



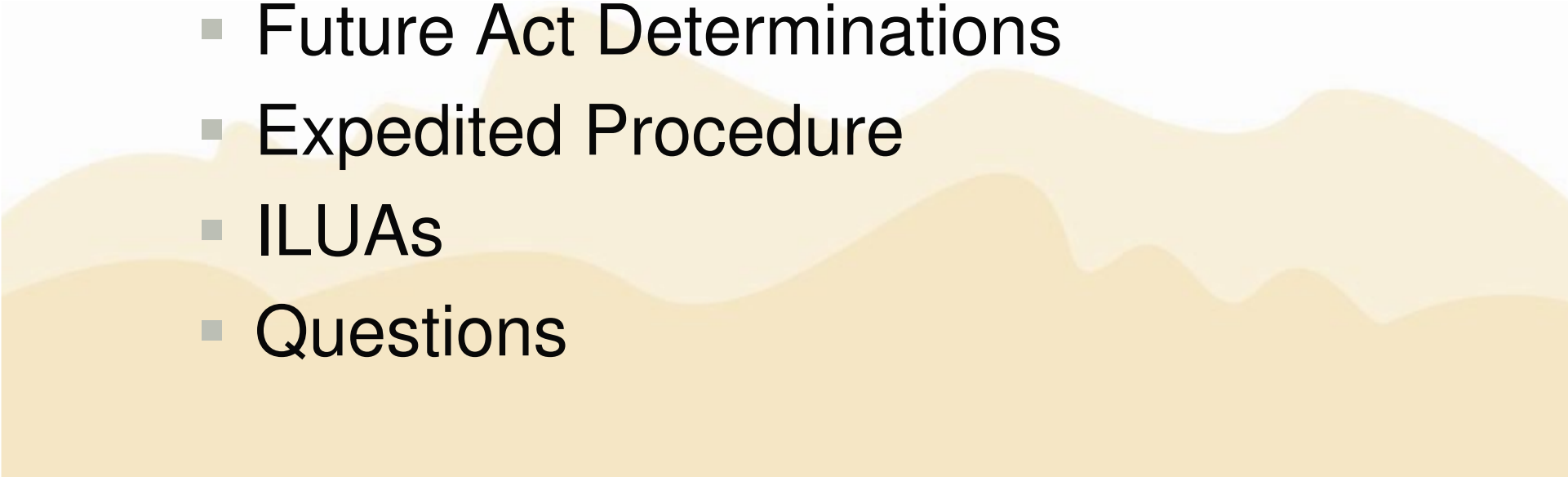
National  
Native Title  
Tribunal



# Native title and the claim process: an overview



# Today's Agenda

- NTA; the beginnings of Native Title
  - Native Title Claims Process
  - What is a future act?
  - Agreement making
  - Future Act Determinations
  - Expedited Procedure
  - ILUAs
  - Questions
- 

# What is native title?

- The recognition (not a grant) in Australian law of the rights and interests of Indigenous people in land and waters, according to their traditional laws and customs.
  - Recognition of pre-existing rights and interests
  - May be exclusive or non-exclusive
  - Extinguished by valid inconsistent acts
  - Bundle of rights e.g. – the right to hunt, fish, protect sites, collect ochre, live on, camp

# Where has it come from?

- Judicial decision

In 1992, nearly 200 years after the arrival of the British, the High Court of Australia made an historic decision. In *Mabo (No 2)*, the Court decided that the doctrine of *terra nullius* should not have been applied to Australia and that the common law of Australia would recognise native title.

- Legislation

The *Mabo (No 2)* decision led to the Australian Parliament passing the *Native Title Act 1993* (Cwlth).



# Native Title Act

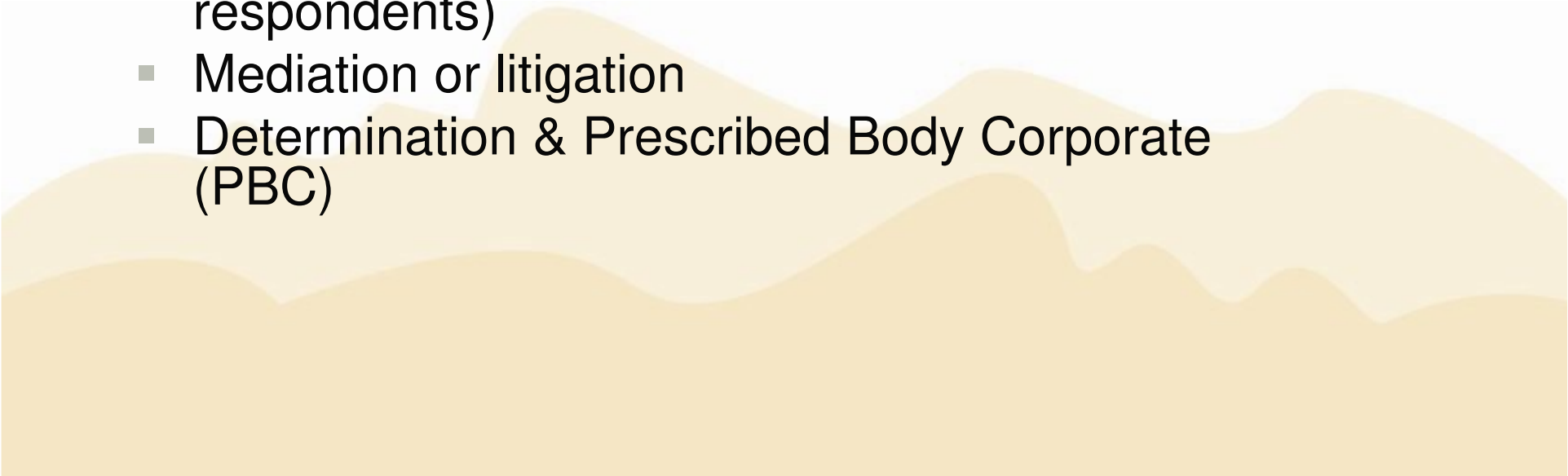
- Recognition and protection of native title
- A process for determining claims to native title
- A regime in which future dealings affecting native title may proceed
- A scheme for negotiating Indigenous Land Use Agreements (ILUAs)



# Native Title and Heritage

- The *Native Title Act 1993* (Cwlth)
  - Recognition and protection of rights and Interests
  - Registration of a claim provides claimants the right to negotiate but not to veto future acts
  - Federal Court determination
- The *Aboriginal Heritage Act 1972* (AHA) – WA State legislation
  - Protect and preserve Aboriginal heritage
  - Responsibility of land owner to report any findings
  - Aboriginal Cultural Material Committee advises the Minister relating to Aboriginal heritage
  - S.18 approval to disturb a site

# Native title determination cycle

- Filing the application in the Court
  - Referred to the Tribunal for registration testing
  - Activation of future act rights
  - Notification
  - Research/amendment
  - Agreement on connection (with the State & respondents)
  - Mediation or litigation
  - Determination & Prescribed Body Corporate (PBC)
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# Registration Test

- If an application satisfies the conditions of the registration test it:
  - is entered on the Register of Native Title Claims (RNTC)
  - accrues certain procedural rights (including the right to negotiate)
- If an application does not satisfy the conditions of the registration test it:
  - remains on the schedule of applications but is vulnerable to dismissal unless it can demonstrate to the Court why it should not be dismissed (NTA amended in 2007)
  - does not accrue procedural rights



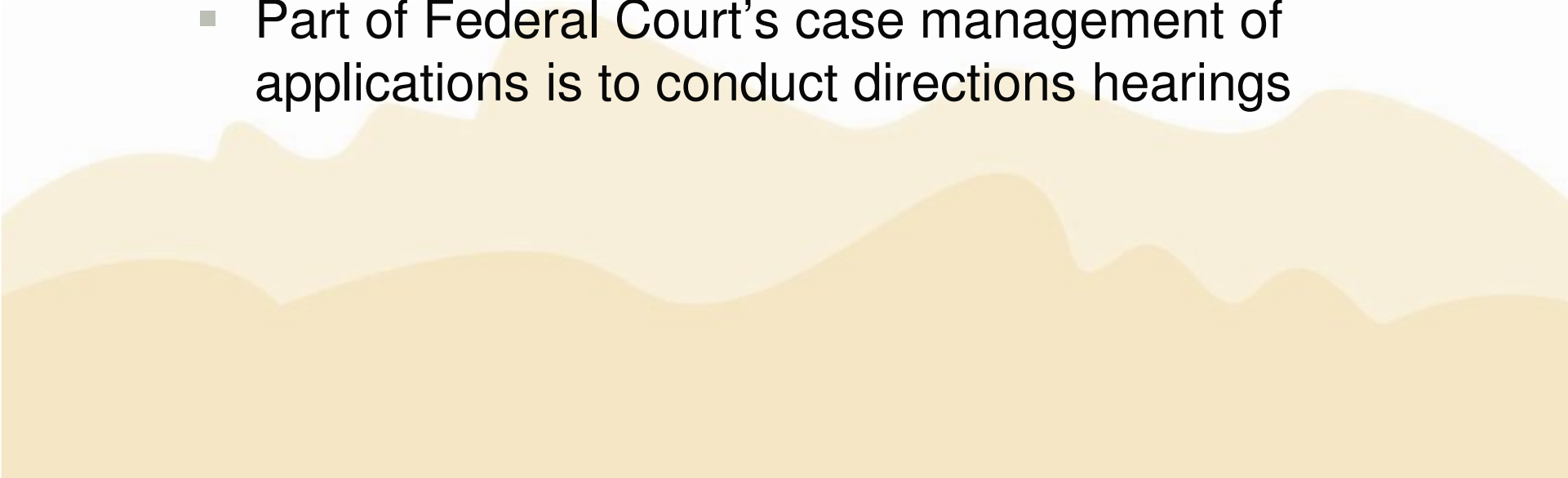
# Notification

- The Registrar must inform the public in a determined way of a claimant application
- This is achieved by:
  - Obtaining a tenure search from Landgate listing all people whose interest is potentially affected by the application
  - Writing to these parties individually, inviting them to register their interest with the Federal Court (become parties to the proceedings)
  - Advertising publicly (Koori Mail and Local Newspapers)

# Notification

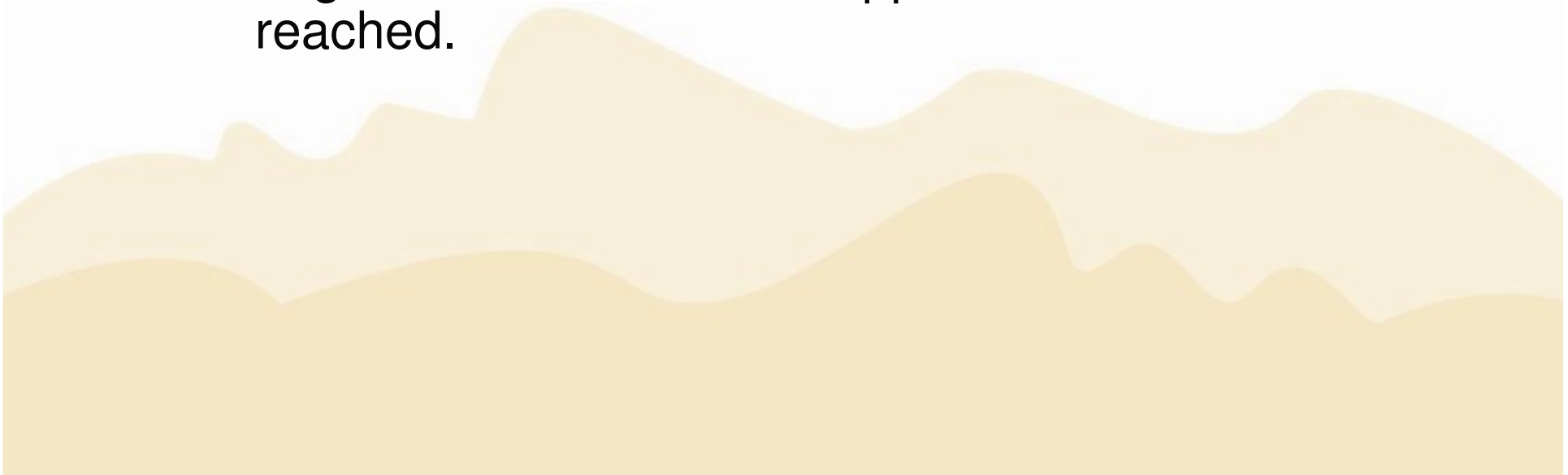
- Notification period is three months
- Interest holders become parties by application to the Court
- Co-ordination and settlement of the party list is the responsibility of the Federal Court
- After the notification period, interest holders can still be joined as parties but may be charged
- When an application moves towards determination the Court can again ask parties to confirm their interest(s) and if not they may be removed from proceedings.

# Referral to Mediation

- Federal Court finalises party list
  - Refers application for mediation (prior to 2009 all matters referred to the Tribunal. Act amended to allow the Court to decide when & who should mediate – the Tribunal, the Court or other suitable body or person)
  - Part of Federal Court's case management of applications is to conduct directions hearings
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# Mediation supervised by Federal Court

- Federal Court may request that mediators report on the progress on mediation and may request a negotiation plan
- Federal Court may order that mediation cease if negotiations to settle the application is not reached.



# What is native title claim mediation?

- No longer case managed by the NNTT.
- Role of State Government and NTRB
- The Federal Court case manages each claim to either a consent agreement or litigation outcome.



# Purpose of Mediation


- Native title determination mediation is to assist parties to reach agreement about:
  - Whether native title exists and, if it exists:
    - who are the native title holders
    - the nature and manner of exercise of native title rights
    - the intersection between native title and other rights
    - whether the rights confer possession, occupation, use and enjoyment to the exclusion of all others



## Determination of Native Title

- Determinations of native title are always ordered by the Court but may be by:
  - consent (consent determination by agreement through mediation)
  - contest (determination ordered as result of trial)
- There can only be one determination of native title for any area
- Set out extent and nature of residual native title rights (recognition)
- Are vested in a Prescribed Body Corporate

# Summary

- Application filed in the Federal Court
  - Referred to Tribunal
  - Registration Test
  - Notification
  - Mediation or litigation
  - Determination
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- A decorative graphic at the bottom of the slide consisting of several overlapping, wavy, horizontal bands in shades of light beige and cream, creating a soft, abstract background.



# FUTURE ACTS



# What is a future act?

Proposed activity relating to land or waters which affects native title rights and interests. eg the creation, acquisition, renewal and transfer of interests in land.

An act *affects* native title if it extinguishes native title rights or is wholly or partially inconsistent with the continued existence, enjoyment or exercise of those rights (s.227 NTA).

‘Future acts’ are not **VALID** unless they comply with the relevant provisions of NTA.

# Agreement making

- Procedural rights are the mechanism to initiate agreement making with proponents
- Proponents may be:
  - Government
  - Mining companies
  - Other people with interests in land
- Agreements are usually progressed in the form of an ILUA or other form of agreement
- NNTT can assist in mediation of agreements

# Tribunal involvement:

Tribunal only involved if:

- Matter has been notified by the relevant Commonwealth, State or Territory body under subdivision P - Right To Negotiate  
and only when:
- A negotiation party requests assistance reaching agreement over the act - s 31(3)  
or
- A negotiation party makes a future act determination application for the act to be done - s 35  
or
- A native title party objects to the Government Party's statement that the Expedited Procedure is attracted. i.e. that the normal right to negotiate procedure does not apply

## FADAs – What are they?

- Tribunal can make a determination as to whether the act (ie. the grant) can go ahead or not.
  - Tribunal makes determinations that can be:
    - that the act must not be done
    - that the act may be done
    - that the act may be done, subject to conditions.
- (s 38(1) of *NTA*)

# FADA – time frames

- ❑ Parties might chose to lodge a FADA when
  - A minimum of six months have passed since the s 29 notification day (s 35)
  - Negotiations have stalled and there is no prospect of reaching an agreed outcome.
  - Agreement essentially reached but technical issues prevent execution of documents (e.g. the death of an applicant) to finalise the matter.
  - No other legislative timeframes apply to this process.

# How the FADA Inquiry is run...

## □ What the NNTT considers in making its determination... s 39 NTA

- a) The effect of the act on:
  - (i) enjoyment of native title rights & interests;
  - (ii) the way of life, culture and traditions of any of those parties;
  - (iii) development of the social, cultural and economic structures of any of those parties;
- b) the interests, proposals, opinions or wishes of the native title parties in relation to the management, use or control of land or waters in relation to which there are registered native title rights and interests, of the native title parties, that will be affected by the act;
- c) economic or other significance of the act to Australia, the State or Territory concerned,
- d) any public interest in the doing of the act
- e) any other matter the Tribunal considers relevant.

# Negotiation in Good Faith

- ❖ Section 31 – requirement for parties to negotiate in relation to future acts not in expedited procedure
- ❖ Section 30A – the negotiation parties are the Government party, any native title party, and any grantee party (ie the proponent)
- ❖ **Section 31(b) – obligation to negotiate in good faith**
- ❖ Section 36(2) – failure to negotiate in good faith by any party other than the native title party means that the Tribunal must not make a determination

Facilitating timely and effective  
outcomes



# Good faith ('Njamal') indicia

*Western Australia v Taylor (1996) 134 FLR 211*

- Unreasonable delay in initiating communications in the first instance
- Failure to make proposals in the first place
- Unexplained failure to communicate with the other parties within a reasonable time
- Failure to contact one or more of the other parties
- Failure to follow up a lack of response from the other parties
- Failure to attempt to organise a meeting between the native title and grantee parties
- Failure to take reasonable steps to facilitate and engage in discussions between the parties
- Failing to respond to reasonable requests for relevant information within a reasonable time
- Stalling negotiations by unexplained delays in response to correspondence to telephone calls

# Njamal Indicia (cont...)

- Unnecessary postponement of meetings
- Sending negotiators without authority to do more than argue or listen
- Refusing to agree on trivial matters, eg a refusal to incorporate statutory provisions into an agreement
- Shifting position just as agreement seems in sight
- Adopting a rigid non-negotiable position
- Failure to make counter proposals
- Unilateral conduct which harms the negotiating process, eg issuing inappropriate press releases
- Refusal to sign a written agreement in respect of the negotiation process or otherwise
- Failure to do what a reasonable person would do in the circumstances

# Expedited Procedure

- Applies to acts that are determined by the State to be not likely to:

- Directly interfere with community or social activities
- Interfere with areas or sites of particular significance
- Involve major disturbance to any land or waters

EG : Exploration licences.

- **Timeframes:**

- From the State's notification date
  - 3 months- for non-registered NTP to become registered.
  - 4 months – for NTP to lodge an objection to the EP.
  - Total time is dependant on objections progress.

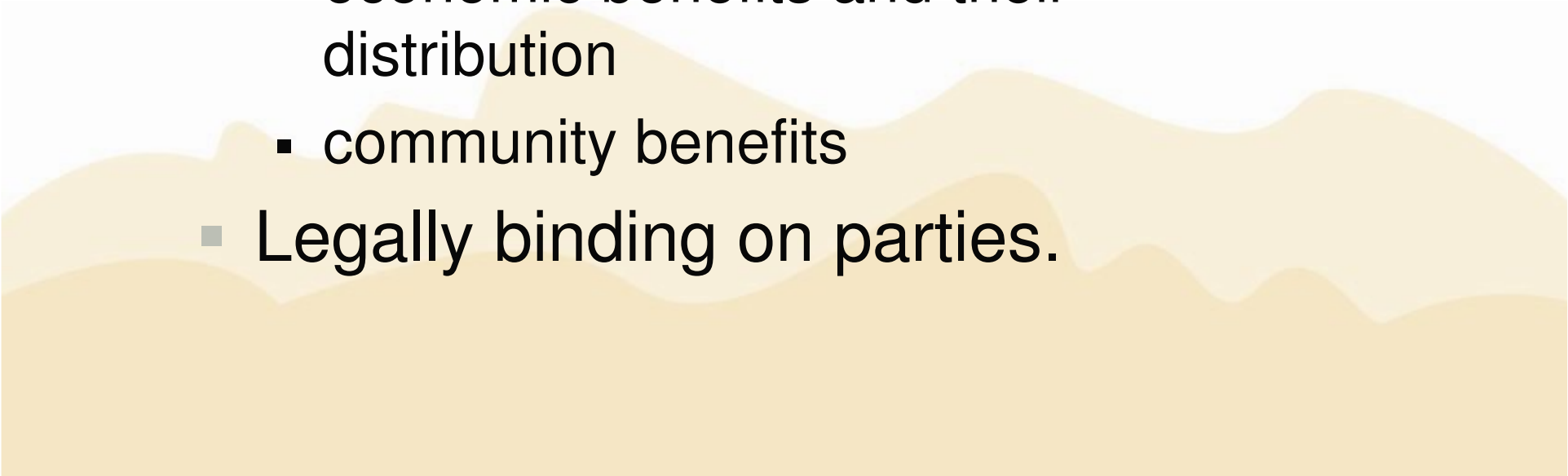
# Expedited Procedure

- Parties may use the 4 month period to negotiate an agreement.
- If this does not occur, the Tribunal will determine that either;
- The Expedited Procedure does apply (and the grant will be made) or
- does not apply (sending the matter into Right to Negotiate).

# s24MD Notices

- The State may notify their intention to take land (compulsory acquisition) under s24 MD.
- In general, compulsory acquisition extinguishes NT, with some exceptions.
  - NOIT on behalf of a third party
  - Creation of infrastructure supporting a mine

# ILUA

- An agreement used to resolve a range of issues, for example:
    - future acts
    - governance arrangements
    - economic benefits and their distribution
    - community benefits
  - Legally binding on parties.
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# Role of PBCs

- Native title groups must nominate a 'prescribed body corporate' (PBC) to hold or manage their native title.
- Also referred to as a RNTBC.
- Must consult with and obtain consent from native title holders in relation to any decisions which surrender or affect native title rights and interests.
- Effective PBCs utilise and maximise native title rights and benefits and engage meaningfully in land management.

# Role of PBCs

- PBC negotiates and enters into agreements on behalf of the native title holders.
- PBCs are an integral stakeholder in the native title system.

