

NOTICE OF DECISION UNDER SECTION 38(1)

TO: Secretary for Internal Affairs

Title of publication: Naughty Bear
Other known title: Not stated
OFLC ref: 1001308.000
Medium: Console Game
Distributor: All Interactive Distribution
Country of origin: Canada
Language: English

Classification:	Objectionable except if the availability of the publication is restricted to persons who have attained the age of 13 years.
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Excisions: No excisions recommended

Descriptive note: Contains violence.

Display conditions: None

	Components	Running time
Game:	Naughty Bear	
Total running time:		

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:

The Secretary for Internal Affairs submitted this publication for classification on 26 July 2010 under s13(1)(b) of the Films, Videos, and Publications Classification Act 1993 (FVPC Act).

All Interactive Distribution (as distributor) was notified of the submission of the publication. 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):

The letter from the Inspector of Publications for the Secretary of Internal Affairs states that in other jurisdictions the game has received a higher age restriction than the M rating given to it in Australia. For this reason, the Inspector believes there may be grounds to have the game classified at a higher rating than the current M.

All Interactive Entertainment made a lengthy written submission stating: "the M rating is comparable to the PEGI 12 rating in the UK rather than an elevated rating of MA15+". Supporting evidence of their submission is attached to the classification file.

Description of the publication:

The publication is a third-person console game designed for use on the Xbox 360 platform. The game is produced by 505 Games and is played in single player mode or multiplayer (accessed online through Xbox Live).

Naughty Bear is a violent, satirical game with a similar tone and appearance to that of children's television shows, such as Tellytubbies. The player controls an anthropomorphic teddy bear whose sole task is to kill other bears on the island. This is achieved by scaring the bears into killing themselves, actively killing the bears using a variety of weapons, or participating in various challenges to kill the bears by other means. Points in the game are achieved by the level of mischief, sabotage and overall anti-social behaviour the player commits on each level. During the game a narrator instructs the player on how to systematically catch and kill other bears. The narrator enthusiastically praises the player for committing violence and driving other bears insane. The more sadistic the violence the player engages in, the more encouraging the narrator becomes. The bright colourful settings and the playful nature of each level are juxtaposed against the game's insidious objectives.

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.¹

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 cruelty and violence

The publication deals with matters of cruelty and violence. The strongest depictions of serious physical harm and acts of significant cruelty will be discussed under s3(3)(a)(i).

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"² 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.³

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

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

³ Above n2 at para 29.

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 matter relevant to the publication is:

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 console game deals extensively with the infliction of serious physical harm and acts of significant cruelty. In order to successfully complete each level, the player must kill a mass number of bears in insidious ways. The most common weapons available to the player include pistols, clubs, and machetes. When a bear is struck with a weapon, fluff flies into the air or the bear falls to the ground. When a combination of blows is struck, the viewer is presented with a close-up of the attack. If the player uses a gun to shoot at the bear, the bullets hit the bears' bodies but entry wounds are not visible. The bears' bodies remain intact and no post-mortem injury occurs. Punching bears to death is another means of killing in the game.

As well as weapons, the player can use objects and fixed chattels to harm the other bears. For instance, if a bear is using a payphone the player can sneak up behind them, grab the phone off the bear and hit them with it. The combination attack concludes with the player shoving the phone handset into the mouth of the bear and choking it to death. The death is quick and no prolonged depiction of the bear's suffering is presented. More sadistic and cruel means of killing bears includes setting bear traps that impede the victim's ability to walk, giving the player a significant amount of time to assault and kill the bear. Other forms of sadistic killing include shoving a bear's face onto a BBQ hotplate, dunking a bear's head into a toilet and drowning it, slamming bears' heads into machines, and electrocuting them.

The cruel and sadistic nature of killing in the game is mitigated to an extent by the fact that the characters are teddy bears and not human beings, the comical and unrealistic nature of the settings, reminiscent of children's television shows, and the over-the-top scenarios during the game. Nonetheless, the sadistic and cruel nature of the game cannot be ignored given the attractiveness of a teddy bear game to children. The player is also able to drive the bears to suicide, discussed below under s3B.

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.

"Highly offensive language" is defined in s3A(3) to mean language that is highly offensive to the public in general.

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). The relevant matter is:

s3B(3)(a)(i) material that describes, depicts, expresses, or otherwise deals with harm to a person's body whether it involves infliction of pain or not (for example, self-mutilation or similarly harmful body modification) or self-inflicted death;

The player is rewarded with a large amount of naughty points by scaring other bears so much that they become dazed and insane. Once a bear has been driven to insanity it commits suicide. This involves using any weapon it has available to it to harm itself. If no weapon is in their possession they explode in a flurry of stuffing. The nature of the game and the manner of the suicides are unlikely to encourage others to harm themselves.

However, unless restricted to persons 13 years of age and over, this material is likely to be injurious to the public good because the general levels of emotional and intellectual development and maturity of persons under that age mean that the availability of the publication to those persons would be likely to cause them to be greatly disturbed or shocked.

Additional matters to be considered:

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

The dominant effect of the publication as a whole is a satirical game that deliberately juxtaposes childlike animation and effects with gratuitous violence.

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

The publication is a Microsoft Xbox 360 console game, a platform which provides complex and sophisticated game play, graphics and sound effects.

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 publication has no merit, value or importance in relation to the above considerations.

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 console game is intended for teenagers and adults.

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

The publication is intended for the purpose of entertainment.

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 unrestricted availability of this game would be injurious to the public good given the manner in which it deals with cruelty and violence. The emphasis on killing is likely to desensitise children to violence in general. This effect is likely to be compounded by the player's skill at killing being acknowledged and rewarded. Children will be especially disturbed by the depiction of a familiar childhood toy engaged in frequent acts of violence against other toys. However, teenagers and adults possess the maturity to recognise the game's contrived representations of violence and the satirical nature of the game. Therefore the game is classified as objectionable except if the availability of the publication is restricted to persons who have attained the age of 13 years.

The Classification Office has considered the effects of the NZBR Act on the application of the classification criteria elsewhere in these reasons. The classification of this publication interferes with the freedom of expression, but this is an outcome that is consistent with Parliament's intention that publications of this type be restricted to an appropriate age group.

Display conditions:

Where the Classification Office classifies any publication as a restricted publication, it is required under s27(1) of the FVPC Act to consider whether or not conditions in respect of the public display of the particular publication should be imposed.

In considering the issue of public display, the Classification Office must have regard to the matters set out in s27(2) of the FVPC Act, namely:

- (a) The reasons for classifying the publication as a restricted publication;*
- (b) The terms of the classification given the publication;*
- (c) The likelihood that the public display of the publication, if not subject to conditions, or as the case may be, any particular condition, would cause offence to reasonable members of the public.*

The public display of the publication is not likely to cause offence to reasonable members of the public.

Date: 26 August 2010

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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