

## NOTICE OF DECISION UNDER SECTION 38(1)

TO: Chief Censor

**Title of publication:** Dead or Alive: Dimensions

**Other known title:** Not stated

**OFLC ref:** 1100587.000

**Medium:** Console Game

**Distributor:** Nintendo Australia Pty Ltd

**Country of origin:** Japan

**Language:** English

<b>Classification:</b>	Unrestricted: Suitable for mature audiences 16 years of age and over.
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**Excisions:** No excisions recommended

**Descriptive note:** Violence and nudity

**Display conditions:** None

	<b>Components</b>	<b>Running time</b>
<b>Game:</b>	Dead Or Alive: Dimensions	
<b>Total running time:</b>		

A direction has been given to the Film and Video Labelling Body Inc. to issue a label for this publication.

### REASONS FOR THE DECISION

The Office of Film and Literature Classification (Classification Office) examined the publication and recorded the contents in an examination transcript. A written consideration of the legal criteria was undertaken. This document provides the reasons for the decision.

### **Submission procedure:**

On 1 June 2011 the Chief Censor called in the publication for classification under s13(3) of the Films, Videos, and Publications Classification Act 1993 (FVPC Act), noting concern that the publication may contain restricted or objectionable material. The Chief Censor directed the Secretary for Internal Affairs to acquire a copy of the game, which was consequently submitted for classification by the Censorship Compliance section of the Department of Internal Affairs on 8 June 2011.

The distributor of the publication, Nintendo Australia Pty Ltd, were notified of the submission of the publication. As persons with an interest in the publication they were informed of their right to make a written submission on the classification.

Under s23(1) of the FVPC Act the Classification Office is required to examine and classify the publication.

Under s23(2) of the FVPC Act the Classification Office must determine whether the publication is to be classified as unrestricted, objectionable, or objectionable except in particular circumstances.

Section 23(3) permits the Classification Office to restrict a publication that would otherwise be classified as objectionable so that it can be made available to particular persons or classes of persons for educational, professional, scientific, literary, artistic, or technical purposes.

### **Synopsis of written submission(s):**

A written submission from the distributor was received by email on 29 June 2011. In it the distributor summarises the circumstances surrounding the game's classification in Australia, and how after due process it received a classification of 'M' in Australia. A report of material from the game, which contributed to the Australian classification, is provided as part of the submission.

The content of the distributor's submission provides a thorough review of all the content in the game. It focuses in detail on material from the game that is of relevance to classification issues, such as the nature and extent of mildly sexualised elements of the game, any nudity, and the nature and extent of violent elements. This submission was carefully considered by the Classification Office, and found to be consistent with the Classification Office's examination and classification of the game.

### **Description of the publication:**

*Dead Or Alive: Dimensions* is a fighting game for the Nintendo 3DS handheld game console. It was developed by Tecmo Koei Holdings Co. Ltd in 2011. The game utilises both screens of the console, each screen measuring about 8 centimetres across. The bottom screen is a touch screen, which the player can use for navigation, menus, special moves, and other input. Most of the game play appears on the top screen. The top screen has the option of '3D' viewing, although the cartoon-like, semi-realistic animations are only marginally more graphic with this switched on. Part of the *Dead Or Alive* series, this version of the game has 25 playable

characters, all expert in martial arts. Bios of the characters appear, along with their images. Ages of the characters vary, with some characters in their late teens, and most at various older ages, up to 1500 years old. Not all characters' ages are given, with "NA" provided in the 'age' field. Characters include Kasumi and Ayane, who present as young women. Some characters are 'unlocked' and made available as the player progresses through the game. These include Alpha 152, who is a green-glowing mutation of a clone of Kasumi, and Bankotsubo, an ancient 'Tengu', a Japanese mythological creature. Characters battle each other in martial-arts combat, and the overall narrative, told through cut-scenes, involves a nefarious high-technology corporation called DOATEC.

### The meaning of "objectionable":

Section 3(1) of the FVPC Act sets out the meaning of the word "objectionable". The section states that a publication is objectionable if it:

*describes, depicts, expresses, or otherwise deals with matters such as sex, horror, crime, cruelty, or violence in such a manner that the availability of the publication is likely to be injurious to the public good.*

The Court of Appeal's interpretation of the words "matters such as sex, horror, crime, cruelty or violence" in s3(1), as set out in *Living Word Distributors v Human Rights Action Group (Wellington)*, must also be taken into account in the classification of any publication:

[27] The words "matters such as" in context are both expanding and limiting. They expand the qualifying content beyond a bare focus on one of the five categories specified. But the expression "such as" is narrower than "includes", which was the term used in defining "indecent" in the repealed Indecent Publications Act 1963. Given the similarity of the content description in the successive statutes, "such as" was a deliberate departure from the unrestricting "includes".

[28] The words used in s3 limit the qualifying publications to those that can fairly be described as dealing with matters of the kinds listed. In that regard, too, the collocation of words "sex, horror, crime, cruelty or violence", as the matters dealt with, tends to point to activity rather than to the expression of opinion or attitude.

[29] That, in our view, is the scope of the subject matter gateway.<sup>1</sup>

The content of the publication must bring it within the "subject matter gateway". In classifying the publication therefore, the main question is whether or not it deals with the following matters in such a manner that the availability of the publication is likely to be injurious to the public good:

#### *Matters such as sex*

Included as a "matter such as sex" is any publication that in terms of s3(1A) -

- (a) ... is or contains 1 or more visual images of 1 or more children or young persons who are nude or partially nude; and
- (b) those 1 or more visual images are, alone, or together with any other contents of the publication, reasonably capable of being regarded as sexual in nature.

Sexual elements take the form of what is known in Japan as 'fan service' – material intended to please fans, often occurring as mildly sexualised elements designed to appeal to teenage boys,

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<sup>1</sup> *Living Word Distributors v Human Rights Action Group (Wellington)* [2000] 3 NZLR 570 at paras 27-29.

for example. This occurs in the game itself or as part of a photo gallery of characters. These elements are a minor part of the game, and subtle elements. In the game itself, the female characters sometimes have costumes that are revealing, occasionally affording glimpses of developed cleavage, part of the buttocks, thighs, or underpants. Detail is invariably limited, with no genitals visible, nor significant female nipple detail. This is a very minor element of the game, and the depictions are fleeting. Superfluous to advancing in the game, the revealing glimpses are likely to only mildly titillate, and the depictions are unlikely to seem erotic to players who are not already inclined to see women's bodies in a sexual way. During game play the player's focus is required to be on the manipulation of controls for fighting. Fast action frequently obscures character detail. Such elements further limit the significance of the revealing costumes.

The player also has the option of going into a computer-generated gallery, or 'showcase mode', which shows the characters as statues. These figurines can be 'collected' as they are unlocked through game-play, along with various costumes and other objects, numbering some 1000 items. Only some of them are mildly revealing. Their outfits and bodies can be examined by manipulating the point-of-view. With some effort the angle of view in the 'showcase' can be manipulated to glimpse certain figurine's legs and underpants under her dress, or slightly zoom in on a character's cleavage. 'Zooming in' between character's legs provides little reward, with detail generally being lost to geometric blocks merely approximating the human form. No genital detail is ever visible, nor is there any women's nipple detail. The depictions that can lend themselves to a mildly salacious view require effort to examine. They are limited in number, forming a very small part of the graphic environment.

One character, the green-glowing science-fiction creature Alpha 152, appears to have no clothing, or only skin-tight clothing; she has well-defined breasts and buttocks, although there is neither impression of realistic skin, nor any genital or breast detail. The lack of detail, the small screen, and fantasy setting limits the realism.

The characters that are sometimes shown in revealing outfits are adults. One of Kasumi's disguises is a school uniform as part of a covert mission; here she presents as an older teenager or senior high-school student. The costume is likely intended to be a very mild form of 'fan service' intended to appeal to older school-age girls and boys. No genital or breast detail is visible, and her underpants can only be glimpsed. Such glimpses are incidental, and neither inherently sexual in nature, nor prominent. The school uniform disguise is one of many costumes.

#### *Matters such as horror*

Some of the scenarios are mildly horrific, involving malevolent mutant creatures with advanced fighting skills, rendered with moderate detail on a small screen. It is obvious and far-fetched fantasy.

#### *Matters such as cruelty*

Matters of cruelty are a minor element, and are discussed in conjunction with the infliction of serious physical harm under s3(3)(a)(i) below.

#### *Matters such as violence*

Matters of violence are extensive but not graphic, and are discussed in conjunction with the infliction of serious physical harm and significant cruelty under s3(3)(a)(i) below.

## Certain publications are "deemed to be objectionable":

Under s3(2) of the FVPC Act, a publication is deemed to be objectionable if it promotes or supports, or tends to promote or support, certain activities listed in that subsection.

In *Moonen v Film and Literature Board of Review (Moonen I)*, the Court of Appeal stated that the words "promotes or supports" must be given "such available meaning as impinges as little as possible on the freedom of expression"<sup>2</sup> in order to be consistent with the Bill of Rights. The Court then set out how a publication may come within a definition of "promotes or supports" in s3(2) that impinges as little as possible on the freedom of expression:

Description and depiction ... of a prohibited activity do not of themselves necessarily amount to promotion of or support for that activity. There must be something about the way the prohibited activity is described, depicted or otherwise dealt with, which can fairly be said to have the effect of promoting or supporting that activity.<sup>3</sup>

Mere depiction or description of any of the s3(2) matters will generally not be enough to deem a publication to be objectionable under s3(2). When used in conjunction with an activity, the Classification Office defines "promote" to mean the advancement or encouragement of that activity. The Classification Office interprets the word "support" to mean the upholding and strengthening of something so that it is more likely to endure. A publication must therefore advance, encourage, uphold or strengthen, rather than merely depict, describe or deal with, one of the matters listed in s3(2) for it to be deemed to be objectionable under that provision.

The Classification Office has considered all of the matters in s3(2), but none are relevant to this publication.

## Matters to be given particular weight:

Section 3(3) of the FVPC Act deals with the matters which the Classification Office must give particular weight to in determining whether or not any publication (other than a publication to which subsection (2) of this section applies) is objectionable or should in accordance with section 23(2) be given a classification other than objectionable.

The Classification Office has considered all the matters in s3(3). The matters relevant to the publication are:

*s3(3)(a)(i) The extent and degree to which, and the manner in which, the publication describes, depicts, or otherwise deals with acts of torture, the infliction of serious physical harm, or acts of significant cruelty.*

The game is based around generally non-graphic bouts of fighting, with numerous undetailed depictions of the infliction of serious physical harm, and by extension, these are ostensibly acts of cruelty, although this is not a major element in itself. The game involves martial arts style fighting with the use of hand to hand combat with other opponents who must be defeated to progress through the game. Fighting involves pushing different combinations of buttons to affect various punches, kicks and throws. The onscreen violence is often frenetic with impact deriving from synthetic noises of punches, kicks and throws. These, and the depictions, are limited in realism. Blows are mostly shown through a flash of light and the recipient moving

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<sup>2</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at para 27.

<sup>3</sup> Above n2 at para 29.

through the air, or falling. Characters are magically resilient, and unrealistic fantasy elements are used in the depictions of fighting, in the plot, and in the scenarios on which the plot depends. A cutscene shows bloody injury, where DOAC armed offenders in protective gear and rifles are defeated by the ninja character Hayate, who strikes at the evil forces with his sword. Blood is briefly shown splashing from the soldiers' bodies on several occasions. Such a focus on injury does not occur during game play, and it is a very minor element overall. The style is that of a comic book, with static or slow-motion graphics, and only broad impressions given of the harm inflicted. During game play, the player's attention is mostly drawn to the manipulation of controls, and the focus is on achieving 'defeats' rather than 'kills'. The science-fiction and fantasy setting is far removed from any semblance of reality, and the overall presentation is reminiscent of older, simpler 'arcade' style fighting games. For example, motion is often limited to two dimensions, namely up/down/left/right, and the animation is highly stylised and relatively simple, as is frequently the case in arcade games.

*s3(3)(a)(ii) The extent and degree to which, and the manner in which, the publication describes, depicts, or otherwise deals with sexual violence or sexual coercion, or violence or coercion in association with sexual conduct.*

A mildly sexually coercive instance in a cutscene is noted in the distributor's submission:

In one cutscene...a male character is seen holding a female character, against her will. While holding her he makes the following comments: "How 'bout a drink, pretty little thing?" and "Aw, loosen up. I'll show you what a real man's like". This male character is soon disarmed by the intervention of another male character, and the female character escapes.

As such, this material is of limited extent and degree.

**Publication may be age-restricted if it contains highly offensive language likely to cause serious harm:**

Section 3A provides that a publication may be classified as a restricted publication under section 23(2)(c)(i) if it

*contains highly offensive language to such an extent or degree that the availability of the publication would be likely, if not restricted to persons who have attained a specified age, to cause serious harm to persons under that age.*

The publication does not contain any highly offensive language.

**Publication may be age-restricted if likely to be injurious to public good for specified reasons:**

Section 3B provides that a publication may be classified as a restricted publication under section 23(2)(c)(i) if it

*contains material specified in subsection (3) to such an extent or degree that the availability of the publication would, if not restricted to persons who have attained a specified age, be likely to be injurious to the public good for any or all of the reasons specified in subsection (4).*

The Classification Office has considered all the matters in s3B(3), but none are relevant to this publication.

**Additional matters to be considered:**

*s3(4)(a) The dominant effect of the publication as a whole.*

The dominant effect is of a '3D' fantasy fighting video game requiring good dexterity and fast reactions from the player, and featuring some heroic female avatars.

*s3(4)(b) The impact of the medium in which the publication is presented.*

The game requires player interaction, and creates an immersive environment. Any graphic material can be enhanced by the 3D setting, although is in turn limited by the cartoon-like depictions, and small screen size.

*s3(4)(c) The character of the publication, including any merit, value or importance it has in relation to literary, artistic, social, cultural, educational, scientific or other matters.*

The game has social merit. It is well produced and highly popular.

*s3(4)(d) The persons, classes of persons, or age groups of the persons to whom the publication is intended or is likely to be made available.*

The content, such as adult game characters, indicates a mature intended audience.

*s3(4)(e) The purpose for which the publication is intended to be used.*

The publication is intended to be used for entertainment.

*s3(4)(f) Any other relevant circumstances relating to the intended or likely use of the publication.*

The game is currently being sold by New Zealand retailers.

**New Zealand Bill of Rights Act 1990:**

Section 14 of the New Zealand Bill of Rights Act 1990 (NZBR Act) states that everyone has "the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form". Under s5 of the NZBR Act, this freedom is subject "only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society". Section 6 of the NZBR Act states that "Wherever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning".

**Conclusion:**

The handheld console game *Dead Or Alive: Dimensions* contains violence. There are also a small number of depictions of women in costumes that are revealing, occasionally affording partial

glimpses of cleavage, buttocks, thighs, or underpants. Such depictions are brief, or require determined effort to see, and are lacking in significant detail. They are mild and incidental to game play. To see this material as erotic requires an existing salacious awareness or intent. Children and teenagers are therefore unlikely to be harmed by the mildly sexualised material. The violence is also mild, but extensive. Repeated bouts of martial arts fighting are fundamental to the game. The fantasy representation is mostly cartoon-like and unrealistic, with a focus on deft manipulation of controls. The violence, limited in graphic detail, will not inure or disturb most children or teenagers. As such the unrestricted availability of the game is unlikely to be injurious to the public good. The game's content indicates a mature intended audience. It is therefore classified as unrestricted, although suitable for mature audiences who are at least 16 years of age.

The Classification Office has considered the effects of the NZBR Act on the application of all the classification criteria. This publication does not raise issues that make it likely to require restriction. As such the rights and freedoms in section 14 can be read consistently with the FVPC Act and are not impeded in any way.

**Date:** 6 July 2011

For the Classification Office (signed):

**Note:**

You may apply to have this publication reviewed under s47 of the FVPC Act if you are dissatisfied with the Classification Office's decision.

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