

# MATTERS

In this edition of *HFA Matters*, we delve into the critical activities shaping our industry over the past quarter. Our engagement with the Council for Medical Schemes (CMS), which extended well beyond its scheduled time, proved to be extremely valuable in operationalising our Memorandum of Understanding (MOU). This edition also includes highlights from our recent Consultative Forum, which addressed a range of pivotal topics, including an insightful presentation by ENSAfrica on the pivotal 'non-disclosure' judgement. This ruling poses significant challenges to the underwriting processes of medical schemes and risks intensifying anti-selection.

Despite President Ramaphosa's invitation to Business Unity South Africa to engage on alternative paths to reaching the goals of the NHI Act, the Minister of Health seems to be pressing ahead with advancing the National Health Insurance (NHI) agenda, publishing regulations and timelines. We have formally reached out to both the President and Minister Motsoaledi, seeking discussions on various pressing industry concerns, particularly the NHI.

On FWA, we remain acutely aware of the reputational risks posed by the draft Section 59 Report released in 2022. To safeguard the industry's interests, we have urged CMS to allow industry bodies and the FWA Committee to review the final report before it is made public, which we believe, is planned for December.

*Happy reading!*



## IN THIS ISSUE



### Outcomes from the HFA/CMS Meeting

Highlights from the discussions on regulatory challenges, contribution trends, NHI concerns, and a path towards greater industry alignment.



### Positive outcome in the RAF tariff matter

A settlement agreement has been reached between the Minister of Transport, the RAF, and the opposing parties.



### HFA's PCR test legal action

Preliminary hearing bodes well for the merits of the case to be heard in 2025.



### SAHPRA's draft Localisation Policy

A proposed policy aims to encourage local manufacturing of medicines to address public health needs, but what are the implications for funders?



### A legal view of SARS' new reporting directive

While SARS has broad powers to request information, these must align with what's authorised under the MSA.



### HFA's NHI Act legal challenge

While HFA fully endorses the principle of UHC, we argue that the NHI Act, in its current form, is fundamentally flawed, irrational, and unconstitutional.



### Landmark ConCourt judgement

This decision presents significant challenges for medical schemes and schemes' ability to manage anti-selection risks effectively.



### SASP's Competition Commission exemption application

HFA submits this will set a destructive precedent and will impact affordability and access to healthcare.

Follow us:



## KEY OUTCOMES FROM THE HFA/CMS MEETING – 14 OCTOBER 2024



The recent engagement between the Health Funders Association (HFA) and the Council for Medical Schemes (CMS) set the stage for strengthened collaboration and valuable dialogue on pressing industry issues. Attended by the Acting Registrar and his executive team, the meeting addressed topics ranging from regulatory updates to key operational challenges, laying a

solid foundation for future engagement under the HFA-CMS Memorandum of Understanding (MOU).

Signed in June 2023, the MOU focuses on collaboration, knowledge-sharing, and addressing mutual challenges. Its relevance was evident when HFA raised concerns about CMS's Circular 44, a survey to assess healthcare brokerage services, which we believe lacked proper handling. The session demonstrated the MOU's utility as a platform for constructive dialogue.

### Contribution increases

We had in-depth discussions about rising medical scheme contributions, pointing out that these increases are primarily driven by utilisation with an incomplete regulatory framework a key contributing factor. To better understand the factors at play, we proposed forming a medical inflation technical group. CMS supported this idea especially since they have recently appointed an actuary to their staff. This group would analyse drivers from both the supply and demand sides and would include exploring a risk-based capital (RBC) model as an early warning tool.

### NHI

When it came to the NHI, we made our position clear: while we support universal healthcare (UHC), the current proposals are not practical. CMS appreciated our input and suggested we take our concerns directly to the Minister of Health.

### SARS directive on member disability data collection

We were surprised to learn that CMS was unaware of a SARS directive asking schemes to collect disability information from members. However, the Acting Registrar committed to following up with SARS directly.

### Improving Access and Regulation

We strongly advocated for introducing Low-Cost Benefit Options (LCBOs), emphasising their potential to extend medical scheme membership to 5 million more people. CMS requested HFA to provide demographic and risk profile data of this cohort of people to help move the conversation forward with the Department of Health. We have accordingly prepared a document which provides details to this effect and aim to submit to the CMS in next 2 weeks.

### FWA

On Fraud, Waste, and Abuse (FWA), we highlighted several pressing concerns. The long-awaited Section 59 Report remains unpublished, and the ongoing delay has created challenges for schemes trying to investigate and recover funds. We emphasised that negative media narratives are undermining these efforts and harming the industry's reputation. It is vital for all stakeholders - CMS, funders, and healthcare professionals - to speak with one voice to tackle FWA effectively and ensure that members' funds are appropriately spent. CMS assured us that the draft Section 59 Report had been reviewed by the Panel's legal team and is expected to be released by year-end.

CMS also committed to more collaborative engagement to prevent sensitive matters from being aired in the media before internal discussions have taken place.

### Progress on the PMB review and Primary Healthcare Package

The CMS provided an update on their efforts to review and refine the Prescribed Minimum Benefits (PMBs), which have not undergone a comprehensive review in over two decades. They shared progress on developing a comprehensive primary healthcare package, which is intended to be streamlined into a core set of essential services. This package will include standards for treatment pathways, quality measurements and costing models to ensure consistency and accessibility.

However, a parallel development by the National Department of Health (NDoH) adds a layer of complexity. The NDoH has also drafted a primary healthcare package, which means CMS and the NDoH will need to align their respective frameworks to avoid duplication and ensure coherence in healthcare delivery. (Please see this [PMG report](#) regarding a request by the DG of Health to the Council of Medical Schemes for the inclusion of all immunisation services listed in the Essential Medicine List.)

CMS agreed that the review of existing PMBs must proceed in tandem with the development of the primary healthcare package. However, there is still uncertainty regarding how these two frameworks will coexist. Specifically, it is unclear whether the primary healthcare package will act as a standalone set of benefits or be integrated with - or layered on top of - the existing PMB structure.

CMS committed to sharing updates at the next PMB Advisory Review Committee meeting.

### Medical Schemes Amendment Bill:

We emphasised the need for the Medical Schemes Amendment Bill, currently with the NDoH, to incorporate the HMI recommendations and urged that the industry be consulted before legislative changes are finalised.

*Continued from the previous page*

## Hybrid AGMs

On the issue of hybrid AGMs, we expressed concerns about negative press coverage that failed to distinguish between open and restricted schemes, and painting all schemes as irresponsible. While hybrid AGMs offer greater access, they come with cost and security challenges, and elections remain particularly complex in virtual settings. CMS acknowledged these concerns but emphasised the importance of prioritising member engagement. CMS committed to publishing guidelines on hybrid AGMs by February/March 2025.

## IFRS 17

We raised concerns about IFRS 17, highlighting escalating audit costs and inconsistencies in reporting. CMS acknowledged these complexities and is working with the SAICA Medical Scheme Project Group to address these issues. They are also upgrading

their IT system to better support IFRS 17 requirements, though we noted ongoing functionality problems with the CMS portal. CMS committed to conducting a post-implementation review of IFRS 17 next year and indicated that they would consider drafting a circular for auditors to help manage rising audit fees.

This meeting underscored the importance of transparent dialogue, paving the way for greater alignment between industry stakeholders.



## POSITIVE DEVELOPMENTS IN THE ROAD ACCIDENT FUND TARIFF MATTER



We are pleased to share positive news regarding the Road Accident Fund (RAF) tariff issue. As you may recall, HFA, alongside other stakeholders, supported the Law Society of South Africa (LSSA) and the National Council for Persons with Disabilities in their application to oppose a set of tariffs promulgated in 2022 by the Minister of Transport.

These tariffs, which were significantly lower than private sector rates and covered only approximately 60% of the conditions recognised in the private sector, posed serious financial risks for both motor vehicle accident victims and medical schemes. Their implementation could have left South Africans, particularly the most vulnerable, facing significant financial hardship.

In a key development, a settlement agreement was reached in

October 2024 between the Minister of Transport, the RAF, and the opposing parties. As part of this agreement, the RAF committed never to apply the disputed medical tariffs, leading to the withdrawal of the High Court case. Following this, the RAF published new draft replacement tariffs, which are a marked improvement over the previous rates.

While the settlement agreement still needs to be made an order of court, this outcome demonstrates the power of collective action in addressing injustices that could have severely impacted South Africans.

As you are aware that the RAF has many outstanding cases and owes the medical schemes a significant amount of money. In recent developments, the RAF has approached us with a request for a meeting on 'Stakeholder engagement on the development of standard formulae for the calculation of the Road Accident Fund's (RAF's) liabilities to claimants.' This is a positive development and we will report on this after our engagement.



## UPDATE ON HFA'S PCR TEST LEGAL ACTION



In 2022, the Health Funders Association (HFA) filed a complaint with the Competition Commission against Pathcare, Ampath, and Lancet over the pricing of COVID-19 PCR tests during the pandemic in 2020 and 2021. Representing 36 medical schemes and 5.6 million members, we sought refunds for what we identified as excessive pricing. This action aligns with our

responsibility to ensure that Medical Scheme Trustees protect their members' interests and uphold sound financial stewardship.

While the Competition Commission chose not to refer our complaint - citing the consent agreements reached with the pathology laboratories in December 2021 - they did not make a ruling on the merits of the case. As a result, HFA self-referred the matter to the Competition Tribunal for further adjudication.

In response to Exceptions raised by the laboratories, we refined our complaint, removing requests for administrative penalties and withdrawing allegations of collusion. This preliminary hearing was held on the 27<sup>th</sup> November 2024.

We are buoyed by the day's proceedings and while we will only hear the outcomes from the day in January 2025, we remain confident in our position and expect that the case (with some adjustments to our papers) will move forward to a formal Tribunal hearing in the latter part of 2025, where the merits of our complaint will be thoroughly examined.

This case highlights the important role that an industry association like HFA plays in advocating for fairness and accountability. By representing 36 medical schemes in this matter, we are working not only to recover funds for members but also to support the long-term sustainability of the healthcare funding industry and uphold the principles of good governance.

## SAHPRA'S DRAFT LOCALISATION POLICY: IMPLICATIONS FOR THE INDUSTRY



At the recent HFA Consultative Forum, Altair Richards from ENSafrica provided valuable insights into the South African Health Products Regulatory Authority's (SAHPRA) draft localisation policy. The proposed policy aims to encourage local manufacturing of medicines to address critical public health needs, referencing the challenges exposed

during the COVID-19 pandemic, such as vaccine nationalism and limited local production capacity across Africa.

The draft policy proposes prioritising the review and registration of medicines that meet local manufacturing criteria under SAHPRA's existing priority review guideline. This prioritisation would consider public health needs and demand for the medicine in the region. While the intention to secure long-term supply chains and boost local manufacturing is laudable, several questions arise about SAHPRA's authority to implement such a policy under the Medicines Act.

### Legal Concerns and Industry Impact

Altair Richards highlighted that SAHPRA, as a statutory body, must act within the confines of its empowering legislation. Sections 1.3 and 2A of the Medicines Act, referenced in the draft

policy, focus on ensuring safety, quality, and therapeutic efficacy in medicine registration. However, these provisions do not explicitly support prioritisation based on localisation. Additionally, the Act emphasises the need for transparent, fair, and objective processes, which may conflict with prioritising applications linked to local manufacturing.

There is also concern about the practical implications of the policy. South Africa's pharmaceutical manufacturing capacity has significantly declined over the past two decades. Critics question whether this policy would genuinely boost local production or favour existing local manufacturers while discouraging multinationals from expanding their product portfolios in the country. This could ultimately reduce access to innovative medicines.

### Broad-Based Black Economic Empowerment (BBBEE)

SAHPRA has also linked this policy to its BBBEE guidelines, suggesting that licensing approvals and renewals may tie into a manufacturer's BBBEE level. While this aligns with broader government policy, it raises further questions about fairness and feasibility within the pharmaceutical sector.

The draft policy is currently open for public comment until 17 December 2024.

## SARS' NEW DIRECTIVE ON MEDICAL SCHEME DATA REPORTING



A recent directive from SARS raised significant concerns for medical schemes. SARS requested that schemes begin providing detailed data on disabled principal members and their dependents, as well as information about individuals making payments on behalf of members. These changes also introduce a move from annual to monthly reporting and

include separating allowable from non-allowable expenses on IT3 (f) certificates.

In response to concerns raised by HFA on behalf of members, SARS has verbally agreed to relax the six-month compliance period initially imposed on schemes, pending a workshop early in 2025 to address the complexities and practical challenges of implementing the directive.

SARS has positioned the directive as a way to improve access for persons with disabilities and streamline their audit processes,

particularly around preventing double claims on tax credits. However, the scale of the data required presents significant challenges.

### Legal perspective on SARS request

To assist schemes, HFA commissioned a legal opinion from Esmé Prins of Healthcare Navigator, who provided valuable insights. While SARS has broad powers to request information, Esmé argued that such requests must align with the data medical schemes are already authorised to collect under the Medical Schemes Act (MSA). The MSA mandates schemes to gather only information necessary for lawful claims processing, and the directive's requirements may exceed this scope.

Furthermore, Esmé highlighted that compliance with the directive would need to adhere to the Protection of Personal Information (POPI) Act, even if the courts ultimately uphold the request's legality.

### Looking ahead

The industry workshop in early 2025 will be crucial in resolving these issues and finding a solution that will assist SARS in relieving the administrative burden on disabled members.

## HFA'S LEGAL CHALLENGE AGAINST THE NHI ACT



The Health Funders Association (HFA), with the support of a formidable legal team led by Adila Hassim SC, is pressing forward with its legal challenge against the NHI Act. While HFA fully endorses the principle of universal health coverage (UHC), we argue that the NHI Act, in its current form, is fundamentally flawed, irrational, and unconstitutional.

### Key concerns

Our challenge focuses on Section 33 of the NHI Act, which restricts medical schemes from covering services funded by the NHI. This provision not only undermines the role of medical schemes but also infringes on the constitutional rights of members under Section 27 of the Constitution, which guarantees access to healthcare services.

The Act's vagueness is another significant concern, particularly regarding its implications for the private healthcare sector. This lack of clarity creates uncertainty, making it difficult for private

providers and medical schemes to plan or budget effectively. We contend that this violates the rule of law and risks destabilising the private sector, potentially impacting medical schemes long before the NHI is fully implemented.

### Alternative approaches and economic insights

HFA believes there are better ways to achieve UHC that do not infringe on constitutional rights. Comprehensive research by Genesis Analytics, supported by economic and actuarial experts, highlights the risks of the NHI's proposed monopsony structure. While this approach may initially reduce costs, it is likely to lead to supply shortages, care rationing, and a decline in the quality of healthcare. Addressing resource shortages and inequities is critical for the NHI to achieve its goals sustainably.

### Engagement and next steps

Alongside our legal efforts, HFA continues to engage constructively with the National Department of Health and President Cyril Ramaphosa through our membership of Business Unity South Africa (BUSA). We are encouraged by the President's openness to exploring alternative pathways to UHC. However, unless Section 33 of the NHI Act is amended to ensure fairness and practicality, we remain resolute in our legal challenge.

## LANDMARK CONCOURT JUDGEMENT ON NON-DISCLOSURE



At HFA's November Consultative Forum, Altair Richards of ENSafrica delivered an explanation of the recent Constitutional Court ruling in the case of *Swanepoel N.O. (Executor in the Estate Late Mignon Adelia Steyn) v Profmed Medical Scheme* which has set a precedent with significant implications for medical schemes and their ability to manage risk.

The judgement revolved around whether Mrs. Steyn, a Profmed member, was obligated to disclose a hip arthroscopy and gastritis diagnosis during her membership application and whether this non-disclosure was material.

### The legal journey

Profmed had initially declined to reimburse R400,000 in medical expenses and terminated Mrs. Steyn's membership (as well as that of her dependents) based on the non-disclosure. After favourable rulings for Profmed at the CMS Appeal Committee and the Appeal Board, Mrs. Steyn successfully challenged the decision in the High Court. However, Profmed appealed to the Full Bench of the High Court, which ruled in its favour. When the matter was taken to the ConCourt, it delivered a judgement that has since raised concerns across the healthcare industry.

### Key findings

The ConCourt ruled that a duty to disclose arises only if the non-disclosed information is material. The test for materiality was deemed objective, considering whether a reasonable and

prudent person would have viewed the undisclosed information as relevant to an insurer's risk assessment. The court held that mere diagnostic procedures without a resulting material diagnosis do not constitute material non-disclosures.

The judgement also clarified that the termination of membership cannot occur without proving that the material non-disclosure induced the insurer to conclude the agreement. Consequently, diagnostic procedures without significant findings no longer need to be disclosed in membership applications.

### Implications for medical schemes

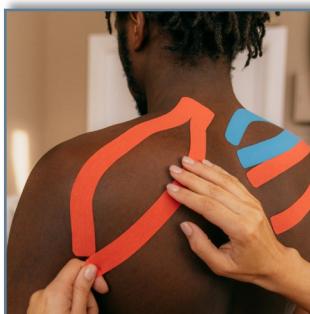
This decision presents significant challenges for medical schemes. By aligning disclosure requirements with principles derived from short-term insurance, the ruling limits schemes' ability to manage anti-selection risks effectively. Additionally, the exclusion of diagnostic procedures from disclosure requirements could encourage members to withhold critical information, further complicating schemes' risk management efforts.

### What's next?

As the judgement sets a binding precedent, it is deeply problematic for the sustainability of medical schemes. Overturning it would require a new ConCourt case.

For further information on this judgement, please access the Constitutional Court's official website [here](#).

## SASP'S EXEMPTION APPLICATION TO THE COMPETITION COMMISSION



The South African Society of Physiotherapy (SASP) applied to the Competition Commission for its members to collectively engage with medical schemes, medical scheme administrators, state and private hospitals, suppliers and other service providers on: Coding arrangements; Collusion on setting price/tariffs in the form of Relative

Value Units (RVUs); Global-fee negotiations; Engaging in centralised procurement - where the SASP, on behalf of its members, negotiates and purchases goods and services in bulk.

HFA submitted its opposition to SASP's request stating that granting an exemption to the SASP will set an alarming and destructive precedent which will impact affordability and access to healthcare. Rather than issue exemptions on a 'piecemeal' basis to specific groupings, HFA urged the Commissioner to implement an industry wide solution. In addition, the HFA stated its support for the establishment of a national independent coding authority to determine codes in a cost neutral, consistent and fair basis and urged the Competition Commissioner to establish the HMI Panel's recommended Multilateral Tariff Negotiation Forum (MLNF) as a matter of urgency.

## IN THE NEWS



### Social protection was always meant to be in the plan – where did it all go wrong?

A critical regulatory gap is undermining the risk-pooling principles that medical schemes are built on — principles designed to maintain affordable membership fees through cross-subsidisation and social solidarity.

[Read more here](#).



### Health Funders Association Board welcomes new CEO *Innovation, collaboration and sustainability priorities for healthcare*

The Board of Directors of the Health Funders Association (HFA) is pleased to announce that Thoneshan Naidoo, an experienced leader in the South African private healthcare industry, has commenced his new role as Chief Executive Officer of the HFA.

[Read the full article here](#).



### Healthcare's blank cheque safety net pushes up costs

Almost nine million people covered by South African medical schemes are financially protected for maternity, emergency and chronic conditions as part of the required basket of benefits called Prescribed Minimum Benefits (PMBs).

[Read more here](#).

## HFA'S VALUE PROPOSITION

- ◊ **A Strong and Collective Voice for Members:** HFA unites its members under a cohesive, powerful voice that advocates for their collective interests in the healthcare funding sector.
- ◊ **Strategic Advocacy and Representation:** HFA champions its members' positions on critical policy and regulatory matters, ensuring their voices are heard in shaping the future of healthcare funding.
- ◊ **Expert Guidance Through the Technical Advisory Committee:** HFA's Technical Advisory Committee offers members access to specialised industry insights and expert advice on complex technical issues.
- ◊ **Access to Expertise:** Members benefit from a wealth of industry knowledge, including legal, policy, governance, financial, and regulatory expertise, empowering them to make informed decisions.
- ◊ **Collaborative Engagement Platform:** HFA provides a dynamic platform for collaboration and the exchange of ideas, fostering industry-wide dialogue that drives innovation and solutions to shared challenges.
- ◊ **Efficient and Cost-Effective Structure:** HFA operates with an agile and efficient organisational model, ensuring optimal use of membership fees, which are maintained at competitive levels to maximise value for members.
- ◊ **Leadership in Policy Development:** By staying ahead of industry trends, HFA ensures its members are well-informed and prepared to lead and respond to emerging policy and regulatory changes.
- ◊ **Legal Support:** HFA offers members access to comprehensive legal opinions and representation on key industry matters, providing a strong foundation for navigating legal challenges.
- ◊ **Policy Submissions:** HFA regularly submits detailed and impactful policy proposals and recommendations on behalf of its members, ensuring their interests are represented in regulatory developments.
- ◊ **Legal Representation:** HFA takes on legal cases that affect the broader healthcare funding landscape, advocating on behalf of its members in courts and regulatory bodies.
- ◊ **Enhanced Advocacy Reach Through Business Unity South Africa:** As a proud member of Business Unity South Africa, HFA leverages this platform to extend its advocacy efforts, further amplifying members' voices at national and industry levels.
- ◊ **Comprehensive Communication Channels:**  
 Regular communication with Members on HFA activities.  
**Weekly CEO Updates**  
**Monthly Member Updates**  
**Quarterly Newsletter**
- ◊ **Collaborative Engagement Platforms:** Member consultative forums, working group meetings, and member scheme visits ensure collaboration, idea exchange and direct access to key industry discussions, driving innovation and solutions to shared challenges.