CCC Operation Belcarra
Submission from Graeme Orr, Professor, University of Queensland Law School

Thank you for the invitation to make a formal submission. I will limit it to my area of expertise, which is the law of politics. I have no particular empirical background in local government or local electioneering.

Context

It is important to understand the context in which this inquiry occurs. This context contains tensions in search of a synthesis:

1. (a) Outside the massive BCC, local politics have traditionally been non-partisan.[1] There remains a widely-held conception – etched more deeply since the erosion party loyalty amongst voters in parliamentary politics – that 'independent' status is an electoral virtue.
   (b) There is an additional incentive for pro-development candidates and councilors to mask their connections or ideology, given the interests many existing residents have in limiting property development.

Yet:

2. SEQ and provincial Queensland cities are growing in population and complexity. The cost and logistics of electioneering in larger communities encourages electoral factions and groupings. These also may grow out of or feed into the factions and groupings inevitable for co-ordinated and stable governance during the term of any Council.[2]

Until SEQ and provincial Queensland cities, meaning their citizens and political class, develop a more mature and open acceptance of the role of parties and groupings in local government, these factors will create tensions for regulation. Even if that acceptance matures into semi-stable parties or local groupings, there will remain regulatory issues, although these will be more akin to those which arise with parties in parliamentary elections.

Queensland's *Local Government (Electoral) Act 2011* includes a couple of provisions to specifically regulate this area. The provisions are noble in intent, but uneasy in enforcement. Inter-state analogues are lacking. NSW has a Local Government Register of Political Parties.

Principles

The law of politics involves three clusters of regulatory principles. The first two clusters are instrumental aims; the third is experiential. The instrumental clusters are of most relevance here:

[1] This is not an iron rule. Also parties of the left have helped drive partisanship. The BCC for some years had open ALP involvement, but more behind-the-scenes conservative party involvement via 'ratepayer' tickets. Townsville CC was, for many years through the inter-war period, dominated by the Hermit Park Labor Party (see Ian Moles, *A Majority of One* (UQP, 1979)). The Greens are now openly active in say Noosa Council elections.

[2] Compare how UK administrative law has had to give broad leeway to factions and groups in council decision-making, rather than adhere to the fiction that each councilor will be purely independently minded. See, eg *Bromley LBC v Greater London Council* [1983] AC 768 and *R v Waltham Forest LBC; ex parte Baxter* [1988] QB 419.

- **Integrity**. Politics is a strategic game, played by elites who vie for representative power. The risks that result from competition must be managed, to legitimate outcomes, to enable a turnover of incumbents, and to reinforce accountability.
- **Liberal Values**. There are 3 liberal values that electoral democracy idealizes: political liberty or participation, political equality, and political deliberation.
- **Ritual**. Elections are something we experience. Campaigns and polling stations symbolize and tangibly express the seasonal coming together of a political community.

Of these values, those directly in play in this inquiry are:

1. Legitimacy. If local representatives are elected without sufficient understanding of their commitments and inter-connections, this creates a legitimacy deficit. This is a particular problem with long (4 year) fixed terms.
2. Deliberation. Good deliberation is not simply an absence of misleading information. It involves at the minimum discussion of positively valuable information. This relates to, but goes beyond the legitimacy aim.
3. Liberty/participation. Unlike legitimacy and deliberation, the traditional laissez-faire approach was to leave the exposure of political affiliations etc to 'free speech'. This meant avoiding regulation and leaving it to rivals and the media to investigate and criticise.

Aside from the law, the media is vital in all this. Local radio and newspapers, and broadcast media if any, have a key role in local politics. This is especially the case in larger towns and cities, where face-to-face politics and organic reputations play a lesser role. Paradoxically, cities that are part of the SEQ urban conglomeration face more challenges than provincial cities, since many of their residents may pay less attention to local media than to Brisbane focused media.

Unsurprisingly then, the laissez-faire approach of not regulating - of leaving things to free speech and the media - risks falling short.

The Current Law and Other Regulatory Suggestions

The current Queensland law requires a 'group' to register. It then creates an offence for members of a group to campaign without registering. [3]

The notion of a 'group' is inherently fuzzy. The dictionary in the Act states a group is something formed:

'(a) promote the election of the [member] candidates; or
(b) to share in the benefits of fundraising to promote the election of the candidates.'

Parties are easily identified. They are at a minimum a public 'brand' built around a leader or ideology. Whilst usually taking the form of an unincorporated association, a party will also be identifiable as it will seek longevity as an entity, beyond an individual election, through a membership and possibly an administration that are separate from their candidates. But factions or looser-than-party groupings are more evanescent and flexible. They are not defined by a foundational document like an association.

[3] Sections 41-43 and 183.

The waters are muddied further by our system of preferential voting. It provides strong incentives for everyone, including Independents, to make preference deals (and from there to even share some resources to get their preference recommendations out). Similarly, the direct mayoral electoral system also naturally creates some loose affiliations across tiers, especially for councilor candidates seeking to ride on the coat-tails of a popular mayoral candidate.

1. **Incentives**. Flushing out 'groups' may involve incentives to registration. The typical incentives for parliamentary parties to register are (a) ballot labels and (b) control of public funding. But by definition, a group seeking to mask itself as a bunch of distinct 'Independents' will not want a ballot label. And, as yet, public funding does not exist at local election level.

   A public inquiry like this – and especially any adverse findings or prosecutions – is an incentive in itself. Laws of imperfect enforceability, and with fuzzy definitional constraints, typically *only* achieve effect in this manner. So this inquiry will have some expressive and deterrence value.

2. **Definitions and sanctions**. The current law seems to assume the 'Independent' candidate to be the unspoken norm. Yet since the introduction of mandatory 'group' registration, Independents are formally the residual class of candidate. This is understandable given the idea of a registrable 'group' was grafted onto the pre-existing, laissez-faire law that assumed, for historical reasons, that the Independent was the natural local government candidate.

   An alternative would be to make the category 'Independent' an explicit one. One that is to be earned, and dichotomous with a 'group'. The category 'Independent' would then be a ballot label that would appear besides (hopefully) genuine individual candidacies. This model would require that there be a list of prohibited activities for 'Independents' – eg sharing campaign resources or donations; co-ordinated campaign or pre-election activities with any other candidate at least in the same council area.

   Anyone found to have been elected as an 'Independent' who was in breach of those activities in a non-trivial way might be subject to ouster, either via an election petition or perhaps also by the CCC. The CCC option is raised simply because the time limits for election petitions are so short, and evidence of offences without targeted victims may take time to surface. The alternative to ouster would be to borrow the existing 100 penalty unit maximum fine from section 183. A factual issue for this inquiry is whether a monetary-only sanction has been sufficient. A significant fine should in any event remain as a deterrent to fake Independents

   A potential downside of this suggestion is that it might artificially force an evolving political landscape into a dichotomous one: eg it might inhibit simpatico candidates who previously were unaware of each other from forming natural alliances during a campaign. But that may not be a huge downside, if it guides candidates into a simple and comprehensible system. It may also deter 'dummy' candidates: I'm not sure if the current definition of a 'group' does that.[4] The definition could also make it clear that the mere public recommendation of support (eg via preference recommendations) for another candidate is not in itself evidence of a lack of 'Independent' status.

[4] A dummy is not part of a 'group' to promote his election. He is more like a decoy designed to lose but to siphon preferences.

3. **Campaign finance**. I have avoided commenting on reform of campaign finance at local elections. That is a big issue: a dog best not wagged by the tail of the Independent vs group issue. It implicates a wider context that varies between large and small councils, and should be driven by fairness in the sense of political equality (a value less relevant to the issue at hand).

   That said, if there were rigorous policing of a requirement for *all* local campaigns and candidates to nominate an 'agent', the means to trace and enforce the 'group'/'Independent' distinction may be enhanced. A group requires an agent.[5] But as I read the Act, there is otherwise no requirement for a specified agent, just a requirement for a dedicated campaign account[6] Compare the UK where the *Final Report of the Committee on Electoral Law Reform* (1948, Cmd 7286) stated: 'The object of the requirement [to have an agent] is that there shall be an experienced person responsible to the candidate and to the public for the proper management of the candidature and in particular the control of expenditure. … We see no reason for any distinction in this matter between parliamentary and local elections … We recommend, therefore, that as at parliamentary elections a candidate at local elections should be required either to appoint an election agent or to himself assume the duties…' It should be noted the UK had expenditure limits on candidates. It also had a history of election 'agents', including a common law of electoral agency, by which a candidate was liable for the acts of her agent akin to an employer's vicarious liability for their employees.[7] There may be a need in a diverse jurisdiction like Queensland to avoid crudely enforced or complex procedural nets that may entangle many small and genuine candidacies.

   To the extent the problem at hand is driven not just by the desire to appear 'Independent' but also the masking of pro-developer money, the shift to 'real-time' donation disclosure may partly assist. For example, real-time disclosure may better inform the media about donation flows.

4. **Education**. Related to all this is the importance of a single source of clear information and even education, for would-be local candidates and politicians. Subject to proper resourcing, the ECQ is the obvious site for this. An observation about electoral authorities generally is relevant here: there is a tendency for information pitched at voters to be crafted in engaging ways, yet for information directed at political actors to be very formal. This arises out of limited budgets and out of a concern to merely re-state legal obligations. But government communications strategies exist to make public service information more effective and digestible, and this can be produced alongside links to the underlying legal text and official forms.

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[5] Section 42.
[6] Contrast section 111 (attributes a kind of agency to certain campaign committees) with section 126 (dedicated campaign account required).
[7] The employment analogy dates to the 1860s, eg *The Norwich Election Petition* (1869) 1 *O'Malley and Hardcastle* 8 at 10. It meant that a candidate could not shirk liability the way a principal could shirk a commercial agent's liability by saying 'but I told the agent to not do X or Y'.