Question 7: Do you agree with the proposed list of considerations the Committee is required to take into consideration when determining whether an application? If not, why not?

The list of considerations ought not to be prescriptive. If it is then the committee will likely get stuck on adhering to arbitrary considerations that are for this current time considered important. This will inevitably lead to the committee sifting through information to separate it into that which neatly fits within the auspices of one or more of the prescribed questions and thereby lose focus on the overall task. The overriding issue my be that natural justice is clearly seen to be done (section 27(1) New Zealand Bill of Rights Act) and care must be had not to get bogged down with mechanics. If a list is to be used then the list needs to be a non-mandatory list (ie, the committee may take into account such matters it considers relevant in the determination of any matter including, but not limited to, …). That way, the committee can take into account that which might be relevant in any particular case.

Question 8: Are there any additional factors that should be added to the list of relevant considerations?

Having regard to the list provides, I consider:

a. Have the parties acted in good faith? It's not clear to me why this is an included item, let alone one so high up in a list. It is expected that parties are acting in good faith. Otherwise bad faith would surely invalidate any application or opposition to it; and may even amount to a criminal offence. If this issue is to be included them perhaps: Is there any evidence that the parties have not acted in good faith? That way there is acknowledgement that good-faith is an expectation.

b. Have kaitiaki demonstrated their relationship to the taonga species and associated mātauranga Māori? I worry about the focus here being obtuse to the point the focus is no longer on the facts but, rather, how slick the applicant/opposition are. There might be evidential problems in demonstration of relationship. Perhaps the correct question is: What is the relationship between kaitiaki to the taonga species and associated mātauranga Māori?

c. What is the kaitiaki assessment of the affect that the grant of a PVR might have? This is a better question but can be simplified further to: What is the kaitiaki assessment of the affect that the grant of a PVR? The problem with the original wording is that it invites speculation and might result in a mire of semantics.

d. How significant is that affect? The problem with this is that it requires some form of assessment but neither considers whether that is quantitative or qualitative. Significant to whom, why and so on. To be fair, this is actually just repetition of the previous question. An affect is either de minimus and thereby not of assistance to the application (and potentially bad faith) or it is not. The whole point of consideration of kaitiaki PVR is to factor those issues into grants. I recommend just removing the question.

e. Is this affect consistent with (i) the nature of the kaitiaki relationship, (ii) the affect from PVRs already granted in relation to that species? Just one more thing to add: Is this affect consistent with (i) the nature of the kaitiaki relationship, (ii) the affect from PVRs already granted in relation to that species, (iii) fostering sustainability of the taonga species? To be blunt, the purpose of this legislation is sameness and sustainability. Why isn't that an issue to take into account?

f. Have mitigations been considered? I consider that question is a little meaningless. Perhaps, better is: What mitigations are available to the proposed PVR that are consistent with preservation of kaitiaki relationship to the taonga species and associated mātauranga Māori? Again, the questions are deigned to focus the attention of the committee and if they are not on point then all that is done is to invite a loss of focus.

Just a small point on paragraph 61 of the report – Option 2 wouldn't be particularly cost effective if the PVR ended up being caught up in judicial review or Waitangi Tribunal proceedings due to failures of process.

Question 11: Do you agree the Committee should only facilitate discussions between kaitiaki and breeders on the issue of mitigations (Option 2)? If not, why not? Is there an alternative you wish to propose?

In short, no. Committees should be able to hear from anyone the Committee consider relevant to any issue of determination before them. Why is there a limit?

Question 12: Do you agree with our preferred option for a first stage review of determinations of the Committee (Option 3)? If not, why not? Is there an alternative you wish to propose?

In short, yes. This is similar to other quasi-judicial Committees. For instance, the Legal Services Agency review process has been refined over its lifetime and the current model works well.

Questions 24 and 25 – growing trials.

I am concerned at the all or nothing approach there. I agree Option 2 is best when the outcomes are utterly unpredictable and potentially catastrophic to the environments, the kaitiaki interests or destruction of a species but, to be fair, that's a pretty extreme approach to take to all cases. Perhaps a fairer approach would be to take Option 2 as the status quo which could be changed to Option 1 if the breeder can satisfy the Committee that growing trials are not required in that particular case. That is to say, the onus is on the breeder.

Questions 26 and 27 – who does the growing trials.

Again, surely this is an "it depends" situation. Again, I agree MBIE could opt for Option 4 as the status quo but the other ideas shouldn't be dismissed altogether and, as with the previous point, why not make the onus on the breeder to explain why an alternative option is appropriate for their situation.

Questions 31 and 32 – proceedings with Commissioner.

I consider the suggestion that the Commissioner can make decisions in a vacuum to be odd and contrary to natural justice. Of course there should be a provision akin to section 208(1) Patents Act. As to where appeals go, that would depend on the nature of the proceedings. In my view, the High Court costs regime is someone prohibitive, so maybe there could be a differentiation in costs between the hobbyist or scientific breeder as against the commercial breeder (or an ability to elect the District Court on a process akin to section 68 Criminal Procedure Act (perhaps with a regime allowing even for a Court to direct a proceeding to the District Court?), but certainly the High Court

would typically be a better place for proceedings involving high value, public interest, taonga, catastrophic implications and the like.