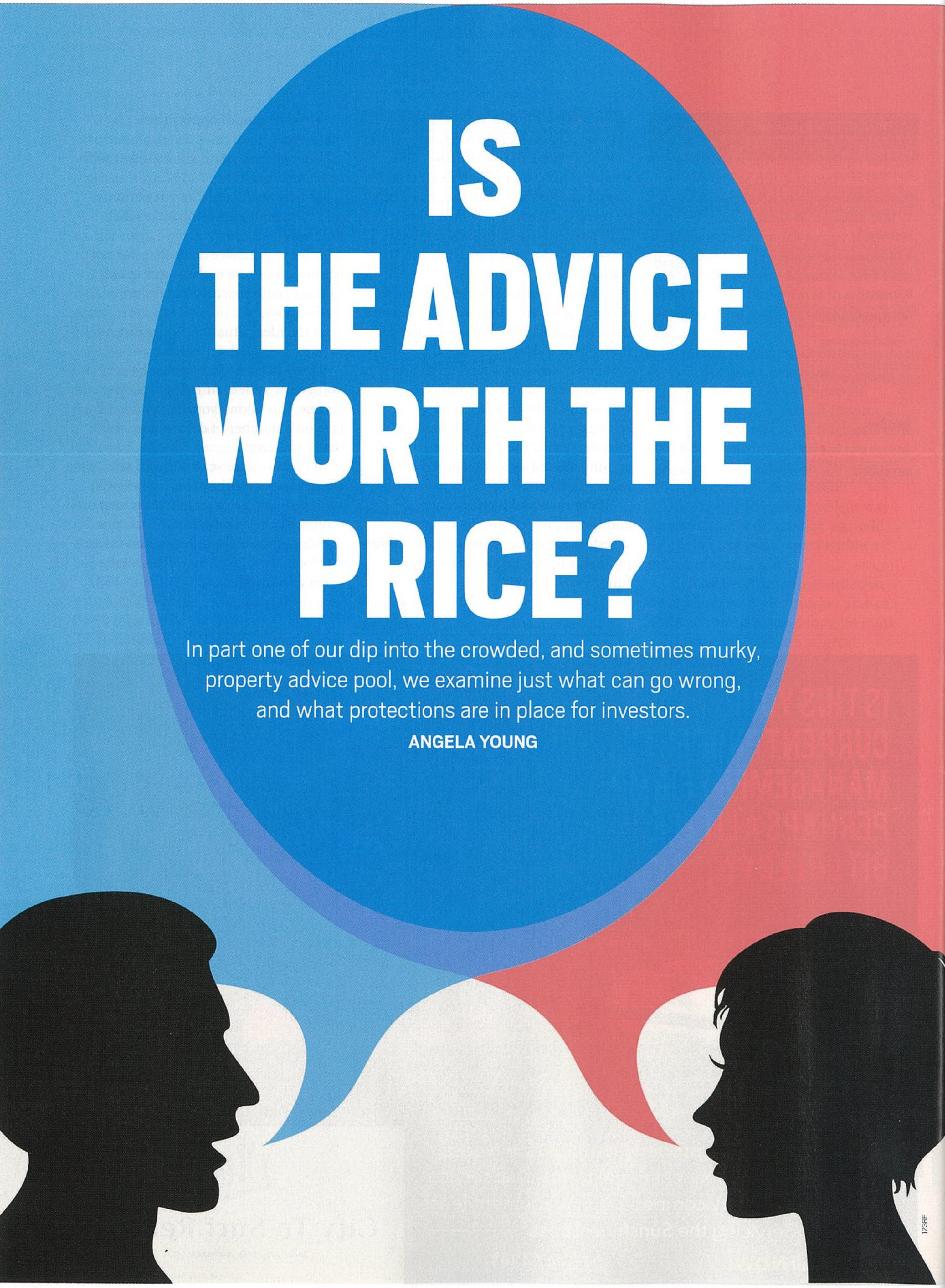


IS THE ADVICE WORTH THE PRICE?

In part one of our dip into the crowded, and sometimes murky, property advice pool, we examine just what can go wrong, and what protections are in place for investors.

ANGELA YOUNG

There's a *wealth* of property advice available out there (geddit?). Advisers range from highly educated professionals who are accountable to legislative bodies and industry groups right through to operators whose sole motivation is to boost their income at the expense of the unfortunate investor.

Unfortunately, telling the good from the bad is not so crystal clear, as the rules and regulations around the various types of advisers vary wildly.

The startling truth about property investment advice is that, as an industry, it is mostly unregulated, thus many advisers need do no more than declare themselves an expert and hang a shingle.

Alexandra Kelly is a solicitor at the Financial Rights Legal Centre in Sydney, and she's seen firsthand some of the damage that can be done when bad advice is issued.

"'Property advice' can be a very broad term and encompass a lot of potential activities," she explains.

"Some of these activities may require licensing or particular qualifications if it involves financial advice or mortgage broking, but other aspects of it are unregulated."

As it stands, there's currently no requirement for any professional standards, educational standards or experience for "property advice", that is, recommending a purchaser acquire a particular asset.

"Anyone can put themselves forward as an 'expert' and charge other people fees for advice about entering into property investments or wealth creation seminars," Kelly says.

The reason the property industry is so unguarded in this respect falls to the definition of a "financial product".

"Our system of regulation means 'financial advice' is defined around advice on financial products, like insurance or superannuation," Kelly says.

"Property is not a financial product as defined in the *Corporations Act* and so they're not covered by the requirements of the *Corporations Act* and *Future of Financial Advice*, which require an adviser to have certain qualifications and a best interests duty.

"Some advice, especially that which involves self-managed super funds, may well be captured as 'financial advice', which would require a financial services license, but many operate unlicensed and consumers are unaware of the risks of unlicensed operators until *after* the harm is done."

For other aspects of unregulated property advice, what protection a consumer has is limited to the Australian Consumer Law (ACL).

"Whilst the ACL does provide remedies for misleading and deceptive conduct or unconscionable conduct, again it provides relief only after substantial harm may have already been done," Kelly says, adding that as these entities have no requirements to be insured for professional indemnity insurance, a consumer who's suffered detriment may never recover their losses anyway.

KNOW THE RULES

When it comes to policing this issue, different types of advice are covered by different authorities.

"The nature and scope of what property advisers do are so broad that some aspects may involve ASIC [the Australian Securities and Investments Commission] where there's use of superannuation or credit facilities," Kelly explains.

"Other aspects won't be 'financial advice', so would be captured by either the Australian Competition Consumer Commission or the state Fair Trading.

"The federal and state regulators have only so much [in the way of] resources to police the operators, meaning in some cases a consumer will have to pursue personal remedies when it all fails."

The advice from ASIC is stark, interesting and substantial (and can be found primarily on the highly valuable MoneySmart.gov.au website, which is well worth a visit, no matter how much you think you know already).

It's essentially summed up in the section specific to investment property advisers, which is: "Think carefully before using the services of groups of professionals such as property developers, accountants, lawyers and mortgage brokers, who work together and recommend each other's services. Be particularly wary if they recommend that you invest in a property market you are not familiar with. Do your own research and choose your own service providers."

Fair Trading departments, on the other hand, will deal with complaints from consumers who feel they've been misled or pressured, and it's property "spruikers" who are often in their sights.

spruik: |ˈspruːik| *vb*

(*intr*) *archaic slang Austral* to speak in public (used esp of a showman or salesman)

noun sprui•ker \ˈsprüka(r)\

While the term "spruiker" has a formal, quite harmless definition, it has evolved to describe those in the property industry who conduct themselves in a false and misleading manner at the expense of their clients.

Brian Bauer, the executive director of Queensland's Office of Fair Trading (OFT), points out that, in general, the law prohibits property spruikers from making claims that are untrue or unsupported by demonstrable facts.

"The law also prohibits undue pressure, in the form of harassment or coercion, being placed on a potential investor," he adds.

An example of the sort of consequences for those found guilty can be found in the Queensland OFT provisions:

CONSEQUENCES

Breach	Individual fine (max)	Corporation fine (max)
False or misleading representations	$220,000	$1.1 million
Misleading or deceptive conduct	$220,000	$1.1 million
Acting unlicensed as a real estate agent	$23,560 or two years' imprisonment	$23,560 or two years' imprisonment
False representations about a property	$63,612	$63,612
Unconscionable conduct	$220,000	$1.1 million
Harassment and coercion	$220,000	$1.1 million
Contraventions by marketeers	$24,380	$121,900

Source: Queensland Office of Fair Trading

Requirements to be licensed can apply, too, depending on the adviser's activities. For example, they'll need:

- a real estate agent licence from the Queensland OFT, if they're recommending purchasing a *particular* property (as opposed to recommending to invest in a certain locality)

- a financial services licence from ASIC if they're offering financial advice to potential investors, particularly with regards to self-managed super funds.

Extra protections are available to investors who end up signing a contract after feeling pressured to do so, according to Fair Trading in New South Wales.

A spokesperson tells API that under ACL, a 10-business-day cooling off period is available to the purchaser of a product or service bought during an event, such as a property promotion seminar, which was not the promoted purpose of the seminar – and that's on top of the statutory cooling-off period that comes with a regular contract of sale for residential property (unless it's bought at auction, of course).

"Buying property is a major purchase and there is an onus on prospective purchasers to do their appropriate due diligence and seek advice or information from a variety of sources prior to committing," the spokesperson adds.

"Any 'advice' or investment strategy that is offered as part of a free or low-cost seminar should be considered by consumers as a sales pitch and researched independently to ensure it suits the individual requirements of the purchaser."

Identifying a "spruiker" can be difficult, especially in such a saturated market.

Bauer describes some of the ways OFT believes they tend to make their money:

- They offer opportunities to buy into a particular development – "property spruikers may have undisclosed links to the development they're promoting, meaning they have a vested interest in promoting its sale over other properties the investor may consider. [You] may find the promoted properties are overpriced, or are not capable of the capital or rental returns promised".
- They receive undisclosed commissions for referrals to associated services – "property spruikers will give referrals to investors for mortgage broking, finance and conveyancing or tax advice. Some property spruikers are directly involved with associated business entities that provide these types of services".

Bauer says investors should also be cautious about organisations offering training courses, follow-up seminars, books, DVDs and other resources purporting to teach potential property investors their "secrets" – particularly where an initial "free" seminar is no more than a hook to encourage potential investors to attend a sales pitch.

Of course, it's not uncommon for well-known and reputable developers as well as spruikers to run investment seminars extolling the virtues of property investment, in return for the opportunity to present their available property developments to the attendees.

These seminars can provide useful information about property investment in general and needn't be a concern provided that the seminar presenters are transparent and upfront about the purpose of the seminar.

The "spruiker" factor kicks in primarily where undisclosed commissions and murky referral arrangements are involved that are not made clear to seminar attendees.

OF NOTE…

A property promoter who sells property as an agent for the owner of the property is required to be licensed under the *Property Stock and Business Agents Act 2002*, which requires licensees providing financial or investment advice to warn the person being advised that the advice is of a general nature and that the person should assess the purchase decision in relation to their own circumstances or consult an appropriately licensed financial adviser. The agent's also required to disclose any conflicts of interest, such as an entitlement to commission or referral fees.

WARNING SIGNS

Alarm bells should ring if your adviser…

- Makes unrealistic promises
- Doesn't ask you in-depth questions about your circumstances and preferred strategy/end goals in order to tailor their advice to you
- Either charges no fee or only a small one (eg. less than $5000) and is evasive about how they are remunerated and what commissions they may be receiving. Beware of undisclosed kickbacks. Reputable firms will have transparent fee and/or commission structures.
- Rings you many times and tries to keep you on the phone
- Says you need to make a quick decision or you'll miss out
- Claims they're a professional broker or portfolio manager and seem professional but sound like they're actually following a script
- Uses a name or claims to be associated with a reputable organisation to gain credibility e.g. NASDAQ, Bloomberg
- Offers you glossy prospectuses, brochures, share certificates or receipts, or directs you to a slick website
- Is inflexible and only offers new or off-the-plan options with hard-sell techniques.

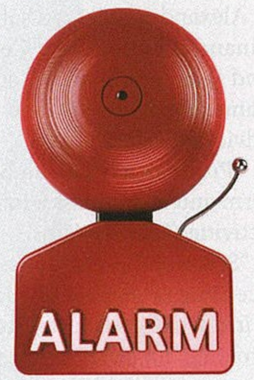
Sources: ASIC, Anna Porter

Alarming phrases

- "I've bought in the same development myself"
- "You'll need to sign this right now, or you'll lose the chance"
- "This is the last unit in the block – don't miss the opportunity"
- "The builder's an old friend of mine".

Alarming words

- "WAREHOUSE PRICES"
- "UNDER COST"
- "TRADE PRICES"
- "WHOLESALE PRICES"
- "BASEMENT PRICES"
- "UNDER LAND VALUE".



ACTION TAKEN

In recent years, Queensland's OFT has taken enforcement action against several people acting unlawfully in the space, Bauer says (see case studies, p31).

"Investors have been encouraged to buy in industry-dependent locations (eg. mining)," he explains.

"As the industry recedes, the rental market retracts, leaving investors with unserviceable debt, dropping property values and loans being called in to adjust the loan-to-value ratio."

A quick search of the NSW Fair Trading archives reveals nine complaints regarding "property spruiking type matters" in just the six months to June 2016, according to the spokesperson.

They include difficulties experienced by consumers seeking refunds of expressions of interest payments for the purchase of property or property investment programs.

"In one case the trader deducted the cost of unused flights which had been booked to inspect the property, and in another case the consumer was seeking a refund of the holding deposit, as finance wasn't approved.

"It should be noted, however, that the trader can dispute these types of complaints where they're able to prove they have acted in accordance with the terms of the agreement."

Many of the other complaints related to dissatisfaction with property investment programs.

For former valuer Anna Porter, the abundance of dodgy advice whirling around the property investment industry was so frustrating she felt compelled to write a book on the topic.

She says she took to her keyboard in the hopes no one else would lose their savings to dodgy investment firms dishing out bad advice to line their own pockets.

"I meet a handful of people every week who've lost a fortune through bad property investment," she explains.

"Over the years I've heard countless heartbreaking stories of people who've gone into property investment full of hope after being sold a dream of wealth and financial freedom… so often, they've overpaid or found the rental market isn't what was promised.

"Regrettably, the property industry's full of less than ethical people," she adds.

"Some are out trying to downright swindle buyers, deliberately misleading them about the value of properties and prospective growth and rental income.

"Some even have the backing of companies that are household names in the mortgage broking industry.

"Others, while well intentioned, just don't have the appropriate qualifications and experience to be providing advice."

The key inspiration for Porter was the case of a young woman (early 20s) who'd been referred to an investment firm by her accountant.

The firm's adviser assured her that where he was directing her to invest was an area that he, too, was going to invest in.

OF NOTE…

If a property promoter provides credit to an investor, he or she is required to hold an Australian Credit Licence under the *National Consumer Credit Protection Act*.

KNOW YOUR EXPERT

Role description	Qualifications required	Realistic expectations	Your own obligations
Property adviser Wealth adviser Wealth creation adviser Wealth creation expert Educator Property investment adviser Property specialist/strategist Property consultant	None	Advice on types of properties, strategies and even particular properties.	Due diligence on the adviser (background check, qualification check, experience check); thorough due diligence on any property or area they recommend. Make sure you ask (and understand) how they're remunerated.
Financial adviser Financial planner	AFS licence	Licensed by ASIC to provide financial advice on these areas: insurance, investing, superannuation, retirement planning, estate planning, risk management and taxation.	Check their credentials on ASIC's MoneySmart Financial Advisers Register.
Buyers' agent Buyers' advocate Property buyer	Real estate licence	Allowed to take a fee and make recommendations on a particular property.	Always exercise your own due diligence on your buyers' agent's advice.
Mortgage broker	Cert IV in finance and mortgage broking (min)	Licensed to give advice on credit under the *National Consumer Credit Protection Act*.	Ensure they're qualified and ask (and check) if they're members of a professional organisation (MFAA or FBAA).
Real estate agent	Real estate licence	Allowed to take a fee and make recommendations on a particular property.	Understand that they are working for the seller/developer. Check who is paying them, and how much.
Accountant	AFS licence	Not permitted to give advice on particular properties/sales.	Check online to see if they have their AFS licence. Ask for examples of their experience.
Valuer	Bachelor's degree (with property-based major)	Advice on properties and projects within their area of specialisation.	Ensure they're registered and a member of a professional organisation (Australian Property Institute or RICS).

GOOD ADVICE?

Having done her own due diligence on the area, the novice investor felt the recommended new house-and-land package in the Hunter Valley represented a good buy, despite being situated in an area reliant on mines and tourism attached to wineries and vineyards – notoriously volatile.

After purchase at a price of $410,000 (which was supposed to be positively geared by $30 a week), the investor found she had to drop her rent thanks to lack of tenant interest, and when she considered selling, discovered the property's value to be only $290,000.

On approaching her adviser, the woman was told the nature of investing was that "it was a waiting game", and that after holding it for five or 10 years she'd be okay – not much compensation when she was needing to find an extra $200 a week more than she'd budgeted just to hold it.

For Porter, the tale was shocking, and sent her on a journey of exploration into the industry – leading her to uncover kick-back trails that surprised even the most hardened of industry insiders.

Ben Kingsley is the chair of PIPA (Property Investment Professionals of Australia), an industry body set up to represent and raise the professional standards of all operators involved in property investment.

"There have been countless government inquiries both at the federal and state levels," he says, "many of which have made recommendations to introduce regulation in the property investment space, but no government has had the political will to get it over the line.

"One could argue there's potential

complexity with regards to real estate agents who are already licensed to sell and buy real estate, i.e. would they need to become financial planners too?

"Another complexity is that some large developers and builders don't want to see their 'business model' of paying commissions to property marketeers or spruikers jeopardised, and they may have some influence within the political game."

Kingsley admits that PIPA is frustrated with the lack of action from government when it comes to protecting consumers: "We have provided several written submissions and recommendations in terms of how we believe direct property investment can be regulated," he explains.

"We believe there needs to be a new section of the *Corporations Act* dealing with direct property investment as a product… advisers need to be qualified and licensed to give advice on property if it's being purchased to achieve rental income or capital growth or a combination of the two.

"At the end of the day, property investing is a high value transaction and the risks of getting it wrong could financially cripple many households, so it makes sense to protect consumers from unscrupulous operators and property spruikers who act in their own best interests instead of the customer's."

REGULATION ATTEMPT

In order to try and regulate the industry a little in its own way, PIPA has introduced its own rules.

"Every member of our association must adhere to our 'Code of Conduct' rules," Kingsley explains, "otherwise they'll have their membership terminated.

"Secondly, under our membership constitution we have the power to impose financial penalties on members who don't adhere to the Code of Conduct, so we have enough power for our own members.

"If the government can't get changes to advice laws over the line, we'd love to see them introduce a requirement that every operator in the property investment industry needs to be a member of a peak association such as PIPA, and that they need to undertake a minimum level of education to obtain a qualification in the property investment advice space, such as our QPIA (qualified property investment adviser) accreditation."

Anna Porter, author of *Whistle Blower*

OF NOTE…

If a dispute arises, a written contract is likely to prevail, so make sure everything (including your terms and agreed results) is clearly stated in writing.

You can check whether or not the adviser you're talking to is PIPA accredited by visiting the website, www.pipa.asn.au.

Another body attempting to instil some ethics into the industry is REBAA, the Real Estate Buyers Agents Association.

A buyers' agent needs to have a real estate licence to operate in Australia, with the various Real Estate Industry Associations requiring those seeking a licence to complete a course and pass assessment. While the licensing course can be rigorous, Porter goes further suggesting advisers should hold more by way of qualifications, such as their being a property valuer, land economist, urban estate manager or even having a full degree in property investment from a TAFE or similar.

> Consumers are unaware of the risks of unlicensed operators.
>
> ALEXANDRA KELLY

REBAA president Rich Harvey feels such measures aren't always necessary, though he would recommend only using buyers' agents that are REBAA members.

"REBAA doesn't have authority to prosecute or anything like that, we're just an association of members that follow a strict code of ethics, but if someone gets dodgy advice, or bad advice that leads to a loss… they can go to the Department/Office of Fair Trading in each state, and lodge a claim with their Fair Trading commissioner."

To be a member of REBAA, he explains, you have to be licensed in the state in which you're operating, you have to have been operating for a minimum of two years and you have to abide by a very strict code of ethics.

"Ask the adviser for testimonials," Harvey urges, "ask them for their track record, look at their longevity, see if they've won any awards.

"There's a range of things you can do to check out their credentials, but checking up their licence is a first step… you can jump on the website of each state and put in a person's name or a company name and check they're licensed."

For Harvey, it's madness to put your trust into an adviser that isn't qualified.

"Would you go to a doctor that's operating in a back yard? Would you go to a mechanic that's set up shop on the side of the road? It's the same sort of thing. If you're going to get advice from someone, you've got to make sure they're genuine and practising what they preach."

Asking how your adviser is being paid is, he says, absolutely crucial.

"The killer question is… 'how are you paid for giving me the advice?'.

"If they're paid on a fee for service… and they don't take any kick-backs from developers or agents… they can be called independent."

If they're paid by the agent or the developer, then they're a property seller or if these commissions are not clearly disclosed, even potentially a marketeer or spruiker.

"In every state, there needs to be a full disclosure – you can't have secret commissions."

Like most professional associations, membership of REBAA comes with the expectation members comply with the code of ethics, or risk being penalised. According to Harvey, using a member of REBAA brings a level of protection.

"REBAA is an association of reputable buyers' agents. To become a member of REBAA you have to jump a few hurdles, but if someone has a complaint – we've had a couple of complaints against members – we deal with it very fairly.

"The executive will ask for the nature of the complaint, we then give the buyers' agent the right of reply.

"If it's a very serious issue, we can disbar them from being a member." API

CASE STUDIES

Across Australia, every year there are multiple complaints about various different kinds of property advisers and cases coming before the courts. We could write a book! But we don't have space for that, so here's a small snapshot of some of the bad stuff…

- **April 2015** – Queensland property spruiker agreed in an enforceable undertaking not to engage in conduct liable to mislead consumers and make a $15,000 payment. A promotions company working with the "adviser" also entered into an enforceable undertaking with the OFT and made a $20,000 payment. The spruiker and company were providing free seminars to encourage people to sign up for property investment courses. The OFT investigation found false and misleading information was being provided at the seminars and in correspondence, with regards to testimonials and details of the benefits of the courses.
- **October 2015** – Supreme Court of NSW found a group had been unlawfully carrying on a financial services business for five years by providing advice to 860 clients to purchase investment properties through an SMSF.
- **Trial set for October 2016** – ASIC has commenced proceedings in Federal Court against companies associated with a property educator and his company in relation to their promotion and sale of interests to investors in five land banking schemes. ASIC alleges the schemes are unregistered managed investment schemes and that companies and the educator have been unlawfully carrying on an unlicensed financial services business. There are more than 100 investors in the schemes, which have been promoted to investors, including through seminars. ASIC is seeking orders to appoint a provisional liquidator or receiver and manager to each of the five schemes and the development companies in order to take control of any assets and protect the interests of investors.

On the editor's desk…

- A couple paid $10,000 to be part of a mentoring process and were encouraged by the investment company to buy in a regional location instead of their own preference, which was in Sydney. Their rent has now dropped 55 per cent and the value has fallen $140,000. According to the investors, after talking to representatives of the company they were told "you did your due diligence".
- OFT looking into a property management firm after accusations of non-disclosure and money being taken from rental account, as well as illegal fee withholding after termination of agreement.

Don't miss Part 2 of our investigation in next month's API, in which we'll equip you with everything you need to protect yourself against the dodgiest of "advisers".