

SUMMARY OF REASONS FOR DECISION

Under the Films, Videos, and Publications Classification Act 1993 (FVPC Act)

HEADNOTE

Title of publication:	Gears Of War 3: Online Beta
Other known title(s):	Not stated
OFLC ref:	1100173.000
Medium:	Console Game
Classification:	Objectionable except if the availability of the publication is restricted to persons who have attained the age of 16 years.
Descriptive note:	Contains graphic violence.
Display conditions:	None

The console game is a third-person "shooter" formatted for play on the Xbox 360 console. It is the online beta version of a popular sci-fi series of games. The full version, comprising single player story and online multiplayer modes, is currently scheduled for release in late 2011.

Gears Of War 3: Online Beta is a shooter game in which online players form two teams and engage in frenetic gun battles across futuristic, fantastical, spatially-limited environments. At the start of each round the two teams have 15 "re-spawn" lives. When these are used up, the team members are reduced to one "life" each. A team wins by killing members of the opposing team until their supply of re-spawn lives are exhausted.

There is an array of different weapons available to the players, such as a pistol, a machine gun, a shotgun, and a sniper rifle. Additional weapons include a nail gun, an advanced form of Gatling gun, a mortar gun that rains explosive ordnance on enemy positions from the air, and a "digger launcher" – this is a gun that can be used to target opponents at a distance. It sends an exploding underground charge towards an enemy's position and is used to devastating effect. Similarly the sniper rifle, although slow to operate, is powerful. One accurate shot from the sniper rifle will disintegrate an opponent.

The publication deals with matters of cruelty and violence in terms of s3(1) of the FVPC Act. The mainstay of the game lies in killing as many opponents as possible. Opponents can take human form, or non-human form. During the game's examination all soldiers appeared as humans with rabbit heads. The infliction of serious physical harm and acts of significant cruelty are discussed in relation to s3(3)(a)(i).

The publication does not deal with any s3(2) matters in a manner that tends to promote or support any of the listed criteria.

The game repeatedly depicts the infliction of serious physical harm, punctuated with occasional spikes in cruelty. It is possible during the game to use weakened enemy soldiers as human shields.

Alternatively, a player can choose to kill the captured soldier by snapping their neck, or stamping on their head. These options are only available when an enemy soldier's health is severely depleted, and are not always able to be completed due to the continuous threat of an attack by other opposition players.

As with previous versions of *Gears of War*, the player is armed with a gun that sports either a chainsaw or a bayonet. In close combat situations the chainsaw or bayonet can be used to stab or slash opponents. This produces large blood bursts. The blood vanishes quickly from screen, as do slain bodies. The most common form of combat involves targeting enemies from a distance across harried, chaotic and noisy battlefields. The need to be constantly alert to threats from any angle lessens the focus from any individual act of violence; in this respect the game is about survival.

The dominant effect of the publication is a frenetic, violent third-person shooter game set in sci fi/fantasy environments. The online aspect adds some unpredictability in terms of game play, and adds to the rapid nature of the gaming experience.

The unrestricted availability of the game would be injurious to the public good. The depictions of violence are bloody and some involve elements of cruelty. This content would be disturbing to children or young teenagers, and may have the effect of trivialising violence by presenting it as entertaining and exciting. Constant exposure to the frenzied images of violence, in which the player is an active participant, has the potential to desensitise or inure young audiences towards violent behaviour in real life. Older teenagers and adults have the maturity and life experience to put this material in the context of an entertaining but violent console game. Likelihood of injury to the public good is avoided by restricting this publication to those audiences that have attained the age of 16 years.

Note:

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CONSIDERATION SHEET

OFLC ref: 1100173.000

Submission channel: s12(1)

Title of publication: Gears Of War 3: Online Beta

Other known title: Not stated

Medium: Console Game

Distributor: Microsoft New Zealand Limited


Country of origin: United States

Language: English

Applicant: Film & Video Labelling Body

Examination transcript No: 541, p262

Examination date: 01 March 2011

Classification Officer(s): 

Other identifying information:

COMPONENTS OF FILM**Components of film originally examined:**

	Components	Running time
Game:	Gears Of War 3: Online Beta	
Total running time:		

Components of film excised:

EXAMINATION

Section 23 Examination and classification –

...the Classification Office shall examine the publication to determine the classification of the publication.

Section 24 Soundtrack to be considered -

Where a film is intended to be viewed with an accompanying soundtrack (whether or not the soundtrack is an integral part of the film), an examination of the film under s23 of the Act shall also take into account the content of the soundtrack and its relationship to the film.

Description of Publication:

The console game is a third-person "shooter" formatted for play on the Xbox 360 console. It is the online beta version of a popular sci fi series of games. The full version, comprising single player story and online multiplayer modes, is currently scheduled for release in late 2011.

Gears Of War 3: Online Beta is a shooter game in which online players form two teams and engage in frenetic gun battles across futuristic, fantastical, spatially-limited environments. At the start of the round each team has 15 "re-spawn" lives. When these are used up, the team members are reduced to one "life" each. A team wins by killing members of the opposing team until their supply of re-spawn lives are exhausted.

There is an array of different weapons available to the players, such as a pistol, an automatic-firing machine gun, a shotgun, and a sniper rifle. Additional weapons include a nail gun, an advanced form of Gatling gun, a mortar gun that rains explosive ordnance on enemy positions from the air, and a "digger launcher" – this is a gun that can be used to target opponents at a distance. It sends an exploding underground charge towards an enemy's position and is used to devastating effect. Similarly the sniper rifle, although slow to operate, is powerful. One accurate shot from the sniper rifle will disintegrate an opponent.

Statutory Submissions

Section 20 – Synopsis of Written Submissions

Not Applicable	X
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Section 21 Other Assistance

None Requested	X
See Record of Assistance	

Other Relevant Information

None Considered	<input type="checkbox"/>
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In reaching a classification decision the Classification Office may consider a variety of information including **previous decisions** of the Classification Office or other **ensorship bodies, research, books, articles, reviews**, and information obtained from the **Internet**. If you have used any of this information please record this below.

Previous decisions				
Classification Body	OFLC	<input type="checkbox"/>	VRA	<input type="checkbox"/>
	Chief Censor of Film	<input type="checkbox"/>	IPT	<input type="checkbox"/>
Title: Gears Of War 2				
Publication/Certificate/Decision No. 801711				

Other Sources (please specify and reference):

CLASSIFICATION

Section 3 Meaning of “objectionable”-

s3(1) ... 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.

Subject Matter Gateway

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)* [2000] 3 NZLR 570; (2000) 6 HRNZ 28, must also be taken in to 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.

The content of the publication must bring it within the "subject matter gateway". In classifying the publication therefore, the question is whether or not it deals with the following:

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.

N/A

Matters such as horror

N/A

Matters such as crime

N/A

Matters such as cruelty

See violence.

Matters such as violence

The publication deals with matters of cruelty and violence in terms of s3(1) of the FVPC Act. The mainstay of the game lies in killing as many opponents as possible. Opponents can take human form, or non-human form. During the game's examination all soldiers appeared as human-sized rabbits. The infliction of serious physical harm and acts of significant cruelty are discussed in relation to s3(3)(a)(i).

Or – The content of the publication does not bring it within any "subject matter gateway".

For publications that fall outside the "subject matter gateway" go to s3A and s3B

Section 3(2) 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"¹ 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.²

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.

s3(2)(a) The exploitation of children, or young persons, or both, for sexual purposes.

In *Moonen v Film and Literature Board of Review (Moonen II)* [2002] 2 NZLR 754, the Court of Appeal stated that the absence of definitions of "young persons" and "children" in s3(2)(a) was deliberate. The provision does not require proof of the models' ages; it requires an assessment of whether or not the publication in which the models appear promotes or supports the exploitation of children or young persons for sexual purposes:

¹ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at para 27.

² Above n2 at para 29.

The legislation is concerned with the vulnerability of young people and with the corrosive injury to the public good of depicting persons perceived to be children or young people as subjects for exploitation. The Board properly assessed whether the publication of the photographs would tend to promote or support the exploitation of children or young persons, not limited to the impact on the particular persons photographed. The inquiry under s3 does not require the ascertainment of the precise age of the person photographed.³

It was Parliament's intention therefore that s3(2)(a) should apply to any publication as defined in the Act, that promotes, supports, or tends to promote or support, the exploitation of children or young persons for sexual purposes. As long as a publication at least tends to promote or support such exploitation, whether or not it depicts underage models, no underage models or no models at all is irrelevant to the proper application of s3(2)(a). The issue is whether, on the evidence presented by the publication itself, the publication at least tends to promote or support the exploitation of children or young persons for sexual purposes.

N/A

s3(2)(b) *The use of violence or coercion to compel any person to participate in, or submit to, sexual conduct.*

N/A

s3(2)(c) *Sexual conduct with or upon the body of a dead person.*

N/A

s3(2)(d) *The use of urine or excrement in association with degrading or dehumanising conduct or sexual conduct.*

N/A

s3(2)(e) *Bestiality.*

N/A

s3(2)(f) *Acts of torture or the infliction of extreme violence or extreme cruelty.*

N/A

If the publication promotes and supports, or tends to promote and support, any of the 3(2) provisions above and is deemed objectionable go to the Bill of Rights section.

However, section 32 of the FVPC Act directs the Classification Office to consider whether it would classify the publication differently if the material falling under s3(2) were excised or altered. If an excision were made, the publication would no longer fall under 3(2) of the FVPC Act. If the publication contains material that falls under 3(2) which can be excised or altered, go the Excisions section and then return to s3(3) and 3(4) below.

Otherwise, if the publication does not fall under s3(2) consider the following matters:

Section 3(3) Matters to be given particular weight –

In determining, for the purposes of the Act, whether or not any publication (other than a publication to which subsection 3(2) of this section applies) is objectionable or should in accordance with section 23(2) be given a classification other than objectionable, the following matters shall also be considered:

³ *Moonen v Film and Literature Board of Review* [2002] 2 NZLR 754 at para 40.

...particular weight shall be given to the **extent** and **degree** to which, and the **manner** in which, the publication describes, depicts, or otherwise deals with...

s3(3)(a)(i) *Acts of torture, the infliction of serious physical harm, or acts of significant cruelty.*

The game repeatedly depicts the infliction of serious physical harm, punctuated with occasional spikes in cruelty. It is possible during the game to use weakened enemy soldiers as human shields during an intense fire fight. Alternatively, the player can choose to kill the captured soldier by snapping their neck, or stamping on their head. These options are only available when an enemy soldier's health is severely depleted, and is not always able to be completed due to the continuous threat of an attack by other opposition players.

As with previous versions of *Gears of War*, the player is armed with a gun that sports either a chainsaw or a bayonet. In close combat situations the chainsaw or bayonet can be used to stab or slash opponents. This produces large blood bursts. The blood vanishes quickly from screen, as do slain bodies.

s3(3)(a)(ii) *Sexual violence or sexual coercion, or violence or coercion in association with sexual conduct.*

N/A

s3(3)(a)(iii) *Other sexual or physical conduct of a degrading or dehumanising or demeaning nature.*

N/A

s3(3)(a)(iv) *Sexual conduct with or by children, or young persons, or both.*

N/A

s3(3)(a)(v) *Physical conduct in which sexual satisfaction is derived from inflicting or suffering cruelty or pain.*

N/A

...particular weight shall be given to the **extent** and **degree** to which, and the **manner** in which, the publication

s3(3)(b) *Exploits the nudity of children or young persons, or both.*

N/A

s3(3)(c) *Degrades, dehumanises or demeans any person.*

N/A

s3(3)(d) *Promotes or encourages criminal acts or acts of terrorism.*

N/A

s3(3)(e) *Represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, being a characteristic that is a prohibited ground of discrimination specified in section 21(1) of the Human Rights Act 1993.⁴*

N/A

3A Publication may be age-restricted if it contains highly offensive language likely to cause serious harm

⁴ The grounds of discrimination prohibited by s21(1) of the Human Rights Act 1993 are sex, marital status, religious belief, ethical belief, colour, race, ethnic or national origins, disability, age, political opinion, employment status, family status and sexual orientation.

3A(1) A publication to which subsection 3A(2) applies may be classified as a restricted publication under section 23(2)(c)(i).

3A(2) *This subsection applies to a publication that 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.*

3A(3) *In this section, **highly offensive language** means language that is highly offensive to the public in general.*

The publication does not contain highly offensive language.

3B Publication may be age-restricted if likely to be injurious to public good for specified reasons

3B(2) This subsection applies to a publication that 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).

3B(3) *The material referred to in subsection (2) is material that*

3B(3)(a) *describes, depicts, expresses, or otherwise deals with—*

3B(3)(a)(i) *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.*

3B(3)(a)(ii) *Conduct that, if imitated, would pose a real risk of serious harm to self or others or both.*

3B(3)(a)(iii) *Physical conduct of a degrading or dehumanising or demeaning nature.*

3B(3)(b) *is or includes 1 or more visual images—*

3B(3)(b)(i) *of a person's body; and*

3B(3)(b)(ii) *that, alone, or together with any other contents of the publication, are of a degrading or dehumanising or demeaning nature.*

3B(4) The reasons referred to in subsection (2) are that the general levels of emotional and intellectual development and maturity of persons under the specified age mean that the availability of the publication to those persons would be likely to—

3B(4)(a) *Cause them to be greatly disturbed or shocked; or*

3B(4)(b) *Increase significantly the risk of them killing, or causing serious harm to, themselves, others, or both; or*

3B(4)(c) *Encourage them to treat or regard themselves, others, or both, as degraded or dehumanised or demeaned.*

N/A

3C Procedure for classification under sections 3A and 3B

In determining whether to classify a publication as a restricted publication in accordance with section 3A or section 3B, the Classification Office must consider the matters specified in paragraphs (a) to (f) of section 3(4).

Section 3(4) Additional matters to be considered –

In determining, for the purposes of the Act, whether or not any publication (other than a publication to which subsection 3(2) of this section applies) is objectionable or should in accordance with section 23(2) be given a classification other than objectionable, the following matters shall also be considered:

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

The dominant effect of the publication is a frenetic, violent third-person shooter game set in sci fi/fantasy environments. The online aspect adds some unpredictability in terms of game play.

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

The publication is an Xbox 360 console game, and as such has impressive graphics and sound effects that combine for an immersive gaming experience.

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 artistic merit.

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 publication is probably intended for older teenage and adult audiences.

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

The publication is intended as entertainment.

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

The publication is an "online" game in the sense that it is both played online and will only be available online – it will not be made available in retail shops.

BILL OF RIGHTS CONSIDERATIONS

New Zealand Bill of Rights Act 1990

Section 14 Freedom of expression -

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.

Section 5 Justified limitations -

Subject to section 4 of this Bill of Rights, the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

Section 6 Interpretation consistent with Bill of Rights to be preferred -

Wherever an enactment can be given a meaning consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

Discussion of Bill of Rights Considerations:

Section 3(1) considerations have been weighed against relevant provisions of the NZBR Act. Given the manner in which the publication presents matters of cruelty and violence, the classification imposed is a reasonable limitation on the freedom of expression contained in the Bill of Rights, and is demonstrably justified in a free and democratic society. A limitation on the publication's availability is the minimum restriction that can be applied in order to prevent injury to the public good.

CONCLUSION

Injury

If s3(1) applies to the publication the question is whether or not it deals with the matters discussed in a manner that **the availability of the publication is likely to be injurious to the public good**. In discussing injury consider the nature and severity of that injury, the likelihood of it occurring and who would be injured by the publication's availability. The classification recommended must remedy the injury identified.

If s3B applies to the publication, **the injury to the public good** must be explained in terms of s3B(4) of the FVPC Act.

If s3A applies to the publication, explain the age restriction in terms of **how the language is likely to cause serious harm to persons under the age of the restriction**.

Classification:

R16

The unrestricted availability of the game would be injurious to the public good. The depictions of violence are bloody and some involve elements of cruelty. This content would be disturbing to children or young teenagers, and may have the effect of trivialising violence by presenting it as entertaining and exciting. Constant exposure to the frenzied images of violence, in which the player is an active participant, has the potential to desensitise or inure young audiences towards violent behaviour in real life. Older teenagers and adults have the maturity and life experience to put this material in the context of an entertaining but violent console game. Likelihood of injury to the public good is avoided by restricting this publication to those audiences that have attained the age of 16 years.

EXCISIONS/ ALTERATIONS

Section 32 - Excisions from and alterations to film –

In the case of a film submitted for classification under any part of the Act other than s29(1) and 41(3) (court referrals), if the Classification is of the opinion that it would classify the film differently according to whether any specified part or parts of the film are excised from or left in the film, it shall, before making a final determination in respect of the classification of the film, follow the procedure prescribed by section 33.

Section 33(1) directs the Classification Office to notify the authorised distributor of the film of the classification that would be given if part or parts of the film were excised or altered, and, the classification that would be given if the specified part or parts were not excised or altered.

Section 33(5) provides that, in deciding whether or not to propose excisions or alterations, the Classification Office may consider the effect that any such excision or alteration may have on the continuity of the film or on its overall effect.

EXCISIONS SUMMARY	
None (for non-moving image and s29(1) / 41(3) publications)	<input type="checkbox"/>
No excisions recommended (for all other moving image publications)	<input checked="" type="checkbox"/>
Excisions/alterations recommended	<input type="checkbox"/>
Number of Excisions/Alterations:	
Brief Description:	

PUBLIC DISPLAY CONDITIONS

Not Applicable	
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Section 27 Conditions relating to the display of restricted publications –

Where the Classification Office classifies any publication as restricted, the Office shall in every case consider whether or not to impose conditions on the public display of that publication, and may impose such conditions at the time of classifying the publication.

In determining whether or not conditions in respect of public display should be imposed, the Classification Office must have regard to:

s27(2)(a) The reasons for classifying the publication as a restricted publication.

Because of the publication's treatment of cruelty and violence.

s27(2)(b) The terms of the classification given to the publication.

R16.

s27(2)(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 publication is innocuously titled and unlikely to cause offence to reasonable members of the public.

Section 27(3) directs that where the Classification Office considers that the public display of the publication, if not subject to conditions under this section, would be likely to cause offence to reasonable members of the public, the Classification Office shall, at the time of classifying the publication, impose such conditions under this section in respect of the public display of that publication as it considers necessary to avoid the causing of such offence.

Date	01/03/14	OFLC Ref.	1100173	VR	2
Applicant	DVR				
Distributor	Microsoft NZ Ltd				
Title	Start of War 3: Online Beta				
Other known title(s)	/				
Director(s)	NS				
Producer(s)	NS				
Medium	Console Game	Language(s)			
Country(ies)	USA	English			
Disc Image? Yes <input checked="" type="radio"/> No					

Classification	Descriptive note		
R16	Graphic Violence		
Cut/ban criteria	No. of excisions	Excisions made?	Date excisions cleared
Other information			
Total running time		Total running time after excisions	

Frantic deathmatch in stadium environment.
 Two opposing teams kill each other by
 attacking weapons, slugs, grenades.
 Men wounded can be revived by OAR
 team mates or respawn.
 By blood spats from enemy.

Mortar - rains down exploding missing from
mid air. some large area

The Masher - a gattling gun.

Cancer - chamber gun.

At end of round slatters slow number
of hits.

New environment - outdoor bunker area. singing
Cater, sandbags. based wire

Team some this a producer lots of dust.

IS response live at start of match

Grasber - a acid gun.

Longshot - high-powered sniper rifle.

New environment - Library.

Digger - counter a gun that forgets opponents seeing
an underground chase not explodes.
- 3 charges at a time