Schedule 3 Criteria: A Guide for Bridging Visa Holders Applying for Substantive Visas

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As an immigration lawyer with over 27 years of experience in immigration law, I've seen many clients navigate the complexities of the Australian system. One of the most challenging and often misunderstood areas is Schedule 3 of the Migration Regulations 1994. If you're in Australia on a bridging visa or have become unlawful, and you're hoping to apply for a substantive visa, then this guide is for you. In this article, I'll break down what Schedule 3 is, why it matters, and how you can navigate its requirements.

What is Schedule 3?

Schedule 3 of the Migration Regulations 1994 sets out additional criteria that apply to certain visa applicants who are in Australia and do not hold a substantive visa. A substantive visa is any visa that is not a bridging visa, a criminal justice visa, or an enforcement visa. So, if your last substantive visa has expired and you are currently unlawful or holding a bridging visa, Schedule 3 will likely apply to your next visa application.

The purpose of Schedule 3 is to encourage non-citizens to maintain a lawful status in Australia and to depart if they do not. However, it also provides a pathway for those with compelling and compassionate circumstances to regularize their status without having to leave the country.

Who does Schedule 3 apply to?

Schedule 3 applies to you if you are in Australia and:

- You do not hold a substantive visa (you are an unlawful non-citizen).
- You are the holder of a Bridging Visa E (BVE).

If you are in Australia and your substantive visa has expired, you are considered an unlawful non-citizen. Even if you have been granted a bridging visa, Schedule 3 may still apply to your application for a new substantive visa.

The 28-Day Rule: A Critical Deadline

One of the most critical aspects of Schedule 3 is the 28-day rule, which is outlined in criterion 3001. This criterion states that a valid visa application must be made within 28 days after the applicant's last substantive visa ceased to be in effect. This is a strict deadline, and it's crucial to act quickly if you find yourself in this situation.

If you apply for a new visa within this 28-day grace period, you may be able to avoid the more complex requirements of Schedule 3. However, if you miss this deadline, you will need to satisfy the much higher threshold of having "compelling reasons" for the grant of the visa.

Beyond the 28-Day Rule: "Compelling Reasons"

If you've been unlawful for more than 28 days, you'll need to meet the requirements of criteria 3003 and 3004 of Schedule 3. These criteria require you to demonstrate that your circumstances are a result of factors beyond your control and that there are "compelling reasons" for granting the visa.

Factors Beyond Your Control

To satisfy this part of the criteria, you need to show that you became an unlawful non-citizen due to circumstances that were not within your control. This could include:

- **Serious illness or injury:** A medical emergency that prevented you from lodging a new visa application or leaving Australia.
- **Incorrect advice from a registered migration agent:** If you can prove that you received incorrect advice that led to you becoming unlawful.
- **A natural disaster or political upheaval in your home country:** This may have prevented you from returning home.

What are "Compelling Reasons"?

The Migration Regulations do not provide a definition of "compelling reasons", which means that it is up to the Department of Home Affairs case officer to assess this on a case-by-case basis. However, over the years, certain themes have emerged from policy and case law. Some examples of what may be considered compelling reasons include:

- **The best interests of a child in Australia.** If you have a child who is an Australian citizen or permanent resident, and it would be detrimental to the child's well-being for you to leave Australia, this can be a powerful compelling reason.
- **A genuine and ongoing relationship with an Australian partner.** This is particularly relevant for partner visa applications. The Department will look at the length of your relationship, the level of commitment, and the hardship that would be caused to your Australian partner if you were not granted the visa.
- **Significant hardship to an Australian citizen or permanent resident.** This could be a family member who relies on you for care and support.
- **The existence of a genuine and ongoing relationship with an Australian citizen or permanent resident partner, where there are children of the relationship.**
- **The applicant is suffering from a serious medical condition and cannot be moved or can't get adequate treatment in their home country.**

It's important to note that simply being in a relationship with an Australian is not, on its own, a compelling reason. You need to provide substantial evidence to support your claims.

Schedule 3 and Partner Visas

Schedule 3 is a very common issue for onshore partner visa applicants. It's not uncommon for one partner to be unlawful or on a bridging visa when they decide to apply for a partner visa. In these cases, a well-prepared submission addressing the "compelling reasons" is essential.

When assessing compelling reasons in the context of a partner visa, the Department will consider factors such as:

- The length of your relationship.
- Whether you are living together.
- The financial and emotional interdependence of your relationship.
- The presence of any children of the relationship.
- The hardship that would be caused to the Australian partner if the applicant had to leave Australia.

Other Visa Applications and Schedule 3

While partner visas are the most common scenario, Schedule 3 can apply to other types of onshore visa applications as well, including skilled visas and parent visas. The specific "compelling reasons" will vary depending on the visa subclass and your individual circumstances.

Practical Tips for Navigating Schedule 3

If you are facing a Schedule 3 issue, here are some practical tips:

- **Act Quickly:** The 28-day rule is your best friend. If you can, apply for your next visa within 28 days of your last substantive visa expiring.
- **Seek Professional Advice:** Schedule 3 is a complex area of law. An experienced immigration lawyer can assess your situation, advise you on your options, and help you prepare a strong application.
- **Gather Evidence:** Whether you are applying within the 28-day period or need to argue compelling reasons, evidence is key. Start gathering documents to support

your application as early as possible.

- **Be Honest and Upfront:** Don't try to hide your immigration history. Be honest and upfront with the Department of Home Affairs about your circumstances.

Evidence to Support Your Application

If you are making a submission based on compelling reasons, you will need to provide a significant amount of evidence to support your claims. This could include:

- **Statutory declarations:** From yourself, your partner, family members, and friends, detailing your circumstances and the reasons why you should be granted the visa.
- **Medical reports:** If you are claiming that a medical condition prevented you from leaving Australia or applying for a visa sooner.
- **Financial documents:** To demonstrate your financial hardship or your financial interdependence with your partner.
- **Relationship evidence:** For partner visas, this could include photos, joint bank account statements, and evidence of your shared life together.

The Role of the Administrative Review Tribunal (ART)

If your visa application is refused because you do not meet the Schedule 3 criteria, you may have the right to have that decision reviewed by the Administrative Review Tribunal (ART). The ART is an independent body that can review the merits of your case and decide whether the Department's decision was correct. It's important to remember that the ART was previously known as the Administrative Appeals Tribunal (AAT) and was renamed in 2024.

The ART will look at your case with fresh eyes and will consider all the evidence you provide. If the ART finds that there are compelling reasons to waive the Schedule 3 criteria, it can set aside the Department's decision and substitute it with a new decision to grant you the visa.

What Should You Do Next?

Navigating Schedule 3 can be daunting, but you don't have to do it alone. If you are concerned about how Schedule 3 might affect your visa application, I encourage you to book a consultation to discuss your situation and receive tailored guidance. Please book a time with me to discuss your matter further.

Criteria	Description
3001	Application must be made within 28 days of the applicant's last substantive visa ceasing.
3002	In some circumstances, the application can be made within 12 months.
3003 & 3004	If the application is made after 28 days, the applicant must show that their situation is a result of factors beyond their control and that there are "compelling reasons" for granting the visa.
3005	A visa has not previously been granted to the applicant on the basis of the satisfaction of any of the criteria in Schedule 3.

About the Author

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