# 2

# The legal context: due diligence

**M. Law, Law Laboratories Limited, Birmingham**

## 2.1 Introduction: the law and food intolerance

The results of a food intolerance condition can vary from mild discomfort through severe pain to tragedy. How can the law help to regulate this situation and protect the consumer whilst providing a framework in which business can operate? How successful is it in achieving this objective?

Throughout history laws have existed to protect the consumer against the adulteration of food, whether deliberate or accidental. Watering down of milk and the contamination of food with heavy metals have long been the subject of investigation and prosecution. How does this translate into modern life and the problems of food intolerance? The first point to be clear about is that with a few minor exceptions, the law does not specifically recognise or refer to the problem of food intolerance and allergic reactions. It is therefore necessary to examine the legal provisions that do exist in order to see where they can be of help to the sufferer and provide protection against inadvertent consumption of a food which may give rise to a reaction.

Since 1991 the mainstay of food legislation in the UK has been the Food Safety Act 1990 which represented a significant step forward in the enforcement of safe food legislation. The Act came into force in response to intense media pressure following a number of food scares such as *Salmonella* in eggs, *Listeria* in pâté and soft cheeses, and unfit kangaroo meat which was reported to have found its way into pies and burgers. The Food Safety Act is the umbrella legislation for much of the subsidiary food legislation in the UK, including the Food Labelling Regulations 1996 which implement EC Directive 79/112 on the labelling of foodstuffs. The primary function of the labelling legislation is to inform about the true nature of foods and to provide details of the ingredients

which they contain. More help for food intolerance sufferers can, however, be found in the General Product Safety Regulations 1994. These Regulations require producers to place on the market only safe products. In a modern society where food intolerance is recognised as a problem affecting a significant sector of the population, it is only right that a product which places part of that population in jeopardy is recognised as being an unsafe product which should be subject to certain controls.

With the ever widening range of products on the market and the demand for greater innovation, it would seem that all of the cards are stacked against the food manufacturer. Some kind of balance is required to ensure that the food manufacturer who uses his best endeavours to produce a safe, properly labelled product has some protection from the law. The due diligence defence is a feature of modern consumer law which provides for acquittal where certain steps have been taken to avoid the commission of the offence.

All of the law mentioned so far provides a legal framework to protect the consumer and to seek sanctions on behalf of society when all is not as it should be. This is of little help for the consumer who has suffered pain and anguish from the carelessness or negligence of others. Damages to provide recompense for a loss are the province of the civil courts. Since the mid-1980s European law has provided a straightforward remedy in the shape of product liability law which provides a clear path of liability on the part of the manufacturer, or in some cases the supplier, where damage has been caused by a defect in the goods.

## 2.2 The legal background: the Food Safety Act 1990

Since the days of Magna Carta there have been controls over the sale of food in one form or another. The right to 'one measure throughout the land' was an early example of this. Since that time there have been legal controls to prevent the adulteration of food. Flour and milk were early examples, to prevent the addition of chalk to flour (later required by law to boost the calcium content), and to prohibit the addition of water to milk. Since that time the technology of food and the structure of our society has become infinitely more complex. As a consequence issues which once constituted clear breaches of the law are now less easy to discern. We are now in a situation of needing to exercise judgement in order to decide whether or not a situation which may be prejudicial to some will actually give rise to an offence, or whether some other course of action may be open to the consumer. In examining the issue of food intolerance, we need to ask ourselves whether food which may be perfectly wholesome for the majority of the population may give rise to the commission of an offence under criminal legislation when it has adverse effects upon others.

The UK Food Safety Act 1990 creates certain offences. Included among these are those of:

- rendering food injurious to health;

- selling food which fails to comply with the food safety requirement because it has been rendered injurious to health, or is unfit for human consumption;
- selling food that is so contaminated that it is not reasonable to expect it to be used for human consumption;
- selling food which is not of the nature, substance and quality demanded by the purchaser; and
- giving a misleading label with food.

These provisions are intended to protect the consumer from deliberate and accidental chemical and microbiological contamination, from foreign bodies in food, from food of unacceptable quality, and from being misled. The initial problem is that a food which is perfectly safe for the majority of the population can present problems for others. This raises the question of whether or not such food is 'unsafe'. Where does allergenicity fit into this? Put simply, it does not: the offences are intended to capture mainstream contamination and abuse. Whilst it would be possible to fit certain specific situations into the law, consumers who have a specific problem need to look at avoidance rather than rely on the law to eliminate certain foods or ingredients from their diet.

## 2.3 The legal background: labelling

The practical protection which individuals with food allergy and intolerance can expect from the law is information rather than elimination. To this end, comprehensive food labelling requirements have developed. Throughout the European Union these requirements are largely harmonised and stem from EC Directive 79/112 on the labelling and presentation of foodstuffs. The provisions are enacted within the UK as the 1996 Food Labelling Regulations. Although it originated two decades ago, the Directive and its enactments in EU Member States have been progressively updated over the years. The legislation requires that all foods are labelled with either a legally provided name or a customary name which is well understood by purchasers in the place of purchase, or a true name which accurately describes the food. A list of ingredients is required for *most* foods which details what they contain, including any additives. Notice the emphasis on the word 'most': as with many requirements, there are exceptions, and these exceptions may mask the presence of ingredients which may result in unpleasant, dangerous or fatal consequences for a minority of consumers. The first exemption is that for compound ingredients. Any ingredient which itself consists of two or more ingredients, and does not constitute more than 25% of the finished product, may be labelled by its name alone, without the requirement for all of its constituent ingredients to be labelled. This is subject to the proviso that any additives which are functional in the finished product must be disclosed. By way of an example, consider a ready meal which lists amongst its ingredients:

*Fish Sauce (contains Preservative: Sodium Benzoate)*

This fish sauce may contain many ingredients which might include shellfish capable of causing an allergic reaction in susceptible people, yet the labelling meets the requirements of the law. Also, the stipulation for the labelling of functional additives may itself give rise to problems. A garlic purée used in garlic bread may have contained sulphur dioxide as a preservative, but because this preserving effect is no longer required in the finished product, possibly because it is frozen, there is no need to label its presence. This may present a hidden problem for asthmatics. Other exemptions may be realised through the provisions which permit the use of generic names for certain ingredients or because the ingredient is a food which itself is not required to be labelled with an ingredients list. Certain foods such as chocolate currently fall outside the requirements of food labelling law and are subject to the specific requirements of their own legislation. Typically, this may not require the food to be marked with a full list of ingredients, but only to disclose the presence of certain ingredients.

The European Commission has already recognised the need for transparent labelling by requiring that any starches or modified starches which contain wheat gluten are declared as such. Thus a potato starch can be described as starch or modified starch, but wheat starch must be described as wheat starch or modified wheat starch. Many retailers in the UK, together with some manufacturers, are anticipating the needs of their customers by voluntarily providing information about potential allergens in their product. This may be by providing a full breakdown of compound ingredients, by highlighting the presence of potential allergens or by making specific claims such as 'gluten free' on the product. Inevitably the law is slow to respond to the needs of consumers, and this kind of initiative can provide a useful means of communicating helpful information.

Although these labelling requirements originate in Directive 79/112/EEC on the labelling and presentation of foodstuffs, there are differences in the way that the legislation is both enacted and enforced between one Member State and another. These differences are largely manifested as extra requirements of a domestic nature, although in recent years greater efforts have been made to harmonise the requirements. In the UK, for example, all the requirements relating to claims and misleading descriptions are purely domestic in nature and will not be found in the Directive.

In 1968 when the Trade Descriptions Act came into force in the UK it was hailed as a consumers' charter. Indeed, its impact went far beyond its own provisions, for it heralded an age of consumer awareness and spurned the creation of civil law advice centres to deal with the influx of complaints and enquiries which did not fall within its scope. Despite being over 30 years old, the Act does not seem to be suffering from mid-life crisis and is still a much-used weapon in the enforcement armoury. It has relevance in relation to food allergenicity, as it provides similar provisions to the misleading label requirements of the Food Safety Act. Thus a label which proclaims that the food inside is nut free or suitable for coeliacs when through a deliberate act or

carelessness that is not the case, may also constitute an offence under the 1968 Act. Many local authorities adopt the approach of instituting legal proceedings under both Acts in order to widen their chance of success.

## 2.4 The legal background: the control of food manufacture

In addition to the EC controls over the labelling of food, there are measures to control its manufacture. Directive 89/397/EEC on the Official Control of Foodstuffs deals with the manufacture of food and provides for it to be controlled at the point of manufacture. The main purpose of the legislation is to provide powers for enforcement officers to enter food production premises, inspect the operation and examine recipes in order to ensure that relevant legal provisions are being complied with. The Directive also requires each Member State to take the responsibility for food originating in its territory irrespective of its ultimate destination. As with most EC law, enforcement is a matter for individual Member States and reflects their patterns of government. In the UK enforcement is the responsibility of local authority Trading Standards and Environmental Health Departments, whereas in France it is enforced nationally by the Services de la Concurrence, de la Consommation et de la Répression des Fraudes. One of the problems highlighted has been the variation in the pattern of enforcement amongst the Member States. In an attempt to rectify this, the European Commission has been running the Karolous Programme for a number of years. This initiative allows enforcement officers to spend time with their colleagues in other Member States and observe their operating methods with a view to achieving greater uniformity of enforcement. At officer level, bodies such as FLEP (Food Law Enforcement Practitioners) provide a forum for the exchange of views on food law enforcement. Even at a local level, unofficial visits have been arranged between French and British officials in order to foster a better understanding of each other's problems and working practices. All of these moves are to be encouraged, as one of the greatest enemies of free competition and a true single market is a lack of uniformity in enforcement.

## 2.5 General product safety

Among the lesser known pieces of EC legislation is Directive 92/59/EEC on general product safety, implemented in the UK by the General Product Safety Regulations 1994. When the Directive was under discussion in Brussels in the early 1990s it was felt in the UK that it was an unnecessary measure. At that time the Food Safety Act was just coming into force, and at first sight it appeared that all of the provisions of the European Directive were already in place in existing Food Safety and Product Safety legislation. However, the General Product Safety Regulations became reality, and it soon became apparent that there were situations in which new offences would be created and therefore

new protection would be available in certain situations. Despite the existence of the Food Safety Act, the General Product Safety Regulations do apply to food. The legislation places a duty upon manufacturers and sellers of goods supplied to consumers to place on the market only 'safe products'. A 'safe product' is defined as any product which under normal or foreseeable conditions of use, including duration, does not present any risk or only the minimum risks compatible with the product's use considered as acceptable and consistent with a high level of protection for the safety and health of persons, taking into account in particular:

- the characteristics of the product, including its composition, packaging, instructions for assembly and maintenance;
- the effect on other products, where it is reasonably foreseeable that it will be used with other products;
- the presentation of the product, the labelling, any instructions for its use and disposal and any other information;
- the categories of consumers at serious risk when using the product, in particular children.

The latter two points are particularly relevant in relation to serious allergy situations, because the legislation brings in the concept of selective risk and recognises that adequate information is a relevant factor in deciding whether or not a product is safe. Although at first glance it would seem difficult to describe a peanut butter cookie as dangerous, closer examination of the provisions of the legislation will show that in deciding whether or not goods are dangerous, regard must be paid to any warnings or information given with the goods.

Where specific EC law on the safety of goods exists (such as the Directive on toy safety), the Directive on general product safety will not override it. The Food Safety Act, however, is UK domestic law which is supplemented by the General Product Safety provisions.

A food product containing nut ingredients, which are not obvious from its name, can be sold in a catering establishment with no information other than its legal name, yet still meet the provisions of food labelling law despite the fact that it may pose a serious threat to a vulnerable sector of the population. However, if the requirements of General Product Safety legislation are taken into account, we have a product with the potential to cause harm. That danger can, however, be mitigated by providing adequate warnings. The use of prominent notices such as 'some of our products may contain nuts or nut traces – please ask staff for details', can be used to make the customer aware of the possible presence of nut ingredients in the absence of full labelling. To date, enforcement authorities have not made wide use of these provisions, but at least one large local authority in the UK has recognised the potential and has referred to the legislation in newspaper publicity aimed at achieving greater awareness of the problem amongst caterers. Again, it should be stressed that this is EC legislation which will apply throughout the European Union.

## 2.6 Civil remedies: the Consumer Protection Act

All of the legislation outlined so far is criminal legislation, that is to say it protects society in general. In addition to criminal law, civil provisions protect the individual by providing a financial remedy in the form of damages where death, injury, loss or damage has resulted from a faulty product. Although such a remedy has existed for many years, it required the plaintiff to prove that the manufacturer was negligent in the production of the food. Negligence has always been difficult for the ordinary citizen to establish without the powers to inspect the production facility or to see production records, assuming that they even existed. This inequality was recognised by the European Commission in the mid-1980s when the Product Liability Directive was established. Enacted in the UK by the Consumer Protection Act 1987, this piece of legislation provided a great step forward by eliminating the need to prove negligence. The prerequisites for a successful action were to be able to prove that the damage was caused by a defect in the goods. The definition of damage includes death or injury, thus bringing unsafe food within its remit. One of the first actions within the UK was brought by a person who had suffered botulism as a result of eating a hazelnut yogurt which had been prepared with contaminated hazelnut purée. The legislation also removes the need for there to be a direct contractual relationship between the two parties involved. Previously, the buyer would have had to take action against the seller, but now the person who suffered harm can take action directly against the manufacturer, despite there being no contractual link between them.

## 2.7 Due diligence

When the Food Safety Act 1990 came into force, the concept of 'due diligence' became a major talking point within the food industry. The concept was not, however, new to consumer law, having been available in the Weights and Measures Act 1963 and the Trade Descriptions Act 1968 as well as other consumer legislation. Due diligence is a protection available to potential defendants under the provisions of the Food Safety Act and the General Product Safety Regulations. It acts as a balance to the principle of strict liability which forms the basic tenet of consumer law. Strict liability means that the defendant is guilty whether or not he intended to commit the offence. Thus a food manufacturer who, for example, produces a product which by accident contains a piece of fibre from a conveyor belt will be guilty of an offence under the Food Safety Act irrespective of the fact that he was unaware that it had happened. This clearly represents an onerous burden for the manufacturer, but he can be acquitted if he is able to demonstrate that he has 'taken all reasonable precautions and exercised all due diligence to avoid the commission of the offence'. 'All reasonable precautions' means that a system of controls was in place, and 'all due diligence' means that it can be demonstrated that the system

worked. The key words here are 'all' and 'reasonable'. It is necessary to show that *all* reasonable precautions were taken, not just some. It is also only necessary to take those precautions which are *reasonable*. The test of reasonableness is related to the size and nature of the business and also the risk which the precautions are designed to avoid. Risks which involve consumer safety are likely to be regarded by the Courts as carrying a higher priority than those involving possible financial loss. Legislation itself gives little clue to the detail of what is required in order to establish the defence, but the food industry can give thanks to a veritable army of used car dealers and importers of toys and novelties who, over the years, have attempted to use the defence in order to avoid conviction and have had their attempts scrutinised in minute detail by the Courts of Appeal. Some of our best known High Street retailers have also taken part in this process of shaping due diligence law. The learned judges in these cases have provided a number of decisions on individual points of issue which can be collated to provide a clearer insight into the standards to be met.

The decisions in these cases can be summarised into a series of key requirements as follows:

- The system must be under the control of the 'directing mind' of the business. Its operation can be delegated to senior managers but control must remain with the directors or owners of the business.

There needs to be practical demonstration of the control. Board meetings should include food safety issues as an agenda item. Issues should be discussed and minuted with a clear plan of action. Minutes of later meetings should demonstrate how the matter was resolved.

- The system must exist and be written down. It must be shown to work – a 'paper' system which looks impressive but fails to deliver practical results will not suffice.

There should be written procedures to control activities which can affect product safety and legality. Sufficient staff should be available to allow the system to work as intended.

- The system should be appropriate to the size of the business and the risks posed by its products.

'Off the shelf' systems will not do; the scope of the system will be dependent upon many complex factors.

- Responsibilities of staff should be clearly specified in job descriptions, and training should be given to ensure that staff are able to carry out those responsibilities effectively.

In order to show that the system works effectively, it is necessary to show that the staff have been trained both in the skills necessary to carry out their work and in the system itself.

- It must be proactive as well as reactive and should anticipate problems which are common to the business.

The system should recognise that things will not always go as planned within a business. There should be provision to deal with out-of-specification product and serious failures which will require the recall of a product.

- Records must be maintained to demonstrate that the system works as intended.

Records should relate to critical areas which can affect product safety and legality.

- The system must include the control of suppliers.

Control can be exercised through raw material specifications, supplier audits, questionnaires, certificates of compliance or analysis, or an appropriate combination of these. Reliance upon the reputation of the supplier will not suffice.

- Product testing should be a feature of the system where it is necessary to demonstrate that particular requirements have been complied with.

The level of product testing should be appropriate to the risk. The greater the level of potential risk, the greater the level and frequency of sampling.

- Complaints should be recorded and analysed in order to detect trends which should then be acted upon.

Complaints should not be regarded as a source of annoyance but as a barometer of how well the business is performing in terms of meeting both legal requirements and customer satisfaction. Problems should be carefully examined to look for their cause and a programme of improvement implemented in order to eliminate or reduce the problem.

- The system should be reviewed regularly to ensure that it remains relevant to the needs of the business.

No business is static; the laws relating to that business will change as will the nature of the business, its range of products, technology and the expectations of its customers. Systems will therefore need to be modified and updated in order to keep pace with this change.

The full requirements of the defence need to be met by food manufacturers as well as importers into the UK who will be treated as bearing the legal responsibility for the products which they import. Although the expectations of 'due diligence' are the same for imported goods as they are for goods manufactured in the UK, it is plainly not possible to discharge the responsibilities in the same way. This will require the use of auditing, holding detailed product specifications and regular testing in order to demonstrate the

appropriate level of control. The greater the level of cooperation between the exporter and the importer, the easier this will be to achieve.

'Due diligence' is a principle unique to UK law. Even though its application may not be used so directly outside the UK, adoption of its principles can have advantages. For example, the principles form a sound foundation on which to organise the controls within a food business wherever it is located. If that business is supplying into the UK, adoption of the 'due diligence' principles could contribute to the UK importer's defence and make it easier to establish. Anyone familiar with quality systems will see the obvious similarities between the requirements of the 'due diligence' defence and a well-constructed quality system.

## 2.8 The practical application of 'due diligence' to food allergenicity

The key to practical implementation of the 'due diligence' defence is knowing your product. Modern foods are complex and will rarely be manufactured from a handful of fresh ingredients derived from known sources. Frequently, complex flavouring compounds and other bought-in functional ingredients will be used in order to provide the specific manufacturing properties and product attributes which are necessary to make a product successful in today's competitive world. It is therefore important to hold detailed specifications for these ingredients in order to be confident that they do not contain potential allergens or, at least, that adequate warning can be given if necessary. Herein lies a problem, because many manufacturers of such ingredients will be shy about revealing the exact nature of their product. A request for a product specification may result in a polite refusal as the ingredient manufacturer plays the confidentiality card. In this situation there are a number of options available. Persistence frequently pays dividends, particularly if the reasons why the information is required are carefully explained. It may help to ask for details of what is in the product, stressing that you are not interested in relative quantities. An alternative approach would be to send a dietary intolerance questionnaire to your supplier seeking details about the presence or absence of known allergens. Should this fail, you should question whether or not you are dealing with a responsible supplier and investigate alternative sources of supply. However, in many cases a 'stonewall' approach will be received from a supplier who is well aware that he has a unique product which cannot be sourced elsewhere.

In addition to known sources of potential allergens it is necessary to eliminate or control adventitious contamination from other ingredients. A biscuit factory which produces peanut cookies as well as plain will need to take appropriate steps to safeguard the purchasers of the latter variety. The level of control exercised is likely to depend upon a number of factors, not least of which is the size and resources of the operation. A large factory with the production volumes to justify it could address the problem by the use of separate production lines

with dedicated raw material handling facilities. A smaller enterprise may rely on the segregation of raw materials with line cleaning taking place after the production of the nut product. It should be emphasised, however, that although the latter solution may be simpler and cheaper, its overall objective must be the same, that is, to eliminate the possibility of cross-contamination from products which do not purport to contain nuts. Such an approach would require a thorough understanding of the line itself together with all of its associated equipment in order to be aware of specific areas where nut traces could be harboured. This is likely to involve a certain amount of line stripdown with careful selection of cleaning methods in order to ensure that all traces are removed and that the cleaning operation itself is not responsible for cross-contamination of an adjacent line. The use of compressed air, for example, should therefore be limited in order to prevent this. Rapid diagnostic techniques for detecting nut presence are available and would prove their worth in demonstrating that the cleaning operation had been successful. After cleaning, the line should be positively released back to production by a suitably senior member of staff. The procedures for carrying out this operation should be documented in order to demonstrate the existence of the system. Records of cleaning should be kept which are signed by the person responsible for the cleaning in order to confirm that it has actually been carried out. The records should be audited and countersigned by quality assurance staff to provide a measure of validation.

Information about potential allergens present in products should be stored in a readily retrievable form in order to facilitate accurate labelling and to deal with customer enquiries which may arise. This can be in the form of either manual records, a product database or one of the electronic specification systems now available.

In some cases, the practicalities of factory layout, the range of products and raw materials handled and other factors may make the elimination of cross-contamination unachievable. In such cases clear labelling of the presence of traces which have the potential to provoke an allergic reaction can provide an alternative approach. With products containing nuts the stakes clearly are higher. In this case, consideration should be given to the manner in which the information is communicated. In some instances, the presence of nuts or nut-derived ingredients is essential to provide the authentic characteristics of the product. In this case, merely labelling their presence may not be enough and it may be necessary to emphasise their presence. This may be done by emboldening the nut ingredients in the list of ingredients. Even this may not provide complete peace of mind, as situations have arisen where a consumer allergic to, for example, almonds but not peanuts has innocently purchased a product clearly labelled as containing peanuts only to suffer an allergic reaction as the product had been produced on the same production line as another product containing almonds. In this case an additional warning in the form ‘Warning: this product may contain traces of nuts other than peanuts’ will help to overcome the problem. Where it is not possible to produce a product free from nut traces, a

suitable warning statement will be needed. Such a warning needs to be bold, concise and compelling in order to have any effect. Care therefore needs to be exercised when selecting the wording, positioning, font and colour for such a statement. On a crowded label this is not always easy, but if it is buried amongst a mass of other text it may fail to deliver its message, with potentially disastrous consequences. Generally, any warning statement should start with the word 'WARNING' in block capitals and be preceded and followed by a clear line of space. Siting of the warning is also crucial: an area of label used for other mandatory text is preferable, as this is likely to be the part of the label where the consumer is looking for information.

Retailers' codes of practice will provide a worthwhile source of advice on the implementation of Good Manufacturing Practice in order to control potential allergens within the manufacturing environment. They may contribute to the 'due diligence' defence, but this will depend upon several factors. First of all, it should be remembered that they are primarily designed to support the retailer's 'due diligence' defence rather than the manufacturer's. Secondly, they should be constructively evaluated by the manufacturer to ensure that they meet his needs. Additional controls may be required to enable them to be fully effective. Lastly, they should actually be implemented and operated; the existence of a code of practice which is not implemented may actually damage the defence.

As indicated, the 'due diligence' defence will apply to offences committed under the Food Safety Act and also under the General Product Safety Regulations. In order to put in place measures to avoid conviction under these Regulations, it is necessary to carry out a risk analysis of the product. This should be a combination of a HACCP (hazard analysis and critical control points) approach and examination of risk using techniques such as brainstorming and lateral thinking in order to identify risks that may not be immediately obvious. By way of an example, consider the situation of a company which produces wine glasses. No doubt the glasses will perform satisfactorily when used for their intended purpose, but what if they are subjected to moderate consumer abuse? Is it reasonable for them to be used for liqueur coffee? This is a foreseeable risk, and should the glasses not be suitable for this purpose and possibly shatter when hot coffee is poured into them, it is suggested that they should carry a prominent warning that they are not suitable for use with hot liquids. In the absence of statutory labelling requirements, thought will need to be given to what information about the presence of potential allergens needs to be provided, how it will be communicated and what training needs to be given to staff. The lateral thinking will come into play when the nature of the service provided is not so straightforward as in a self-service café where labelling or warning notices can be employed. For example, where a catering company services banquets and dinner parties, the guests may not see the menu and the hosts or arrangers of the function may not be aware of any specific allergenic conditions which may affect their guests. In this case some means need to be found of bridging the information gap between the two sides.

It should be noted that the 'due diligence' defence will not provide protection against civil action under Product Liability legislation, although the fact that such precautions have been taken should reduce the opportunity for things to go wrong in the first place.

## 2.9 The future

Food law is a dynamic entity driven by changing technologies and consumer needs. As such it is inevitable that labelling law will seek to try to meet the needs of those who require information about a product in order to avoid certain medical conditions. This need has been recognised on a global basis: Codex Alimentarius has proposed that all compound ingredients which constitute more than 5% of a finished product (as opposed to the present level of 25%) should be fully declared on food labels, thus revealing the hidden secrets of their potential allergens. It is questionable whether or not this change will actually help the situation for sufferers, as there is at least as great a possibility of the potential allergen being in the undeclared 5% as in the undeclared 25%. The European Commission is considering whether or not this approach should be adopted within Community law. The Commission is also considering an amendment of the Food Labelling Directive to disapply the exemptions to ingredients which contain recognised allergens. The allergens so far proposed for inclusion are as follows:

- Cereals containing gluten and products of these
- Crustaceans and products of these
- Eggs and egg products
- Fish and fish products
- Peanuts and products of these
- Soyabeans and products of these
- Milk and milk products (lactose included)
- Tree nuts and nut products
- Sesame seeds
- Sulphite at concentrations of at least 10 mg/kg.

Other than the requirement on the declaration of starches containing wheat gluten, this initiative is one of the first to specifically recognise and address the question of food allergies.

In order to make food control more proactive, some countries are establishing bodies with specific responsibility for food safety and standards. France has set up the Agence Française de Sécurité Sanitaire des Aliments (the French Agency for Food Nutrition) to assess health and nutrition risks, and the UK is in the process of establishing the Food Standards Agency which will be independent from the Ministry of Agriculture, Fisheries and Food and the Department of Health. Both of these agencies have a wide remit which, although not initially targeting food allergenicity, would not preclude them from doing so in the future.

Outside legal control, UK food retailers have done much to champion the cause of food intolerance. Most major supermarkets require their suppliers to provide detailed information about what is in their own-label products. Such information is available to callers and published in leaflets, and there are proposals to make it available on the Internet.

One of the problems with changes to food labelling legislation is that new requirements inevitably add to the information which the manufacturer must include on the label. In the long term the law of diminishing returns will apply as it becomes more and more difficult for the customer to make any sense of the sheer amount of information on a label. The past few years have seen requirements for information about the presence of genetically modified organisms, the presence of sweeteners, the laxative effects of polyols, and quantitative ingredients declarations. All of this information is competing for space on labels which themselves are a finite size. Add to this the demands of marketeers who have the job of promoting and selling the product and it can be seen that there will soon come a time when there will be no further space to add extra information to a label. This problem has been recognised by EFLA, the European Food Law Association, which represents the views of enforcement officers, retailers, manufacturers and consultants. EFLA have suggested that other means of disseminating information should be explored. Amongst the suggestions are greater use of freephone helplines which can deal with customer enquiries and the use of in-store computers to enable the customer to access information about the products on sale. With the potential for food shopping on the Internet, useful product information could easily become a pre-shopping feature by allowing the customer to access the retailer's food intolerance database at the touch of a button.

## 2.10 Summary

In this chapter we have seen something of the difficulties which face customers who may have an allergic reaction to a particular food ingredient. We have also seen something of the difficulties faced by food manufacturers in meeting the growing clamour for a greater variety of prepared foods at lower cost whilst trying to safeguard the interests of allergy sufferers. It would be impractical to eliminate from the diet food ingredients which are perfectly harmless to the vast majority of the population. The way forward therefore lies in the provision of good information about exactly what is in each food. Labelling exemptions which provide some flexibility and saving on label space may prove to be a trap for the unwary, as they may mask the presence of ingredients which, even in small quantities, may provoke an allergic reaction. Worse still is the situation where food is sold loose, packed on the premises or sold at a catering outlet. In this case the customer is likely to see little in the way of ingredient information. The key to this is the availability of information, whether by means of product information sheets, staff knowledge or through electronic storage and retrieval systems.