

04 December 2018

Mr J Wickes  
Director Operations 2  
Anti-Dumping Commission  
Level 35  
55 Collins Street  
Melbourne  
Victoria 3000

**Canberra**  
6/2 Brindabella Circuit  
Brindabella Business Park  
Canberra International Airport  
Australian Capital Territory 2609

Canberra +61 2 6163 1000  
Brisbane +61 7 3367 6900  
Melbourne +61 3 8459 2276

[www.moulislegal.com](http://www.moulislegal.com)

**Brisbane**  
Level 4, Kings Row Two  
235 Coronation Drive  
Milton, Brisbane  
Queensland 4064

**Melbourne**  
Level 39, 385 Bourke Street  
Melbourne  
Victoria 3000

Australia



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By email

## **Downer EDI Mining-Blasting Services Comments on injury allegations in context of PAD 473**

As the Commission will be aware, we represent Downer EDI Mining –Blasting Services (“DBS”).

We wish to make the following submissions on behalf of our client with respect to the Australian industry’s injury allegations and Preliminary Affirmative Determination No 473 (“the PAD”).

<b>Incorrect market analysis level .....</b>	<b>1</b>
<b>Narrow focus on blasting services contracts masks the truth .....</b>	<b>2</b>
<b>No impact of dumped imports on awards of blasting services contracts.....</b>	<b>4</b>
<b>Subject imports have not caused injury to the Australian industry .....</b>	<b>5</b>

### **Incorrect market analysis level**

DBS is a blasting services company. It supplies blasting services and bulk explosives which include AN and ammonium nitrate emulsion, in almost all cases under a contract which effectively “bundles” all the supplies and services together in one package. It produces, mixes and delivers bulk explosives to the blast location, and then applies and ignites the explosives at that location, for the purposes of breaking up and exposing the resources being extracted at the mine site.

DBS is not typically a seller of AN, although it did sell a small amount of AN directly in the investigation period. DBS nominates a cost for AN as part of its blasting services in its tender, and if the tender is accepted this will be referred to in the blasting services contract. That cost is one of many costs, for other consumables, emulsions, labour hours, services and the like, all of which go together to arrive at a final construction of the price of the products and services purchased by the mine site concerned. The tenders for which blasting services companies such as the blasting services arms of the Australian industry, DBS, AEL, and other independents compete are tenders for the provision of bundled products and services.

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The point of competition, and the only point at which any conclusions could be reached about the proposition that dumping has caused material injury to the Australian industry, is at the point at which sales of AN are made directly to the end users of AN. The point at which they purchase AN is the relevant juncture for a causation analysis. The downstream point at which blasting products and services are supplied is not a point at which AN price discovery accurately takes place, because there are too many other products and services also sold at that downstream point. How a blasting services company loads its price or deflates its price towards any one or any number of elements of a tender is a matter for its commercial judgement in seeking to have the contract awarded to it. And, ultimately, the final product used in the provision of the blasting services is a bespoke explosive prepared for the site conditions. It is not AN in the form in which it has been imported nor on its own. Again, the AN cost in any tender is for the purposes of calculating an overall price for the bundled products and services that are provided to mine sites.<sup>1</sup>

No one would seriously consider that the Australian industry members is at risk of “losing out” to imported AN in tendering **[CONFIDENTIAL TEXT DELETED – names of mining companies and tender information]** reserve the right to “split” AN from other consumables and the actual blasting services themselves. The volumes are massive and the freight, port and regulatory obstacles would prevent blasting service providers having any realistic ability to compete with imported AN. A low AN price would invite the mining house concerned to “cherry pick” the low price and get its blasting services from a rival service provider. It is inconceivable that any importer would assume these levels of price and supply risk.

### **Narrow focus on blasting services contracts masks the truth**

The PAD notes that most AN sale contracts were fixed term contracts entered into before the investigation period, and then says it has taken a “practical approach”, because of that fact, to assess whether dumping has caused or is causing material injury.

*The Commission considers it appropriate to assess the information provided by each applicant in relation to specific occurrences of injury experienced during negotiations with customers to determine whether injury has been caused or is being caused, and whether this injury is material.*

We respectfully submit that this is not a practical approach. Instead, is a misguided approach.

It is misguided because it betrays a guiding philosophy that “practicality” – an expression that is highly outcome-driven - is to be preferred ahead of legality and logic.

It is misguided because it disregards the self-imposed constraints, or fortunately-obtained premiums, in the pricing of AN by the competing members of the Australian industry. This pricing is dictated by the contracts they already had in place prior to the investigation period, and that they continued to have in place, for the sale of the very product that this investigation is all about. These contracts are a major factor affecting the financial performance of the Australian industry members, and are far more significant in their effect than the paltry volume of imports under investigation and their paltry market share. Under those contracts the industry sells by far the greatest volume of AN, and does so at prices

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<sup>1</sup> We are not aware of any instance, in any one of the many rebar and rod-in-coil anti-dumping investigations handled by the Commission, in which injury to the manufacturer was adjudged by way of considering sales of fabricated coil products by say OneSteel Distribution, even though the cost of the rebar and rod-in-coil is self-evidently part of the price of the fabricated product. Nor by way of sales of painted coil by BlueScope, when it complains about injury alleged to have been caused by unpainted coil.

which were entirely unaffected by alleged dumping in the investigation period. They cannot be disregarded.

It is misguided because it disregards the market impact of Orica's investment in its Burrup plant in the Pilbara, which parks 330,000 MT of AN production per annum in the previously uncrowded backyard of the West's once-monopoly producer, CSBP. This has created huge disruption in the market Australia-wide, and a jostling for position amongst Australian industry members to "lock in" long term, reliable order volumes. In doing so the Australian industry members have tactically offered lower price levels, directly and via related and independent mining service providers, and have engaged in a cross-country battle for market share extending outside their historically confined markets. It is they who have impacted on each other's prices, in an attempt to secure their own longer term benefit. The exporters under investigation have been irrelevant to those competitive interactions.<sup>2</sup>

It is further misguided because in using the present tense in referring to injury, as an alternative to the customarily required finding of material injury caused by dumping in the investigation period, it suggests that preliminary findings can be made, and notices potentially published, where the investigation *does not* detect material injury caused by alleged dumping in the investigation period. That would be an improper interpretation of the relevant legal provisions of the *Customs Act 1901* ("the Act").<sup>3</sup>

The PAD refers to the claim of the applicants that tender processes and dual sourcing by mine operators expose the Australian industry to competition from imports. Although it refers to the applicants' statement that AN is supplied by the Australian industry and by exporters "*to mining principals or to mining services providers*", the proposition that the Australian industry's prices to mining services providers were in any way affected by dumping is not later referred to or returned to in the analysis. Instead, the non-specific expression "*customers*" is used, in a sense that suggests the only area of interest of the Commission in arriving at its PAD was sales to "*mining principals*".

This wrongly sidesteps the need to consider sales to "*mining services providers*". Our client submits that no Australian industry member found it necessary to reduce its prices to "*mining services providers*", such as DBS, due to allegedly dumped imports or because of a fear of competition from imports. Because of the fixed term contracts already in place, because of the insecurity and expense of foreign supply, and because of the control over supply exercised by the Australian industry members, it is simply not possible for imports to drive the pricing behaviour of the Australian industry. The key factor driving the price behaviour of the Australian industry is competition amongst its own members, at a time of reduced market size and the expansion of local supply

We have already explained that sales to "*mining principals*" are not typically sales of AN, in that mining services providers such as DBS operate in the market that provides "*blasting solutions*" to clients, and are not in the business of simply trading AN. DBS and the other independent blasting services companies provide bundled blasting products and services. Thus, in only considering sales to "*customers*" in the sense of "*mining principals*", we submit that the Commission's analysis in the PAD is unreasonable and distorted. That is a level of the market after which AN has first been purchased by blasting services companies, whether from the Australian industry members or otherwise, under

<sup>2</sup> The impact of increased supply is referred to time and time again in media and other reportage. As an example, see "*Incitec Pivot Cleans The Slate For FY19*" at <https://www.fnarena.com/index.php/2018/11/14/incitec-pivot-cleans-the-slate-for-fy19/> (Attachment 1). This refers to manufacturing problems in FY2018 at Incitec Pivot's Moranbah plant, oversupply of AN, and an expectation that the market will not return to balance until 2021.

<sup>3</sup> The Commission has requested reams of documents referring to events that did not take place in the investigation period. The use of this information is legally suspect, but at the same time DBS has nothing to fear from that information, as all of it backs up and does not contradict what is said in this submission.

contracts and in circumstances which do not seem to have entered the Commission's contemplation. Thus, the Commission's analysis is not focussed where it should be, namely the market for the sale of AN itself.<sup>4</sup>

Moreover, our client has provided an exhaustive amount of evidence demonstrating that it has not forced down the price of any AN supplied to it or offered to be supplied to it by the Australian industry. To the contrary, it has submitted evidence of three circumstances that are entirely opposed to that notion.

The first is **[CONFIDENTIAL TEXT DELETED – example of commercial behaviour of Australian industry members]**:

**[CONFIDENTIAL TEXT DELETED – extract from correspondence]**<sup>5</sup>

**[CONFIDENTIAL TEXT DELETED – example of commercial behaviour of Australian industry members]**. It has nothing whatsoever to do with imports and everything to do with **[CONFIDENTIAL TEXT DELETED – competition, extra capacity and looming oversupply amongst Australian industry members]**.

The second is the lack of price competitiveness **[CONFIDENTIAL TEXT DELETED – tender process]**, demonstrated to the Commission in our client's previous response to the Commission's question in that regard and the associated materials provided.<sup>6</sup>

The third is **[CONFIDENTIAL TEXT DELETED – competitive tender information]**, a circumstance to which we now turn.

## **No impact of dumped imports on awards of blasting services contracts**

Even if the Commission does go down to the level of bundled mining services tenders in its analysis, which on our submission it must not do, it will find no evidence there that is of any assistance to a finding of material injury caused by dumping.

The investigation period for the purposes of this investigation is from 1 April 2017 to 31 March 2018. In that period **[CONFIDENTIAL TEXT DELETED – number]** tenders were awarded in which DBS had participated. In that period DBS was awarded **[CONFIDENTIAL TEXT DELETED – number]** tenders. None of these were tendered for by DBS on the basis that imported AN would be used in the blasting services supplied by DBS, and none of them were then subsequently supplied by DBS using imported AN.

On that basis, it has to be apparent that the PAD's statement that *"the applicants had reduced pricing to secure volumes"*, and were led to do this by reliance on *"documentation, such as correspondences, that showed customers referencing prices of imported ammonium nitrate from some of the countries subject to the application"* has no basis, at least in the case of DBS or exports from Sweden. In light

<sup>4</sup> We refer to our earlier comments about the inability of importers to compete when it comes to requests for tender involving large forward quantities of AN that might be split away from blasting services and other consumables. The evidence provided by our client establishes that it cannot expect to be competitive **[CONFIDENTIAL TEXT DELETED – commercial factors relevant to tendering]**. We expect that its experience is no different to that of the other independent blasting services companies operating in the market.

<sup>5</sup> See email from the writer to Adam Hourigan dated 15 November 2018.

<sup>6</sup> *Ibid.*

of the supply dominance of the Australian industry members, and the other competitive trends to which we have referred, we would not expect this to be an experience that is isolated to Swedish exports.

Sections 269TG(1) and (2) of the Act define the circumstances in which there are sufficient grounds for the publication of a notice. Those grounds are that (a) dumping (b) caused (c) material injury. It appears to us that the Commission has not found, in the PAD, that dumped exports have caused the injury. Rather, it has decided that offers to potentially supply exported AN that potentially might be dumped have caused injury. Every reference in the PAD which goes to the coalescence of these three factors refers to the proposition that the alleged injury has been caused, in the Commission's own words, by price negotiations or potential availability of exported AN.

Not only is this a flimsy excuse for suggesting that dumping caused any injury, but we submit to the Commission that it is also unlawful. The disclosure of price offers made to *"mining service providers"* by AN producers for the supply of AN would be very unusual and extremely unlikely. Accurate disclosures by *"mining principals"* of actual price offers made by AN producers would also be very unusual although statements to encourage parties to *"sharpen their pencil"* are quite likely. This is the nature of competitive tendering, and is a tactic used by mining principals regardless of any tenderer's submitted price. But in any event those circumstances fall a long way short of establishing that injury has been caused by dumping thereby, and the Commission falls into grave error by suggesting the contrary.

Imports cannot be dumped unless they actually take place, and injury cannot be caused by them unless that takes place either.

Moreover, it is not said in the PAD that any contract for the sale of AN to *"a mining service provider"*<sup>7</sup> was won by AN under investigation or that any contract for blasting services to a *"mining principal"* was won by a company on the basis of the use of AN under investigation in its ammonium nitrate emulsion in the investigation period. We think this is telling.

Dumping is not a thought crime, and injury cannot be caused by a phantom occurrence.

## **Subject imports have not caused injury to the Australian industry**

Our client submits that imports have not caused material injury to the members of the Australian industry. Their decision to collaborate in the way that they have done so for the purposes of the application is opportunistic and anti-competitive, and the allegations made in the application are highly misleading.

It ought to be abundantly clear that the establishment of the Burrup AN plant has sent an unprecedented shock into the market. The implications of that facility, and its stuttering performance up to now, have caused:

- Australian industry members to drive down price in order to win contracts and secure future orders in a situation of future market oversupply;<sup>8</sup>

<sup>7</sup> We remind the Commission of the circumstances of DBS's Swedish supply arrangements, and the fundamentally non-injurious nature of them.

<sup>8</sup> Clear examples are (a) the takeover by Orica of Incitec Pivot's AN supply to Roy Hill during the investigation period (see *"Orica claims BHP, Roy Hill explosives contracts"* (2 March 2018) at <https://www.australianmining.com.au/news/orica-claims-bhp-roy-hill-explosives-contracts/> (Attachment 2) and *"Incitec Pivot Limited ASX Release - Further update on Western Australia Business"* (11 January 2018) at <http://investors.incitecpivot.com.au/phoenix.zhtml?c=170340&p=irol-news&nyo=0>) (Attachment 3) and (b) Incitec Pivot's subsequent tit-for-tat takeover of Orica's AN supply to Fortescue Metals Group (see *"Incitec claws Fortescue*

- Orica to utilise directly imported **[CONFIDENTIAL TEXT DELETED – DBS confidential opinion of sources of supply]**, in the interim; and
- **[CONFIDENTIAL TEXT DELETED – competition between Australian industry members]**,<sup>9</sup> and **[CONFIDENTIAL TEXT DELETED – competition between Australian industry members]**.

By DBS's calculations AN imported by non-Australian industry members from the source countries that did not end up in the stocks of Australian industry members was in the region of 1% of the entire market.<sup>10</sup>

The Commission's reliance on the applicant's claim that they were scared by what customers told them about imports as the sole basis for a finding that dumping of AN has caused material injury to the applicants is insufficient and entirely fails the legal standards required for a finding of causation.

The Commission would do well to veer away from "practicality". The pub test would be better.<sup>11</sup>

On behalf of our client Downer EDI Mining-Blasting Services we call upon the Commission to terminate this investigation under Section 269TDA(13) of the Act at the soonest possible opportunity.

Yours sincerely



**Daniel Moulis**  
Partner Director  
**+61 2 6163 1000**

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*blast contract from rival Orica amid explosives price war*" (14 June 2018) at <https://www.theaustralian.com.au/business/mining-energy/incitec-claws-fortescue-blast-contract-from-rival-origa-amid-explosives-price-war/news-story/0daa6e5637d79f23ca3afb1327dd6715> (Attachment 4).

<sup>9</sup> See footnote 4.

<sup>10</sup> See DBS submission of 11 July 2018 (EPR Doc 004).

<sup>11</sup> An opinion also expressed by Moncourt Group in its submission of 17 August 2018 (EPR Doc 011)

# Incitec Pivot Cleans The Slate For FY19

**Australia | Nov 14 2018**

After being plagued by manufacturing issues in FY18 Incitec Pivot has a clean slate, with upside from higher fertiliser prices likely, although oversupply of AN will pressure explosives.

**-Moranbah on track for production targets, contract re-negotiations**

**-Phosphate Hill has largest potential for upside**

**-Uncertainty continues for Gibson Island**

By Eva Brocklehurst

Incitec Pivot ((IPL)) has set aside the manufacturing issues that plagued FY18 and provided an upbeat outlook for the new reporting year. Despite the challenges, earnings growth was supported by a full year for the WALA (Louisiana) facility and a higher realised diammonium phosphate price at Phosphate Hill, as well as solid growth from Dyno Nobel America explosives. Net profit of \$347m was up 9% and operating earnings (EBIT) of \$557m up 11%.

However, manufacturing problems at three plants and unfavourable weather, as well as other one-off costs, meant the company did not benefit from the earnings leverage that it typically enjoys from materially higher fertiliser prices. Morgans believes the stock is fairly valued although recognises that strong fertiliser prices and a falling Australian dollar as well as the share buyback are supporting the share price.

Citi agrees the stock is in "fair value" territory, with management committed to buying back the remaining \$90m of its buyback program, beyond which the company is signalling a preference to reduce debt amid organic growth initiatives.

With few M&A opportunities readily visible, Citi believes the stock lacks re-rating catalysts outside of a stronger-than-expected cycle. Deutsche Bank, in marking to market spot fertiliser prices and FX, is more confident there is 20% upside to earnings and retains a Buy rating.

The share price has had a good run and the margin of error in forecasting FY19 is even higher than usual because of the imminent re-pricing of the Moranbah foundation contracts, CLSA contends. The broker, not one of the eight monitored daily on the FNArena database, has an Underperform rating with a target of \$4.00.





No specific earnings guidance was provided for FY19, although the company expects moderate earnings growth in Dyno Nobel Americas, with Asia Pacific volumes broadly in line, and warns that domestic ammonium nitrate oversupply will keep pricing and margins under pressure.

Macquarie believes the Phosphate Hill plant has the largest potential upside in FY19, given its significant operating leverage. Fertiliser prices are also a watching brief for Morgan Stanley, amid higher spot prices. Still, the share price reaction since May's lows, having rallied 17%, means it sits within the broker's average valuation and an Equal-weight rating is maintained.

#### Explosives

Explosives volumes grew strongly, particularly in the quarry & construction sector where Dyno benefits much more than competitor Orica ((ORI)). Macquarie suspects Incitec Pivot is less confident than Orica on Australian ammonium nitrate pricing, attributed to its experience in Western Australia and the impending renegotiation of Moranbah contracts.

The company is considering the potential expansion of Moranbah in 2021, as the market returns to balance, and will update the market in May next year. Macquarie assumes the issue is price and, on that basis, ammonium nitrate prices are headed in the right direction.

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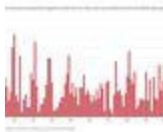
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## Orica claims BHP, Roy Hill explosives contracts

🕒 March 2, 2018   📁 News   👤 Ben Creagh

Orica has confirmed that it is the new explosives supplier for BHP and Roy Hill at their iron ore operations in the Pilbara region.

In an operational review, Orica reported that it secured contracts for the supply of ammonium nitrate to the miners during the first half of the 2019 financial year.

Orica replaces Incitec Pivot as the explosives supplier for BHP and Roy Hill. Incitec Pivot confirmed in recent months that its contracts for ammonium nitrate with the miners were due to end.

After securing the Pilbara contracts, Orica expects its Burrup Technical Ammonium Nitrate (TAN) plant will “contribute positively” to the company’s earnings this financial year, before ramping up to full utilisation rates in early 2020.

Orica said the TAN plant would be operational towards the end of the financial year, but added it was currently overcoming some concerns with the project.

“The joint venture operating partner, Yara, is addressing issues related to the construction quality of heat exchangers which have shown some premature cracking,” Orica said in an ASX announcement.

“A full site outage of the upstream ammonia plant, owned by Yara, is planned over the month of July as part of the routine, multi-year maintenance program.”

*The Roy Hill site. Image: Roy Hill*

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# Incitec Pivot Limited

Office of the Company Secretary

ABN 42 004 080 264

Registered Office:  
Level 8, 28 Freshwater Place  
Southbank Victoria 3006

Tel: (61 3) 8695 4400

Fax: (61 3) 8695 4419

[www.incitecpivot.com.au](http://www.incitecpivot.com.au)

11 January 2018

The Manager  
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Dear Sir or Madam

## **Electronic Lodgement – Further update on Western Australian business**

In accordance with the Listing Rules, I attach a copy of an ASX Announcement for release to the market.

Yours faithfully



**Daniella Pereira**  
**Company Secretary**

Attach.

# Incitec Pivot Limited

GLOBAL DIVERSIFIED INDUSTRIAL CHEMICALS

## ASX RELEASE

### Further update on Western Australia Business

11 January 2018

Incitec Pivot Limited (**ASX:IPL**) today advised that it has been notified that with effect from expiry of its current contract with Roy Hill Iron Ore (Roy Hill) on 9 February 2018, IPL will cease to be Roy Hill's contracted supplier of explosives products and services.

Having regard to IPL's contractual commitments with its third party supplier of ammonium nitrate prill in Western Australia, in addition to the amounts announced on 6 December 2017, the loss of the Roy Hill contract is currently estimated to have a one off impact on Net Profit After Tax (NPAT) of approximately \$5m in FY18, \$16m in FY19, \$22m in FY20, \$18m in FY21, and \$20m in FY22, and minimal impact beyond FY22.

These NPAT impacts may be able to be mitigated to some extent by new commercial arrangements.

#### For more information:

##### Investors

###### Frank Micallef

Chief Financial Officer

Tel: +61 3 8695 4515

Mobile: +61 409 961 569

[frank.micallef@incitecpivot.com.au](mailto:frank.micallef@incitecpivot.com.au)

##### Media

###### Matthew Flugge

Vice President Group Corporate Affairs

Tel: +61 3 8695 4617

Mobile: +61 409 705 176

[matthew.flugge@incitecpivot.com.au](mailto:matthew.flugge@incitecpivot.com.au)


## THE AUSTRALIAN

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# Incitec claws Fortescue blast contract from rival Orica amid explosives price war

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By **MATT CHAMBERS**, SENIOR RESOURCES REPORTER

2:20PM JUNE 14, 2018 •  NO COMMENTS

Fortescue Metals Group is the latest beneficiary of explosives price-undercutting between the nation's two big suppliers that has seen Incitec Pivot win the iron ore miner's blast contract from rival Orica and claw back some losses from earlier big contract losses in Western Australia's Pilbara region.

The effective price war has come as Orica ([ORI](#)) prepares to ramp up its long-delayed \$800 million Burrup ammonium nitrate plant near Karratha, bringing new supply to the world's biggest iron ore production region.

But the east coast coal market may also see oversupply, with Orica about to restart mothballed production at its Yarwun plant at Gladstone.

An Incitec ([IPL](#)) announcement to the stock exchange last night that it had won the Fortescue contract, and mitigated previously flagged net profit losses by \$54m over the next four years, comes after it lost contracts at BHP and Gina Rinehart's Roy Hill to Orica in December and January.

"The domestic ammonium oversupply has set in, with contract pricing coming under renewed pressure," Citi analyst Jakob Kang said.

"Incitec's losses in its WA business is a direct reflection of the excess capacity in the WA ammonium nitrate market given the start-up of Orica's Burrup plant. Oversupply in the west will likely be mirrored on the east coast with Orica's decision to restart its mothballed Yarwun lines."

The problem for Incitec when it lost the BHP and Roy Hill ammonium nitrate contracts was that it had already agreed to buy the explosives ingredient from Wesfarmers' CSPB unit under take-or-pay contracts.

That meant the contract losses left it facing a \$116m hit to net profit.

Orica's contract-grabbing in Western Australia last summer came as its Burrup plant was scheduled to start up (three years later than originally planned), providing a lot of new gas for the nation's iron ore sector — which it is fair to say is producing less than was envisioned in 2012 when the Burrup plant was approved.

Orica's BHP and Roy Hill contracts probably left Orica overcommitted from the Burrup plant (which is facing teething problems and is expected to be up and running by the end of September), leading to an announcement this morning that the contract loss will not change the financial outlook this year or next and will have a minimal impact in 2020.

Incitec said it had been awarded the Fortescue explosives products and services supply contract from July this year to the end of 2023.

The contract win, which will reduce previously announced profit hit by \$54m over Incitec's 2019 to 2022 financial years, appears to have taken care of all or most of the Wesfarmers overhang.

"It is not anticipated that any further disclosures will be required in relation to IPL's contractual commitments to its third party supplier of ammonium nitrate in Western Australia," Incitec said.

Incitec shares rose on the news and were up 6c, or 1.78 per cent, at \$3.43 at 3.20pm. Orica was up 3c, or 0.2 per cent, at \$17.35.

Morgan Stanley analysts said the Fortescue contract meant there was scope for up to a 5 per cent boost to Incitec's consensus earnings between 2019 and 2022.

"More broadly, this award reduces the risk that Incitec's surplus tonnes destabilise the east coast market — a positive for both Incitec and Orica," Morgan Stanley said in a note to clients.

“Beyond 2019, the contract loss is likely to be incrementally negative (for Orica) but we believe the downside risk to the group earnings is reasonably limited. Moreover, with tenders over the next one to three years, there is scope for Orica to recover lost volumes.”

**MATT CHAMBERS, SENIOR RESOURCES REPORTER**

Matt Chambers has been covering the resources industry since taking a job at the Kalgoorlie Miner newspaper in WA in 2002 and quickly working out what the most important round was. After covering mining and ene... [Read more](#)