Speech Notes by
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given at the launch of
'TO HAVE BUT NOT TO HOLD' by Henry Finlay
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It is a pleasure to be associated with this event, and to launch Henry Finlay's book on the history of divorce law in Australia. He is himself very much a part of that history, at least in more recent times. His book takes us far back in time.

Where should one start a history of divorce? We are all aware that, in the 16th century, Henry VIII found his own way to rid himself of wives who displeased him. But for most people of that era, marriage was a status, a sacrament even, which could not be broken.

John Milton railed against the unbreakable nature of the marriage bond and the hardship this entails to those whose natures are incompatible, as long ago as 1643. He can hardly have been the first to do so, though his emphasis on incompatibility is a remarkable piece of foresight. [Leonie Starr, *Counsel of Perfection: The Family Court of Australia*, 1996, Oxford]

Henry Finlay has explained in his book that well before the settlement of Australia, the rich and powerful in England had found a way to break the marriage bond. It was a cumbersome and expensive procedure, involving a decree of separation in the ecclesiastical courts and ending with a privately sponsored Bill of Divorcement. The first such divorce was enacted in 1670, by 1857 only 325 divorces had been obtained in this way in England.

But there was no gender equity in this arrangement. A husband could rely on a single act of adultery to obtain a divorce, but a wife had to establish not only adultery but also aggravating circumstances. Furthermore, she would need access to resources at a time when women had no legal status to own or to deal with property. It is not surprising, then, that only four women succeeded in obtaining divorces by this procedure.

Nor was there class equality, since the poor had no hope of using the procedure. Many lived together without formal marriage. They could simply separate. But for those who had been legally married, there was no way out. Married men might just disappear, leaving their families destitute. A presumption of death might apply in due course. Bigamy was not uncommon in these circumstances.

In truth, the cumbersome parliamentary divorce procedure was largely to secure the succession to property and privilege, which was held to be seriously disrupted by the adultery of a wife. Those consequences did not follow the adultery of the husband. Wives had no rights over their children, and had few remedies against their husbands. His simple adultery, without aggravating circumstances, was insufficient to ground a divorce or separation.

The English Divorce legislation of 1857, which created a new divorce jurisdiction in the High Court, did not remove these basic inequalities. It was based on the single

ground of adultery, with the inequality between husband and wife that had previously applied.

There were some brave men, among them WE Gladstone, who argued for equality in regard to the ground of adultery despite their personal opposition to divorce itself. Others were satisfied with their view that a wife should not be aggrieved by her husband's adultery, while it was proper for a husband to complain of simple adultery, since it might foist another's child upon him, and there were consequences for property and inheritance.

There were many people for whom the 1857 law provided little help. For example, Mary Ann Evans, (1819 – 1880) better known as George Eliot, had lived with Henry Lewes since 1851, several years before the new divorce law came into force. He had long been living apart from his wife, but he could not get a divorce under the new law. Nor could his wife. So it is interesting to observe that two of the novelist's heroines were released from the bonds of unhappy marriage by the untimely deaths of their husbands.

[We can't blame Dorothea for Edward Casaubon's demise in *Middlemarch*, though Gwendolen Harleth was not entirely innocent in the drowning of Henleigh Grandcourt off Naples in *Daniel Deronda*.

Henry Finlay recounts how the British government invited the legislatures of the six Australian colonies to introduce divorce laws based on the English model of 1857. He has traced the history of the legislation that followed, and the motives of those who supported or opposed each new step along the way.

The first part of his study covers the struggles of the six colonial legislatures, first to get a divorce law and, secondly, to break away from the English model by introducing equality in regard to adultery, and more liberal grounds of divorce. In this multi-State gathering, one can compare the success rates of the States.

South Australia in 1858, closely followed by Tasmania in 1860, easily won the race to be the first to get divorce on to the books. Their laws followed the English model. Exhausted by the effort of this, both jurisdictions lagged sadly in the business of liberalising divorce. Another 60 years and a world war were to pass before they made any further changes.

NSW was the last of all, to legislate for divorce, in 1873. Again, it had to follow the English model. But in 1881, NSW won the accolade by being the first to introduce equality in regard to the ground of adultery. No other colony achieved this equality until well into the next century. Victoria did not achieve it at all, not until the Commonwealth occupied the field, much later.

Victoria was an early adopter of divorce, in 1861. It had prepared itself for this, by holding a parliamentary inquiry in 1857 under the chairmanship of John Fawkner. Perhaps spurred on by the revelations of that inquiry about the plight of deserted women, Victoria won a very important victory in the divorce stakes. It was the first to introduce wider grounds of divorce, including desertion, habitual drunkenness, cruel beatings and similar grounds, in 1889. This was an important breakthrough. NSW followed in 1892, but it took the other colonies many years to achieve this.

Of all the others, Western Australia showed the greatest willingness to advance, adopting broader grounds, including in its case, insanity, in 1911.

Behind these bare facts lie a number of fascinating stories from Australian history. There is the struggle between the colonial governments and London, which was most unwilling to accept any deviations from its own divorce model. The impasse

was broken when the concept of domicile as the basis for jurisdiction and recognition of divorce provided a neat solution, which would permit deviations from the English model. The story of how London finally accepted the possibility of divergent colonial laws is fascinating on its own, though the result was based on the unity of domicile, ie the dependent domicil of married women, a concept not finally overcome in Australia until the 1980s

Henry's book reveals how the colonial Parliaments worked, how various groups formed to support social causes or to oppose them. The struggle within each colony, and especially in Victoria and NSW, for equality and for broader grounds of divorce created opportunities for parliamentarians and the press to talk about social issues and the problems of deserted families. The views recorded in the debates and presented in the book represent both those of liberal outlook and the diehards, opposed to every form of divorce.

My own favourites among the champions of broader grounds of divorce are dear old Sir Alfred Stephen and WC Windeyer of NSW, though Victorians no doubt look to William Shiels, who took the debate right to London, and with some success.

On the sidelines, women were struggling to have their voices heard in the debate, for and against the reforms. To many, the Married Women's Property legislation and the enfranchisement of women were as important as the divorce issue.

Henry Finlay has given us a fascinating blend of social history, politics and law, which will lead us to respect some of the early reformers and their efforts to bring justice to women and the poor. He has brought stories from our legal and social history to life, by using the words of those involved. His careful selection of verbatim accounts puts us right in the scene, as it was then.

Though my remarks have focused on the 19th century, Henry has brought the story right up to the Family Law Act of 1975. Some of us may have thought that this advanced model, based on equality, no fault and conciliation, was "the end of history" so far as family law was concerned. But like Fukuyama, we were wrong. The story is by no means over.

Some of the arguments in this book opposing divorce have a familiar ring even today, when some want to bring fault back into the agenda.

Sadly, the family law system has not yet achieved its optimum effects. It is still struggling to find the best way to cut through the thicket of legal technicalities and to pour soothing oil on the troubled waters of acrimony and resentment, which so often accompany marriage breakdown.

Marriage and divorce are now only a part of our family law. In our time, we have seen it extended to non-married relationships both heterosexual and homosexual. The issues look like remaining volatile and engaging for a long time.

Meanwhile, we can reflect on what it took to get us here, and enjoy this account of the history of divorce in Australia. I have pleasure in launching this book.
