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Time to regulate litigation funding

By **CHRIS MERRITT**,
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The Australian Institute of Company Directors has joined the push for a national licensing system for litigation funders because it believes the time has passed when a major part of the financial services industry should remain unregulated.

Top officials of the AICD have called for a national regulatory scheme that would govern the adequacy of the capital base of litigation funders and redress the information imbalance between those who finance class actions and the claimants in those proceedings.

AICD managing director Angus Armour said it was a mistake to believe that the companies that financed class actions were primarily concerned about ensuring that the plaintiffs in these cases achieved access to justice.

“Litigation funders are not about access to justice,” he said. “They work on the basis of market economics. They take a position that can return the most on their capital.”

He said class action proponents frequently depicted those proceedings as a way of ensuring small stakeholders could achieve justice when pitted against large stakeholders.

But he said litigation funders, when compared to claimants in those proceedings, were major stakeholders and he believed government’s role should be to redress the balance in favour of small stakeholders.

The proceedings of the financial services royal commission had demonstrated why it was undesirable for those who provided financial services to remain unregulated.

“There is definitely a role for government in making sure through regulation that information flows (in class actions) are transparent and appropriate like any other form of financial advice,” Mr Armour said.

His call for regulation is in line with that of the US Chamber Institute for Legal Reform and coincides with an inquiry by the Australian Law Reform Commission into litigation funders and class actions.

Mr Armour and the AICD's Louise Petschler, who is general manager, advocacy, warned that if that inquiry led to the introduction of US-style contingency fees law firms would inevitably operate under the same economic model as litigation funders.

They favoured another option being considered by the ALRC — equipping courts with a statutory power to consolidate competing class actions that are based on the same allegations of wrongdoing.

This comes at a time when four law firms have announced that they are considering running class actions against AMP after that company made a series of admissions at the royal commission. Those firms are Shine Lawyers, Slater & Gordon, Phi Finney McDonald and Quinn Emanuel Urquhart & Sullivan.

The US Chamber Institute says one of the reasons the Australian class action system is more pro-plaintiff than the US system is the absence of any statutory equivalent of the US system that subjects class actions to certification by a court before they can proceed.