Since the abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) in 2004, there has been a void in national Indigenous representation. In 2007, the Australian Government committed to establishing a national representative body which would build a partnership between Government and Indigenous people. In laying down the founding principles, the Government articulated that it will not 'create another ATSIC' or hold separate elections and that, while the body will have 'urban, regional and remote representation', it 'will not have a service delivery role'.

With this Government mandate, there was an initial stage of consultation and the appointment of Tom Calma, then Aboriginal and Torres Strait Islander Social Justice Commissioner, to assemble a Steering Committee for the creation of a national representative body. The Steering Committee was constituted by Indigenous people and ran further consultations before producing the report Our Future in Our Hands in August 2009. The report proposed the creation of a National Congress of Australia's First Peoples ('Congress'). Late last year the Government gave official support to Congress and committed $29.2 million to its establishment and early years of operation.

This article compares functions and governance of ATSIC with those proposed for Congress. It first considers the policy basis of self-determination that gave rise to ATSIC and the erosion of that policy that led to its demise. It then addresses the vision for Congress. The article finally questions whether a new Indigenous representative body can have a meaningful role within the current Indigenous policy framework. Does the ideology of 'building partnerships' go far enough in realising calls for self-determination?

INDIGENOUS NATIONAL GOVERNANCE AND THE PROMISE OF SELF-DETERMINATION

Instruments of Indigenous governance are regarded as central to self-determination. They allow Indigenous people to be involved in decision making about their own future. This 'policy' of self-determination was first endorsed by the Whitlam Government in 1972. Although a much more limited concept of 'self-determination' than that set out at international law, the policy variously promoted greater Indigenous participation in Government decisions on Indigenous affairs, allowed a degree of Indigenous control over service delivery and supported the establishment of Indigenous organisations. At the national level, under the auspices of 'self-determination', successive Australian governments have experimented with a number of Indigenous representative organisations, including the National Aboriginal Consultative Committee, the National Aboriginal Conference, ATSIC and, more recently, the National Indigenous Council.

Of these various bodies, ATSIC was the most broad-reaching, straddling representative, executive, research and service delivery roles. Self-determination was a concept underpinning its creation; in 1987, then Minister for Aboriginal Affairs, Gerry Hand said, 'Until all Australians recognise this need for self-determination, recognise the Aboriginal and Islanders' pride and dignity as a people and until Aboriginal and Islander people can take their rightful place as full and equal participants in the richness and diversity of this nation, our claims to being a civilised, mature and humane society sound hollow.'

Formed in 1990 as a statutory body under the Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) ('the ATSIC Act'), the principle of 'self-determination' was to be enunciated in a preamble to the ATSIC Act. Ultimately, though, this proposal was defeated by the Opposition, which preferred the language of 'self-management'. Section 3 of the ATSIC Act outlined the objectives of the new representative body, which included the formulation and coordination of policies affecting Indigenous people; the promotion of self-management; and furthering economic, social and cultural development.

The constitution of the ATSIC Board in its final incarnation in 2004 comprised 16 Zone Commissioners. The Commissioners were elected from 35 Regional Councils, which were directly elected by Indigenous people. Councilors responded to the needs of local communities by formulating plans on improving...
economic, social and cultural outcomes and working with the ATSIC Board and governments to implement plans. The representative objectives of ATSIC were limited by its structure and electoral turn out. In order to vote, Indigenous people had to be registered on the electoral roll, which invariably missed a portion of the population. Of those registered, voter turn-out was less than 30%. Women were generally under-represented, and community councils were based on electoral demarcations, rather than on 'boundaries traditionally recognised by Aboriginal people'. Therefore, the regional councilors were often representing disparate communities that lacked common interests or needs.

Since its genesis ATSIC's capacity for self-determination was constrained by onerous administrative compliance through ongoing audits, performance evaluations, reporting obligations, policy changes and inadequate funding. Under s 76 of the ATSIC Act, the Office of Evaluation and Audit was required to monitor the Commission on a regular basis. It would provide quarterly audit reports to the Minister for Indigenous Affairs, and evaluation reports on every office and service program every three years. Frank Brennan described the close scrutiny of ATSIC's expenditure as revealing the 'underlying philosophy of the legislation which is accountable self-management rather than self-determination'.

The final review of ATSIC in 2003 identified a number of concerns with its organisation. It recommended greater regional control of policy and service delivery, public declarations of conflicts of interest, additional performance evaluation by the Productivity Commission, protocols covering working relationships for the elected and administrative arms, and governance training for board members.

While the report did not recommend the abolition of ATSIC, in early 2004 the Federal Government announced that the body would be another casualty of the emergent Indigenous policy of 'practical reconciliation'. The decision to disband ATSIC was followed through with bipartisan support. There was no consultation with ATSIC or Indigenous communities. The Prime Minister and Opposition Leader justified the abolition by reference to the 'failure' of self-determination.

NATIONAL CONGRESS OF AUSTRALIA'S FIRST PEOPLES

While the Labor Opposition regarded ATSIC as a failed experiment, the incumbent Federal Government has sought to establish another Indigenous representative structure to fill the void left behind. In this pursuit, it has emphasised building partnerships and achieving equality. Consistent with its pre-election approach, self-determination does not feature prominently in the Government's language. Instead, it is intended that Indigenous Australians will be 'involved in developing policies and programs to improve their lives' and that their views will be 'represented to Government through credible mechanisms'.

Notwithstanding the Government's reticence, the Steering Committee set for itself self-determination as a foremost guiding principle in developing the blueprint for Congress. In its report, the Steering Committee states that a new representative body is critical to providing 'a national voice' that will 'enable the goals, aspirations, interests and values of Aboriginal and Torres Strait Islander peoples to be heard in national debate'. It will also have an essential role in advocating rights, including 'our right to determine our political status and pursue our economic, social and cultural development'. Importantly, though, Congress has been designed as a purely advisory body; it will have no direct role in developing policy or implementing services.

COMPOSITION

Congress has been designed in a way that will engage existing Indigenous organisations and community groups, as well as meritorious Indigenous individuals. This will prevent duplication of existing Indigenous bodies, which was identified as a problem with ATSIC. At the same time, it will present new pressures to already under-funded Indigenous organisations.

There are a number of layers of the Congress. Firstly, the Steering Committee has selected an Ethics Council comprised of Indigenous people 'who are widely recognised for their integrity'. The Ethics Council will develop and monitor Congress' ethical standards. Congress will be divided into three chambers comprised of delegates: the Representative Bodies Chamber (40 delegates), the Sectoral Chamber (40 delegates) and a chamber comprised of respected members of the Indigenous community (40 delegates). In addition, based on a shortlist prepared by the Ethics Council, the National Executive has now been elected. Each layer of the organisation will be subject to a gender-balance requirement.

CHAMBER 1

This will draw on Indigenous representative bodies at national, state and territory and local levels. Members will be selected based on strict criteria, including
The Government has already confirmed that it will not be supporting a future fund and has encouraged the body to source funds from 'other sectors'. The Minister for Indigenous Affairs, Jenny Macklin, has stated that funding for the Congress will be administered in the same way as it is for other national peak bodies, respecting the right of organisations to put their view, while requiring them to demonstrate that they are representative and that funding is used responsibly.

In the absence of a capital fund, financial autonomy will be unviable. This was one of the keystones of the new model, put forward by the Steering Committee to distinguish Congress from ATSIC. This limitation will not only maintain its dependence on Government, but also limit the body's scope to initiate new projects, research and consultations. One of the most forthcoming criticisms of ATSIC was that it lacked 'certainty of access to resources' which Indigenous people controlled. So, notwithstanding the development of an extra-governmental corporate structure, the question of financial dependence means that Congress will once again be prone to budget cuts where it voices opposition to government policy.

CONCLUSION
Our Future in Our Hands responds to a need arising from the absence of a national Indigenous representative body since the demise of ATSIC. In its absence, bi-partisan Indigenous policy has been able to develop without Indigenous input. The Steering Committee sought to overcome some of the shortcomings of the ATSIC structure - in particular its lack of engagement with local organisations - through the representative and sectoral chambers. However, unlike previous representative bodies, whose membership was determined by democratic elections, Congress delegates will be partly appointed. With respect to the election of the National Executive, only those Indigenous people who successfully apply to be members of Congress can vote at Annual General Meetings. Moreover, the National Executive was drawn from a shortlist compiled by the Ethics Council. In these respects, there are questions about how 'representative' this new body will be at the local and community levels.

Moreover, one of its benchmarks for success - financial autonomy - has already become untenable. This not only puts Congress on shaky ground but calls into question the nature of the Government's commitment to 'building partnerships' with Indigenous people. It reveals 'partnerships' to be something quite different from the principle of self-determination. The failure to advert to the central pillar of financial autonomy furthers the constraints...
imposed on the new body from the outset, that is, the lack of power to deliver services, to implement policy, or to conduct separate elections. These practical limitations are in many ways a step backwards, reinforcing the idea that Indigenous people are unable to govern themselves unless they are subject to strict criteria and supervision.

Ultimately, the success of Congress will depend on its capacity to attain legitimacy and support from Aboriginal and Torres Strait Islander people across Australia. Tom Calma has made it clear that the model set out in Our Future in Our Hands was ‘determined and controlled by Indigenous people’. However, if this is to continue into the next phase of national representation, the Government will have to move beyond its uneven construction of ‘partnership’ towards self-determination.

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1 Department of Families, Housing, Community Services and Indigenous Affairs (FaHCSIA), National Indigenous Representative Body - Update November 2009 (2009).


3 Steering Committee for the Creation of a New National Representative Body (Steering Committee), Our Future in Our Hands: Creating a Sustainable National Representative Body for Aboriginal and Torres Strait Islander Peoples, (2009) 1.


5 See Jackie Huggins, “Speech to the Cultural Heritage and Native Title Conference” (Speech delivered at the Cultural Heritage and Native Title Conference, Brisbane, 30 September 2003).

6 See, for example, Article 4 of the United Nations Declaration on the Rights of Indigenous Peoples.

7 A central legislative outcome of the era of self-determination was the Aboriginal Councils and Associations Act 1976 (Cth). This gave Indigenous peoples the statutory right to form associations. Over three thousand Aboriginal councils, associations and corporations, including Aboriginal land trusts, town councils and business enterprises, have been incorporated under the Act. See Tim Rowse, ‘Culturally Appropriate Indigenous Accountability’ (2000) 43(9) The American Behavioral Scientist 1514, 1517.


9 Senator Tate (on behalf of Minister Hand), ‘Foundations for the Future’, Senate Hansard, 13 December 1987, 3433.

10 Ibid.

11 See Aboriginal and Torres Strait Islander Commission Act 1989 (Cth) No. 80 of 2004, Schedule 1. Originally ATSIC had 60 Councils, which was one of the demands that emerged in Minister Hand’s consultation (along with the increase of zones from six to 17, including the Torres Strait). The Chair was an elected position from and among the Zone Commissioners (see Schedule 1, s31A Aboriginal and Torres Strait Islander Commission Amendment Act [No. 1] 1990 (Cth).

12 This was mandated under s 94(1) Aboriginal and Torres Strait Islander Commission Act 1989 (Cth).


18 Each of the 33 offices, containing up to 1000 public servants, was reviewed each quarter, see Lois O’Donoghue, Addresses to the United Nations’ (Speech delivered at the United Nations Working Group on Indigenous Populations, Geneva, July 1992). See also s 71, Aboriginal and Torres Strait Islander Commission Act 1989 (Cth).

19 Brennan, above n16.


21 Ibid. 8-13.

22 The policy of practical reconciliation seeks to mainstream Indigenous services and removing support for Indigenous governance structures, which were regarded as akin to ‘symbolic reconciliation’. From 1996 the Government began to incorporate Indigenous services run by ATSIC into mainstream Government departments. For a general discussion, see Andrew Gunsaulus, ‘The Howard Government’s Approach to the Policy of Indigenous Self-Determination’ (2008) 1 MAJ Review 1. The abolition of ATSIC was legislated through the Aboriginal and Torres Strait Islander Commission Amendment Act 2005 (Cth).


24 FaHCSIA, above n1.

25 FaHCSIA, above n2, 2.

26 Steering Committee, above n3, 6.

27 Ibid, citing the UN Declaration on the Rights of Indigenous Peoples.

28 Brennan, above n16.

29 Steering Committee, above n3, 26.

30 Ibid. in January 2010 the inaugural Ethics Council was selected, comprising Tom Calma, Larissa Behrendt, Wesley Enoch, Mary Graham, Nalwarri Figuruvuuthun and Lester Inabina Rigney see Australian Human Rights Commission, Inaugural Ethics Council Up and Running’ (Press Release, 4 January 2010).

31 In May 2010, the first Executive Committee was selected, comprising Sam Jeffrias (co-chair), Kerry Arabena (co-chair).
Josephine Scouris, Peter Buckskin, Ned David, Colleen Hayward, Klynton Wanganeen and Daphne Yarram, see National Congress of Australia’s First Peoples, 'New Congress to Represent Aboriginal and Torres Strait Islanders' (Press Release, 2 May 2010).

32 Steering Committee, above n 3, 26-27.
34 Steering Committee, above n3, 27.
36 Ibid.
37 Ibid.
38 Ibid 1.
39 Ibid 22.
41 Steering Committee, above n3, 18, 31.
44 Ibid.
48 Aboriginal and Torres Strait Islander Social Justice Commissioner, above n 33.