**Case study based on the Rare Earth Industry and Australia’s Lynas Rare Earth Ltd. Introduction**

**Introduction**

Rare earth minerals are critical for the low-carbon and renewable energy technologies crucial to energy-transition plans. These elements have powerful properties required for a wide range of low-carbon technologies and for the manufacturing of permanent magnets for batteries of electric vehicles, wind turbines etc... An Australian company, [Lynas Rare Earth Ltd.](https://lynasrareearths.com/) which has claimed itself to be environmentally sustainable, has created controversies by generating over a million tonnes of long-live radioactive waste in Malaysia. It is currently building a large unsafe radioactive waste dump in a low-lying peat swamp next to its plant.

Lynas is listed with the Australian Stock Exchange (ASX), mines its rare earth minerals from Western Australia, concentrates it near its mine site in Mt Weld and transport the lanthanide concentrate by road and then ships it to Malaysia over 7,000km away to its secondary processing plant near the Port of Kuantan.

Since 2011, civil society organisations (CSO) and concerned residents have advocated and campaign strongly against Lynas locating its secondary processing plant in Malaysia due to the country’s [corruption track record](https://www.washingtonpost.com/business/how-malaysias-1mdb-scandal-shook-the-financial-world/2022/08/24/a7b2b5d4-2377-11ed-a72f-1e7149072fbc_story.html), limited environmental and public health safeguards and the lack of capacity to manage the complex pollution and radioactive wastes/hazards. Lynas should have processed its rare earth minerals in Western Australia in accordance with stronger Australian law and standards, and where it has a ready-made mine pit to dispose of its radioactive waste under stronger safeguards that will be regulated over a long period of time. It has instead chosen Malaysia to take advantage of its generous 12-year tax concession, lax and lower regulatory requirements and poor human rights, environmental protection, occupational health and safety standards. Essentially, Lynas will be leaving a radioactive toxic legacy to burden current and future generations of Malaysians, hindering local community their rights to a clean and safe living environment, safe drinking water and sustainable livelihoods.

**Response to Questions**

1. How can States better advance human rights-compatible energy transition laws and policies that ensure responsible business conduct in all aspects of energy transition efforts and programs (e.g., including, but not limited to, design, approval, financing, implementation, and reporting of energy transition programs)?

Energy transition efforts and program must be fair, just and green/clean both for the Global North and South, so as to effectively reduce greenhouse gas emissions globally. The current situation has a major gap, where high emission nations and industries can and have pushed their emissions and pollution burdens to countries where corruption and democratic good governance are a problem without any repercussion beyond protest actions and objections from local communities and civil society organisations (CSO).

In light of the urgency of the need to tackle climate change, States should enter into a binding multilateral climate change-energy transition treaty that incorporates all of the UN Human Rights instruments, in particular to:

* make the [United Nations Guiding Principles on Business and Human Rights (UNGPs)](https://www.ohchr.org/documents/publications/guidingprinciplesbusinesshr_en.pdf) legally binding and explicitly reflected in energy transition laws and policies governing businesses. While these principles are fundamentally strong, their enforcement remains weak since they are largely voluntary in nature and have not been uniformly enforced across nation states. Until and unless they are written into the law and policies, the universal standard of human rights will not be realised in practised.
* hold extractive and mineral processing industries accountable and responsible for their cradle-to-grave and/or supply chains emissions and pollution footprints since this sector is particularly known for its human rights violations. Mining and mineral processing companies have historically left and continue to leave toxic pollution hazards and long-lasting radiological legacy (associated with rare earth mining and processing) with intergenerational health and environmental impacts and implications, thereby unfairly burden countries in the global South with massive ecological and public hazards and debts. It is therefore critical that basic human right standards be applies to the associated minerals and raw material life cycle footprints and supply chains associated with energy transition efforts.
* Financing of energy transition initiatives, be it through public or private sources, should be subject to scrutiny by affected communities and/or CSO and to ensure that they meet a set of basic human rights standard compatible with the UNGPs.
* The rights of affected communities and CSO to compel States and businesses to ensure that their energy transition and related decisions, approvals or projects will not undermine or weaken local capacity and capabilities to adapt (if at all possible), to build strong resilience and to mitigate against climate change and its impacts.
* Polluting the air, waterways and landscapes with mining and mineral processing discharges and wastes that leave long-term toxic hazards and radioactive legacy detrimental to the ecosystem and/or public health should be included as a crime against humanity.

1. Are you aware of any measures, both mandatory and voluntary, at national, regional, and international levels to foster business respect for human rights in the extractive sector, especially in the context of energy transition plans, programs and activities? If so, are these measures effectively enforced and do they provide the necessary coverage in light of evolving circumstances, including energy transition plans? Is greater clarity necessary in some areas of law and policy? What measures may reasonably correct this situation?

Both the Australian federal and state governments have developed measures to foster business respect for human rights in the extractive sector but they are **not** specific to energy transition plans. These measures are all voluntary and have not led to tangible outcomes in practise, particularly, for marginalised communities both in Australia and overseas.

Examples of these measures (not an exhaustive list) are as follows:

* At the national level, the Human Rights Commission (AHRC) acts as an independent third party which investigates complaints about discrimination and human rights breaches in Australia, including [matters related to businesses](https://humanrights.gov.au/our-work/business-and-human-rights). AHRC has referred to the UNPG specifically with respect to the extractive sector. However, key UN HR instruments have yet to be incorporated into mining related law and/or regulations in Australia. AHRC merely provides [fact sheet and guidance for mining companies](https://humanrights.gov.au/our-work/employers/australian-mining-and-resource-sector-and-human-rights) and provides a [special fact sheet on resource extraction and Indigenous rights](https://humanrights.gov.au/our-work/corporate-responsibility-developing-principles-resource-development-indigenous-land-0). None of these measures are mandatory and hence they have NOT been effective. In relation to Indigenous rights, [existing law and regulations do not mandate company to gain free prior informed consent](https://www.sbs.com.au/news/article/mining-companies-flout-human-rights-conventions-when-negotiating-with-indigenous-australians-study-finds/5aqabuhai) from the community and hence their rights have not been protected. There are also reports on the [destruction of Aboriginal sacred sites](https://www.thetimes.co.uk/article/anglo-australian-miner-rio-tinto-fails-its-tests-on-protecting-heritage-vtglk056x). Further discussion on Australia’s failures in protecting its Indigenous communities can be found [here](http://classic.austlii.edu.au/au/journals/AUJlHRights/2005/3.html).

AHRC has a [general complaint mechanism](https://humanrights.gov.au/complaints#main-content) to report incidents of abuses or violations but it does not extend to overseas operations of Australian mining companies. It is also unclear how effective this mechanism has been in dealing with mining related complaints.

* The Western Australia Department of Mines, Industry Regulation and Safety (DMIRS) has developed a voluntary [mining Code of Conduct](https://www.dmirs.wa.gov.au/content/code-conduct) but it has not stopped mining companies from destroying heritage sites of Aboriginal community in the state. Other states too have similar guidelines but companies do not necessarily adhere to these voluntary guidelines and standards especially when they are operating in remote Aboriginal land and overseas.

Lynas is an example where the voluntary Code of Conduct in WA and guidelines set by the AHRC have not led to the company adhering to safe best practice approach to its pollution and radioactive waste management in Malaysia.

* In terms of energy transition matters, Australia has established the Clean Energy Regulator (CER). CER is a “Government body responsible for accelerating carbon abatement for Australia through the administration of the National Greenhouse and Energy Reporting scheme, Renewable Energy Target and the Emissions Reduction Fund”. However, human rights concerns have not been explicitly included in its brief beyond the need for companies/businesses to adhere to state and territory law and regulations.
* The [Australian Securities and Investments Commission (ASIC)](file:///C:\Users\61477\Documents\AidWatch\Lynas\UN%20Special%20rapporteur\OHCHR\•%09ASIC%20Corporate%20Governance%20https:\asic.gov.au\regulatory-resources\regulatory-index\corporate-governance\) is the integrated corporate, markets, financial services and consumer credit regulator that overseeing and monitoring companies publicly listed with the Australian Stock Exchange (ASX). However, ASIC does not monitor listed companies for their human rights violations. ASIC’s key concerns have been on company’s reporting and financial auditing requirements. Details of ASIC’s roles and responsibilities can be found [here](file:///C:\Users\61477\Documents\AidWatch\Lynas\UN%20Special%20rapporteur\OHCHR\•%09ASIC%20Corporate%20Governance%20https:\asic.gov.au\regulatory-resources\regulatory-index\corporate-governance\).

**At the regional level**, from 1st January 2013, Malaysia entered into a [Free Trade Agreement (MAFTA) with Australia](https://www.dfat.gov.au/trade/agreements/in-force/mafta/Pages/malaysia-australia-fta#about). MAFTA is one of four FTAs Australian businesses can use to trade with Malaysia. In addition to MAFTA and [ASEAN-Australia-New Zealand Free Trade Agreement (AANZFTA)](https://www.dfat.gov.au/trade/agreements/in-force/mafta/Pages/malaysia-australia-fta#about), Malaysia is also a party to both the [Regional Comprehensive Economic Partnership Agreement (RCEP)](https://www.dfat.gov.au/trade/agreements/in-force/rcep) and the [Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)](https://www.dfat.gov.au/trade/agreements/in-force/cptpp/comprehensive-and-progressive-agreement-for-trans-pacific-partnership). These agreements are economic and trade focus with no explicit provisions to foster human rights or environmental/public health protection.

**Internationally**, there are a range of voluntary guidelines (not exhaustive), relevant to, but not all are specific to the extractive sector and not in the context of energy transition efforts:

* [UNPGs](https://www.bsr.org/en/primers/10-human-rights-priorities-for-the-extractives-sector) as mentioned in my response in point 1 above.
* OECD Guidelines for multinational enterprises - a voluntary measure where OECD countries are obliged to receive complaints about the conduct of their corporations. For the [Australian National Contact Point](https://ausncp.gov.au/) which handles complaints, a peer evaluation report can be found [here](https://mneguidelines.oecd.org/national-contact-point-peer-reviews-australia.pdf). This mechanism has largely been ineffective in holding polluting corporations and/or companies that have violated human rights through their operations since it is not mandatory for te company to engage in the mediation process facilitated by the NCP. There has been reforms in recent years to improve the effectiveness of ANCP to uphold the OECD Guidelines.
* IAEA Safety Standards and Guidelines for a range of radiological safety and protection issues related to the extractive sector, including discussions on naturally occurring radioactive materials (NORM) which is relevant to the mining and processing of rare earth, uranium and other transition minerals.

With regard to rare earth elements, as we know, from cases in China and Malaysia (Via [Mitsubishi’s Asian Rare Earth](https://cilisos.my/30-years-ago-a-huge-radioactive-incident-happened-in-perak-heres-the-story-behind-it/) and Lynas operations), the [dire ecological and public health consequences](https://hir.harvard.edu/not-so-green-technology-the-complicated-legacy-of-rare-earth-mining/) from the low environmental and public health protection. China as the dominant producer and supplier of rare earth elements and their products critical to the low-emission and renewable energy industry has much lessons to offer.

In 2011-12, the Chinese government introduced a [new set of policies](http://www.gov.cn/zhengce/2012-06/20/content_2618561.htm) and [environment pollution limits specific to its rare earth industry](https://www.mee.gov.cn/ywgz/fgbz/bz/bzwb/shjbh/swrwpfbz/201102/t20110210_200521.shtml), while attempting to stem out illegal and polluting operations in the country to protect public and environmental health among other objectives. China’s RE pollution limits are the first of its kind for the industry and are based on its own disastrous RE industry experiences and impacts - with disproportionately [high cancer rates at its rare earth production areas, and where the Yellow River, its major river is at risk of severe pollution](https://hir.harvard.edu/not-so-green-technology-the-complicated-legacy-of-rare-earth-mining/) from past decades of regulatory neglect and poor industry practices. Similarly, for [radiological protection, China has been reviewing its own regulatory requirements, aiming to develop standards and guidelines based on ICRP and IAEA’s recommendations](https://www.mee.gov.cn/xxgk2018/xxgk/xxgk06/201809/W020181010397640664246.pdf) since 2018.

However, the effectiveness and enforcement of China’s pollution and radiological safety control systems have yet been studied comprehensively due to the country’s increasingly tightening of media coverage and information flow. [This 2016 report](https://www.chinawaterrisk.org/wp-content/uploads/2016/07/CWR-Rare-Earths-Shades-Of-Grey-2016-ENG.pdf) may shed some lights on the state of the situation with regards to rare earth industry and its adverse impacts in China:

1. What mechanisms or processes should exist at the State level (e.g., inter-ministerial committee, ex ante human rights impact and risk assessment) to assess and ensure that extractive sector operations, including the production and distribution of transition minerals, do not impact negatively human rights? Are these measures effectively enforced and do they provide the necessary coverage in light of energy transition plans, programs and activities?

* UN human rights instruments and UNGP should be mandatorily incorporated into state law and regulations governing the full life-cycle and supply chains of all transition minerals.
* Specifically, press freedom, freedom of information and access to decision making documents (eg EIA reports) related to the extraction, processing and distribution of transition minerals, FPIC and social licence should all be mandatory requirements and criteria for State and businesses.

1. How do States encourage and regulate communication of energy transition efforts by business in the extractive sector, including State-owned enterprises (SOEs), to avoid the publication of misleading or unsubstantiated claims or reporting of an entity’s energy transition programs? Do these measures sufficiently ensure the adequacy, accessibility, reliability, and accuracy of information?

In the state of Victoria in Australia, [making false and misleading claims about a product or service is an offence under the Trade Practices Act](https://www.consumer.vic.gov.au/products-and-services/business-practices/advertising-and-promotions/false-or-misleading-representations). This type of regulation should be strengthened and broadened to include claims about energy transition plans and programs, including the human rights credentials of transition minerals’ production and supply chains beyond the national border. For example, Lynas has essentially corporately captured Malaysia taking advantage of the country’s controlled media, fear of royalty, and the lack of freedom of citizens to obtain information (eg environmental and pollution monitoring data) by claiming that its [Malaysian operations are of ‘zero harm’](https://www.youtube.com/watch?v=sTKSQh0nuY8) despite scientific evidence and data from its own environmental impact assessment reports and review reports showing otherwise.

1. Do current concessions, contracts, and bilateral investment treaties in the extractive sector aid or constrain domestic regulatory space available to States to meet their international human rights obligations in the context of the energy transition? What further changes in key provisions and licensing/procurement processes are desirable to advance energy transition in alignment with the UNGPs?

In the case of Lynas in Malaysia, the Malaysian Government grated a 12-year tax concession to encourage foreign direct investments (FDI). The deal was done under a [notoriously corrupt Prime Minister](https://www.washingtonpost.com/business/how-malaysias-1mdb-scandal-shook-the-financial-world/2022/08/24/a7b2b5d4-2377-11ed-a72f-1e7149072fbc_story.html). When the public protested against Lynas, the Government introduced stricter operating licence conditions on Lynas, promising to compel the company to remove all of its wastes from Malaysia. Later, Lynas’ operating licence was renewed even though the licence conditions have not been met by Lynas. The contract to build Lynas’ radioactive waste dump in Malaysia has been awarded to a company linked to the state’s royal family with no track record in managing radioactive waste or in constructing any radioactive waste facility. Furthermore, the Malaysian Atomic Energy Licensing Board (AELB) has lowered the disposal requirements and standards for Lynas’ waste against IAEA Guidelines and scientific advice, and in stark contrast to requirements in Australia for the similar waste. Public and environmental health of the community near the Lynas plant have been compromised as a result since Lynas’ waste is contaminated with thorium and uranium – both of which are sources of [cancer causing ionising radiation and there is no safe dose of exposure](https://www.unscear.org/unscear/publications/2020_2021_3.html). This type of waste is required to be permanently isolated from the biosphere.

1. What are the gaps in the development and implementation of existing National Action Plans, legislation, and domestic, regional, or international frameworks (e.g., the Paris Agreement or climate change laws) on business and human rights, particularly in relation to the extractive sector, which if addressed will advance a just and human rights-based energy transition?

Please refer to responses under Q1 and 2 above.

1. How can energy transition policies, programs, plans and activities in one State have adverse human rights impacts outside of their territory or jurisdiction (including supply chain issues and sourcing)? What measures may reasonably correct this situation?

As evidence from the Lynas case study and the rare earth industry in China, the mining and processing of transition minerals in countries with weak environmental law enforcement, limited democratic space for citizens to speak out and a lack of media freedom, where corruption remains a problem, mining companies will take advantage of the lower cost of production, weaker enforcement of environmental, OH&S standards and limited human rights protection to carry out their operations. Voluntary guidelines and standards have been easily masked through loopholes in existing ISO certification process and schemes that are based predominantly on reports supplied by the offending business. The actual harms and longer-term public and environmental health impacts (eg the onset of a cancer through exposures to low doses of ionising radiation can take years or even decades to surface) are harder to track when and if the State fails in its duty of care to monitor and make public the full monitoring data to the public, or if the affected communities are incapable of holding the polluting business accountable due to a lack of knowledge and other complex dynamic at play.

1. How can States harness the potential of energy transition to accomplish important policy objectives related to human rights, such as achieving local empowerment, gender equality, protection of the environment, mitigation of climate change and realising the Sustainable Development Goals?

The SDG is another voluntary measure. If we are serious about addressing and tackling climate change to pursue a clean, green and equitable/just energy transition, a strong binding treaty incorporating all of the UN HR instruments will be required to ensure States adhere to a decent standard of human rights.

**Corporate responsibility to respect human rights**

1. What roles should business enterprises in the extractive sector play to integrate human rights into ongoing energy transition plans and programs to address adverse human rights impacts? Please provide examples if possible.

Business enterprises in the extractive sector are unlikely to willingly integrate human rights into their energy transition plans and program unless they are mandated by law to so and that there are accessible mechanisms for affected community and CSO to verify their claims.

1. Are human rights provisions, for example in existing concessions, contracts, and bilateral investment treaties, effective in encouraging businesses in the extractive sector, including investors, to respect all internationally recognised human rights? If not, what should be done to strengthen their efficacy?

No, the voluntary nature of existing human rights provisions has rendered them ineffective. Companies have essentially ‘green washed’ on their environmental and human rights track records by producing glossy and dressed up reports and/or pro-industry certifications, while operating business as usual by polluting the environment and leaving toxic radioactive legacy for local community and weak government in the global South to tackle. It should be mandatory for businesses and investors to uphold human rights and not simply paying lip services. It should be mandatory for any concessions, contracts and treaties or agreements to explicitly respect and uphold all internationally recognised human rights and community and CSO should be granted the right to scrutinise them with ease.

1. Have you seen extractive sector investors play a role in preventing and mitigating, or in exacerbating, negative impacts of energy transition efforts on human rights? Should investors be required to conduct gender responsive HRDD in meaningful consultation with local communities, civil society organizations, Indigenous Peoples, and human rights defenders? What remediation responsibility should investors have?

On the contrary, extractive sector investors have made use of the urgent need for green/renewable energy transition from fossil fuels to greenwash, justify and mask their dirty operations. Take for example Lynas, its sustainability reports have not revealed the inadequacy of its pollution, waste management and disposal practices. Its zero harm claims have misled local community to be complacent despite the presence of significant amounts of radioactive materials in its waste that are sources of very harmful and hazardous ionising radiation. Lynas has in fact proudly promoted its pro-women hiring stance by employing child bearing age young women to work in the plant despite the presence of health hazards from its radionuclide bearing lanthanide concentrate, from the toxic heavy metals both in the concentrate and its wastes. Rare earth minerals themselves have been studied and shown by recent scientific studies to have their [own set of health effects](https://link.springer.com/chapter/10.1007/978-3-030-52421-0_1).

1. What role can the informal economy (e.g., artisanal and small-scale mineral exploitation, including supply chains) play in advancing a just and human rights-based energy transition?

In the case of rare earth, the hazards are complex as radionuclides of infinitely long half-lives are often attached to the mineral ore requiring proper management and regulatory scrutiny to ensure their isolation from the biosphere for a long period of time. Repositories and sites for the disposal of long-live radioactive materials require well engineered facilities that are costly to build and maintain. In China, illegal artisanal and small-scale mineral exploitation of rare earth has contributed to very serious environmental pollution and public health problems which have yet to be effectively brought under control despite over a decade of efforts by the Chinese Government.

On the other hand, the trade union backed [Earthworker Co-operative](https://earthworkercooperative.com.au/) in Victoria in Australia has positively created [green jobs for workers](https://earthworkerenergy.coop/) from the closed LaTrobe valley coal power station. Artisanal and small-scale mineral extraction and processing can only be safely run if occupational health and safety, and environmental standards are assured. They should be well equipped with information on the hazards of various toxic elements and processing methods, and to ensure safe and proper pollution and waste management and disposal. Such conditions are unrealistic in remote regions in the global South and in country with poor track record of environmental and public health protection.

1. Should concessions, contracts, and legislation require all business enterprises producing, purchasing, processing, and distributing transition minerals to apply and implement human rights-based impact and risk assessments and due diligence standards, including gender-responsive HRDD and heightened HRDD for conflict-affected areas? If so, how could such processes ensure meaningful participation of impacted communities, particularly vulnerable and historically excluded groups?

Yes. Human rights-based impact and risk assessments, and due diligence standards, including gender-responsive HRDD should always be mandatory for businesses involved in the mining and production of transition minerals. States in the global South should be equipped with means and resources to ensure that businesses adhered to these standard in their operations and practices. Concessions and contract should only be granted to companies that are committed and are diligently willing to adhere to these standards.

1. How could extractive sector associations, higher education institutions and other stakeholders promote awareness and encourage human rights-compatible business practices (e.g., addressing greenwashing and green scamming practices)?

* Make scholarships or research grants available to higher education institutions to critically review, evaluate and make recommendation for improvements.
* Support citizen science by resourcing affected local communities and/or CSO to critically scrutinise and verify claims made by businesses on their human rights performances
* Resource CSO and/or higher education institutions to independently assess businesses to rank them according to the various human rights provisions

**Access to remedy**

1. What measures and mechanisms should be provided by extractive sector legislation, bilateral investment treaties, concessions, and contracts to allow individuals or communities affected by extractive activities to seek effective remedy for business-related human rights abuses? What remedies are best suited for this sector?

* Contribute to a human rights protection fund that includes pollution and legacy site clean-up fund
* Compel mining companies responsible for the generation of radioactive NORM waste from unsuitable location (especially from countries in the Global South) to return to its mine site or an appropriately selected site for disposal under strict safety guidelines and regulatory control

1. Please provide examples of steps taken by States to investigate, punish and redress business-related human rights abuses related to the extractive sector in the context of energy transition projects. Are the steps and redress mechanisms effective in terms of both process and remedial outcomes?

Not aware of any associated with energy transition but the [West Chicago case in the USA](https://cumulis.epa.gov/supercpad/cursites/csitinfo.cfm?id=0500761) and the [Mt Pass rare earth mine](https://storymaps.arcgis.com/stories/e3fc81532d94456dbafbff151f2d3851) offer an insight into how the adverse ecological and public health impacts have been managed as well as can be with the appropriate clean-up efforts through the US’ Superfund facility.

1. Are you aware of any cases submitted to judicial and/or non-judicial instances (e.g., national human rights institutions, national contact points, mediation, etc.) regarding business-related human rights abuses in the extractive sector, particularly in the context of energy transition projects?

Yes but not directly related to energy transition projects. An example is shown here: <https://www.latrobe.edu.au/news/articles/2019/opinion/dirty-deeds-the-mineral-wealth-pursuit>

1. Are current dispute resolution provisions and frameworks in the extractive sector “fit for purpose” to address complaints related to human rights abuses linked to extractive activities and energy transition projects? If not, what are the alternatives for a legitimate, transparent, and effective dispute resolution system to address such complaints?

**Good practices and other comments**

1. Please provide examples of good practices regarding the integration of human rights issues in the extractive sector in the context of the energy transition.

Earthworker https://earthworkercooperative.com.au/hotwater/

1. What specific renewable energy policies, practices and safeguards should be adopted by States and business so that energy transition does not have adverse effects on human rights?

See responses in Q1

1. Are there any specific recommendations to States, businesses (including investors), civil society, UN bodies and National Human Rights Institutions that would help further advance a just and human rights-based energy transition in the extractive sector? Any other comments or suggestions about the forthcoming report are also welcome.

* High human rights standards and requirements should extend to business operations overseas as well as domestically
* Intergenerational impacts and implications must be included when assessing business operations in the extractive sector since health effects from mining pollution can take years and even decades to surface as in the case of exposure to low-level radiation hazards.
* Anti-corruption regulations and requirements for a business should extend beyond national border to include overseas operations.